SUPREME COURT OF QUEENSLAND

CITATION:	*R v FJ; ex parte A-G (Qld)* [2005] QCA 15
PARTIES:	**R** **v** **FJ** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 338 of 2004 DC No 85 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Gladstone
DELIVERED EX TEMPORE ON:	9 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2005
JUDGES:	McMurdo P, Jerrard JA and Mackenzie J Separate reasons for judgment of each member of the court, each concurring as to the order made
ORDER:	**Appeal against sentence dismissed**
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 respondent entered a plea of guilty at a late stage to offences of grievous bodily harm and assault occasioning bodily harm against their eight month old child - where violence was not isolated - where respondent phoned ambulance - where some evidence of remorse - where child had reached all developmental milestones since the offences occurred - where respondent had no similar criminal history - whether sentence was manifestly inadequate *R v K* [2003] QCA 368, CA No 168 of 2003, 27 August 2003, considered *R v Lawrence* [2002] QCA 526, CA No 131 of 2002, 2

	December 2002, considered *R v Petersen* [1999] 2 Qd R 85, considered *R v Smith* [1997] QCA 350, CA No 29 of 1997, 10 October 1997, considered
COUNSEL:	R G Martin SC for the appellant A J Glynn SC for the respondent
SOLICITORS:	Director of Public Prosecutions (Queensland) for the appellant Legal Aid Queensland for the respondent

THE PRESIDENT: The respondent was convicted after pleading guilty to one count of grievous bodily harm and one count of assault occasioning bodily harm in the District Court at Gladstone. He was sentenced on the first count to five and a half years imprisonment and on the second to 44 months imprisonment with a recommendation in each case that he be eligible for post-prison community-based release after 22 months. The appellant, the Attorney-General of Queensland, contends the sentence is manifestly inadequate in that it fails to reflect adequately the gravity of the offence and to take sufficiently into account the aspect of general deterrence.

Both offences occurred around about February 2003 when the complainant, the respondent's son, was eight months old. The respondent lived in central Queensland with the complainant and his mother who was at work, it seems, when the offences occurred. At about 8 p.m. the respondent telephoned the ambulance on 000 and reported that his son had stopped breathing and appeared limp.

Ambulance officers attended and found the boy lying on the lounge room floor breathing shallowly. When they moved the child he vomited blood. His breathing improved but his pupils were unreactive and he was not in a normal state of consciousness. They noted bruising to his head and face. When questioned the respondent said the child hit his head on the edge of the cot.

The child was taken to hospital and then transferred to Brisbane. The child had multiple bruises to the head, mainly over the forehead and cheeks and to the trunk and abdomen. He had also suffered retinal haemorrhaging of different ages consistent with a shaking injury, one recent and one at least two weeks old.

The boy had elevated liver function indicative of abdominal trauma to the liver, a fractured skull and subdural haematoma and multiple skeletal fractures of varying ages over at least three weeks, including fractures to the right and left humerus, radius and ulna and to the right and left femur and tibia. The respondent was plainly responsible for the assaults to the child on more than one occasion.

The baby's painful right leg was placed in a long-leg plaster and he was observed neurologically. He stabilised and recovered with two weeks inpatient treatment. He will require ongoing paediatric neuro-development follow-up until he reaches at least school age to discover or to observe the sequelae of his shaking injuries. Some literature reports

that such children are at increased risk of subsequent neuro-development sequelae. For the moment he seems to have fully physically recovered, although the possibility remains that the brain injuries may cause later learning or other difficulties.

The child has now returned to live with his mother with supervision and support from the Department of Families. He has reached all his developmental milestones since the offences occurred.

The respondent was 21 at the time of the offence and 23 at sentence. He gave no satisfactory explanation to police or through his counsel at sentence to explain or mitigate his behaviour. He pleaded guilty but at a late stage, the day before the matter was listed for trial. It seems that the plea may well have been entered at the first opportunity after he spoke to his barrister. His relationship with his wife broke up as a result of his offending behaviour. Up until sentence he had honoured his obligations to contribute to the upkeep of his son after his arrest. He had no relevant criminal history which consisted only of some minor drug offences for which he was convicted and fined in the Gladstone Magistrates Court.

The respondent's counsel at sentence expressed his client's remorse for his conduct and his love for his child with whom he was having supervised access visits prior to sentence. The respondent had a good work history. The trial judge accepted

the submission that the respondent was likely to serve his term of imprisonment in protective custody and that any term of imprisonment would therefore necessarily be more onerous than usual.

The prosecutor at sentence submitted that a head sentence in the range of five to six years imprisonment was appropriate and that the respondent's plea of guilty could be recognised by an order for early suspension of that sentence or an early recommendation for parole eligibility. The sentence imposed was consistent with that submission. Whilst that does not mean that the sentence is within the appropriate range, the prosecution's submission at sentence does not assist the appellant's present contentions.

In attempting to progress the contention of manifest inadequacy, the appellant relies on the cases of *R v Smith* [1997] QCA 350; CA No 29 of 1997, 10 October 1997 and *R v K* [2003] QCA 368; CA No 168 of 2003, 27 August 2003. Smith was convicted after a trial of doing grievous bodily harm to his 10 month old child with whom he lived three or four nights each week. He was 26 years old and had no relevant previous convictions. At the time of sentence he was on a methadone programme for heroin addiction. Although he was being sentenced for one episode involving a vicious attack on a defenceless baby, other evidence at trial revealed that he had earlier been violent towards the child. Impressive references were tendered on his behalf which indicated that he was normally a caring person and that the offence was out of

character. Although the injuries were initially serious the child was making a good recovery but the prognosis was not entirely clear because the child had a mild functional deficit on the left side about which it was impossible to predict whether there would be any functional impairment. The Court determined that the sentence gave too little weight to the mitigating factors and the prospect of rehabilitation and that it was manifestly excessive substituting a sentence of four years imprisonment.

Smith does not support the appellant's contention that the sentence here was manifestly inadequate. In addition to many of the mitigating factors that existed in *Smith*, this respondent has the additional important mitigating factor of cooperating with the administration of justice by pleading guilty and has demonstrated significant remorse.

K was 26 at sentence and 23 when the offences occurred. She was convicted after a retrial on one count of grievous bodily harm and seven counts of assault occasioning bodily harm. She was sentenced to seven years imprisonment on the major charge after the retrial. The victim of the offences was her newborn son. She had a previous conviction for unlawful grievous bodily harm to an older child on 24 January 1998 after she severely shook her infant daughter, causing brain damage, retinal haemorrhages, metaphysial fractures and fractures to both forearms. She was placed on 12 months probation without conviction for the first offence. As part of her probation she was required to attend lessons on the proper care of

infants. On the later offence the subject of the appeal, K's baby had fractures to the right tibia, left femur, ribs and a subdual haematoma to the left-side of the head with life-threatening swelling to the brain. The baby boy was at greater risk of spasticity, epilepsy and development problems but had reached all milestones although at the lower end of the normal scale. There was no evidence of severe psychological or psychiatric problems or mental retardation contributing to her unlawful conduct. This Court determined that the sentence imposed of seven years imprisonment was not manifestly excessive but, because after an earlier trial resulting in conviction which was set aside on appeal K was sentenced to five years imprisonment, this Court held that the sentencing judge after the retrial was wrong to conclude that the five-year term of imprisonment was manifestly inadequate. The sentencing judge at the retrial was therefore obliged to reimpose the original sentence of five years imprisonment, consistent with the observations of this Court in *R v Petersen* [1999] 2 Qd R 85 at 87 and *R v Lawrence* [2002] QCA 526 CA No 131 of 2002, 2 December 2002. This was 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.

Accepting that the appropriate sentencing range under the facts in *R v K* was between five and seven years imprisonment, the sentence imposed here was certainly not manifestly inadequate because this respondent did not have a prior

conviction for like behaviour, he had the additional mitigating factor of a plea of guilty, he had demonstrated remorse and in re-establishing supervised contact with the victim had demonstrated prospects of rehabilitation.

In his oral submissions Mr R Martin SC for the appellant today raises for the first time the contention that in cases concerning injury to infants the gap is too wide between the range of sentences imposed for doing grievous bodily harm and the range imposed in serious torture cases contended for by the appellant. Mr Martin submits that a sentence of seven years imprisonment without a declaration that the offences are serious violent offences, should have been imposed here, perhaps with a recommendation for early eligibility for post-prison community based release to reflect the plea of guilty.

The maximum penalty for both doing grievous bodily harm and torture is 14 years. As Mr Glynn SC for the respondent points out, the offence of doing grievous bodily harm with intent carries a maximum penalty of life imprisonment.

Mr Martin's contention must fail because to compare the offence of torture, which does not necessarily involve doing grievous bodily harm and the offence of doing grievous bodily harm, which does not have the element essential to a torture charge of intending to cause severe pain or suffering whether temporary or permanent, is not to compare like with like.

There was no element of intention involved in the offences to which the respondent pleaded guilty. Offences of doing grievous bodily harm and torture cover a wide ambit of different factual situations. Mr Martin has not demonstrated any compelling reason for this Court to raise the level of sentence in a case such as the one before us today. The offence of torture was not charged here. The sentences imposed by the learned primary judge for the offences in the circumstances before him were within the appropriate range. The appellant has not demonstrated that they were in any way manifestly inadequate.

I would dismiss the appeal.

JERRARD JA: I agree.

MACKENZIE J: I agree.

THE PRESIDENT: That is the order of the Court.
