SUPREME COURT OF QUEENSLAND

CITATION:	*R v Samad* [2012] QCA 63
PARTIES:	**R** **v** **SAMAD, Mohammed Abdus** (applicant)
FILE NO/S:	CA No 12 of 2012 DC No 1156 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2012
JUDGES:	Muir JA and Margaret Wilson AJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to five counts of common assault, four counts of assault occasioning bodily harm and two counts of assault occasioning bodily harm whilst armed – where applicant received a head sentence of three years imprisonment for the two counts of assault occasioning bodily harm, suspended after four months for an operational period of three years – where lesser concurrent sentences were imposed for the other offences – where applicant contends that the sentencing judge misapprehended the maximum penalty for one of the assaults occasioning bodily harm – where the offences involved a gross breach of trust and extended over a long period – whether the sentencing judge's misapprehension as to the maximum penalty applicable to one of the offences had an affect on the fixing of the head sentence and the sentence for that particular offence – whether sentence manifestly excessive in all the circumstances *Criminal Code* 1899 (Qld), s 320A(2) *Criminal Law Amendment Act* 1997 (No 3 of 1997)(Qld), s 59(2)

R v RY; ex parte A-G (Qld) [2006] QCA 437, cited

COUNSEL: L Falcongreen for the applicant
S P Vasta for the respondent

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

[1] **MUIR JA:** I agree that the application for leave to appeal should be refused for the reasons given by Margaret Wilson AJA.

[2] **MARGARET WILSON AJA**: The applicant pleaded guilty to five counts of common assault, four counts of assault occasioning bodily harm and two counts of assault occasioning bodily harm whilst armed. He was sentenced on 19 December 2011. Two of the assault occasioning bodily harm offences attracted the head sentence of three years imprisonment, suspended after four months for an operational period of three years. Lesser concurrent sentences were imposed for the other offences.

[3] He seeks leave to appeal against sentence on two grounds –

(a) that the sentencing judge misapprehended the maximum penalty for one of the assaults occasioning bodily harm;

(b) that the sentence was manifestly excessive.

The facts

[4] The applicant lived with his wife and seven children. He was the step-father of four of the children, and the natural father of the other three.

[5] The applicant committed the offences between June 1996 and December 2004. the complainants were three of the applicant's step-children, all boys, two of them twins aged between nine and 17 years and the third aged between nine and 13 years.

[6] The offences all arose out of excessive measures the applicant employed in disciplining the boys. They can be summarised as follows –

CHILD 1 – Aged between 9 and 17 years					
COUNT	**CHARGE**	**DATE OF OFFENDING**	**CONDUCT CONSTITUTING OFFENCE**	**MAXIMUM PENALTY**	**PENALTY IMPOSED**
2	Assault	Unknown date between 11 June 1996 and 31 December 2004	The applicant placed one of the child's fingers in a pair of pliers and squeezed them shut.	1 year	3 months

3	Assault	Ditto	The applicant kicked the child in the back of the upper torso, and threw him against a wall, hitting and kicking him all over.	1 year	6 months
4	Assault occasioning bodily harm ("AOBH")	Ditto	The applicant placed the child's fingers in a door frame and slammed the door shut. This caused numbness and bleeding.	3 years	9 months

CHILD 2 – Aged between 9 and 17 years					
COUNT	**CHARGE**	**DATE OF OFFENDING**	**CONDUCT CONSTITUTING OFFENCE**	**MAXIMUM PENALTY**	**PENALTY IMPOSED**
6	AOBH whilst armed	Unknown date between 1 January 2000 and 31 December 2004	The applicant hit the child over the head with a triangular shaped ruler, causing bleeding.	10 years	9 months
7	AOBH	Ditto	The applicant told the child to place his hand on a door frame, and then slammed the door shut over the child's fingernail. This caused bleeding beneath the nail which eventually fell off.	7 years	9 months
8	Assault	Ditto	The applicant placed the child's finger in a pair of pliers and squeezed the pliers shut.	3 years	6 months

CHILD 3 – Aged between 9 and 13 years					
COUNT	**CHARGE**	**DATE OF OFFENDING**	**CONDUCT CONSTITUTING OFFENCE**	**MAXIMUM PENALTY**	**PENALTY IMPOSED**
10	AOBH	Unknown date between 1 January 1999 and 31 December 2001	The applicant told the child to hold a plastic shopping bag as he set fire to it. The child could feel the plastic burning around his hands and the pain of the burning.	7 years	3 years
11	AOBH	Unknown date between 1 January 2000 and 31 December 2000	As punishment for stealing lollies, the applicant had the child hold his hand over a heated coil on a stove. After the child confessed the applicant was angry with him for having lied and pushed the back of his hand onto the element; he held it there for a second. The child felt his hand burning and suffered blisters. A doctor was called.	7 years	3 years
12	Assault	Unknown date between 1 January 2000 and 31 December 2001	The applicant made the child rub chillies around his eyes and nostrils.	3 years	9 months
13	AOBH whilst armed	Unknown date between 1 January 2000 and 31 December 2002	The applicant caught the child hanging off a steel beam, which he had previously told him not to do. The	10 years	18 months

			applicant made him stay suspended with his chin close to the bar until he told him he could let go. After a couple of minutes the child tired and started to let go; the applicant pricked him on the thigh with a needle at least 50 times to force him to stay suspended.		
14	AOBH	Unknown date between 1 January 2004 and 31 December 2004	As punishment for missing an appointment at school, the applicant hit the child with a broomstick until it snapped.	3 years	6 months

[7] The children were unruly, and the applicant and his wife had great difficulty in controlling them. The Department of Child Safety intervened in 2003, but no charges were laid. After the Department intervened again in 2004, the offending ceased.

[8] The offences came to light when a complaint relating to another child was made. That complaint was ultimately dropped. The applicant participated in an electronically recorded interview. He made general admissions, and although he could not recall specific incidents, he agreed that what was put to him had occurred.

[9] When the indictment was presented, it included four counts of torture (relating to the three complainants and another child). In November 2011 the applicant pleaded guilty to the offences for which he was subsequently sentenced, and the prosecution withdrew the torture charges. In the circumstances, his pleas were timely.

Antecedents

[10] The applicant was born in India. He was aged between 23 and 30 years at the time of offending and 37 at sentence. He had no prior criminal history.

[11] The applicant ran a small business, which designed, manufactured and exported children's equipment, including strollers and prams. He was an active member of the Muslim community, and several referees spoke highly of his character and his contribution to society, including participation in relief work after the Brisbane flood in January 2011.

[12] He said that his behaviour had been in keeping with the way his own father had disciplined him. There was no suggestion that it was influenced by cultural factors.

Submissions before the sentencing judge

[13] The prosecutor stressed the importance of denunciation and deterrence. She referred to the maximum penalties for the various offences and submitted that the head sentence should be four years imprisonment.

[14] Counsel who then appeared for the applicant submitted that the head sentence should be between two and two and a half years imprisonment, wholly suspended for an operational period of four years.

[15] Amendments to the *Criminal Code* which (inter alia) increased the maximum penalty for assault occasioning bodily harm from three years to seven years came into effect on 1 July 1997.[1] The offending conduct which constituted count 4 on the indictment occurred on an unknown date between 11 June 1996 and 31 December 2004. The maximum penalty which could have been imposed for it was that before the amendment came into effect – namely three years. The prosecutor mistakenly informed her Honour that it was seven years, and her Honour repeated the error in her sentencing remarks.[2]

The sentencing judge's remarks

[16] The sentencing judge placed particular emphasis on denunciation and deterrence in crafting the sentences.

[17] Her Honour described the offending as –

> "a breach of trust really by [the applicant] as a parent, exercising what should have been more appropriate discipline in all the circumstances."

Her Honour was rightly concerned by the number of complainants. Later she referred to his use of "cruel and unacceptable discipline" on occasion. She noted the applicant's strict upbringing where beatings were a common thing. She continued –

> "... a lot of the time you believed that the form of punishment was to diffuse the situation that was getting out of hand like rough play or the like, amongst the boys that were part of the family. And indeed, some of the extreme punishments I see there that, for example, you have indicated putting [Child 3]'s hand over the hot plate was only after trying many things to prevent the similar problem. In other words, [Child 3] was stealing things and the like, and clearly, was not responding to having treats taken from him and the like, as a punishment that was effective.
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> Nevertheless, whilst I accept that you believed that you thought [sic] your meting out of the punishment, as I've already described and won't repeat in respect of the charges was suitable, it is totally unacceptable, Mr Samad in respect of young children who are under your care. And however unruly or otherwise they may well be, or slow to learn from other forms of punishments, such as taking things

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1 *Criminal Law Amendment Act* 1997 (No 3 of 1997), s 59(2).

2 AR 23, 35.

> from them, withholding things for example as punishment, nevertheless does not entitle you or any other parent from treating any of the children the way that I have just described by summary of the relevant facts as it relates to the offending before the Court."

[18] Her Honour was careful to disregard uncharged acts of excessive and unacceptable forms of discipline, and careful not unwittingly to sentence as if the applicant had been convicted of torture[3] rather than the offences to which he had pleaded guilty.

[19] She assessed the applicant's good behaviour and contributions to society over the long period between the cessation of the offending and his being charged as indicative of rehabilitation, which she treated as a mitigating factor.

Submissions on appeal

[20] Counsel for the applicant submitted that although it had been open to the sentencing judge to impose actual imprisonment, four months actual imprisonment in combination with a head sentence of three years was manifestly excessive. By the time the application for leave to appeal against sentence was heard on 5 March 2012, the applicant had served 78 days in prison. His counsel conceded that a head sentence in excess of 18 months imprisonment was warranted, and asked this court to set aside the sentence and substitute a sentence of two years, suspended forthwith, for an operational period of three years.

[21] Counsel for the respondent submitted that the application should be refused.

Comparable decision

[22] Counsel were unable to put any truly comparable case before the court.

[23] *R v RY; ex parte Attorney-General (Qld)*[4] was referred to by counsel for the applicant. In that case the offender pleaded guilty to two counts of assault occasioning bodily harm. The complainant was his five year old daughter who had been left in his care by her mother. At the time he also had custody of his three and a half year old son from another relationship.

[24] The offender found the little girl difficult to control. On one occasion he took her to a doctor who noted that blood was coming out of her ears, and that she had bruises to her forehead and both cheeks as well as a dark bruise on her lower abdomen. A child safety check conducted by police and an officer of the Department of Child Safety four days later found the child anxious and fearful, with a patch over her right eye. She had bruises to her left and right eyes and on her right buttock. The offender said that the child had been intentionally hitting her head against things, that her behaviour was difficult and that she was a compulsive liar. He denied using corporal punishment to discipline her. Subsequently the child told police that the offender had been hurting her, but he denied this when interviewed. The child was taken into the care of the Department of Child Safety and the offender was arrested and charged about five weeks after the second incident.

[25] The offender was aged 25 years at the time of offending. He had a substantial criminal history including breaching domestic violence orders and a problem with alcohol. He undertook rehabilitation programs between the time of the offences and the time of sentence.

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3 *Criminal Code* 1899 (Qld), s 320A(2).

4 [2006] QCA 437.

[26] He was sentenced to 12 months imprisonment to be served by way of an intensive correction order. The Court of Appeal dismissed an appeal by the Attorney against the leniency of the sentence, for three principal reasons – that he had shown a real willingness and ability to rehabilitate himself, that the need for personal deterrence was reduced because he had no further contact with the complainant and there was no suggestion his own child was at risk, and that it was desirable to preserve the family unit, if possible.

Discussion

[27] The level of criminality in the present case was considerably greater than that in *RY*.

[28] The applicant's conduct far exceeded the bounds of reasonable discipline which a parent, or step-parent, might impose on his child, and was a gross breach of trust. It is particularly concerning that it involved three children and that it extended over a period as long as eight and a half years. The two instances of deliberately burning a child and his having one of the children stay suspended from a steel beam with his chin close to the beam were especially cruel and heartless. Fortunately, none of the children has suffered ongoing physical effects. This type of conduct has no place in our society, and can be expected to result in condign punishment. The sentencing judge's emphasis on denunciation and deterrence were entirely appropriate.

[29] It was to the applicant's credit that he mended his ways after the Department of Child Safety's intervention in 2004, and that in the long period from then until he was charged he did not reoffend, but rather was a responsible husband and father who made constructive contributions to his community. There was no suggestion that the complainants or his own children were at further risk. Those factors were properly taken into account as indicative of rehabilitation, and, along with the pleas of guilty, were reflected in the early suspension of the term of imprisonment.

[30] There is a wide spectrum of offending that may constitute the offence of assault occasioning bodily harm. It does not necessarily follow from the fact of an increase in the maximum penalty that all such offences committed after the amendment came into effect should attract a higher penalty than they previously would have. Certainly those at the more serious end of the spectrum could be expected to attract a higher penalty. Here the sentencing judge had to consider the applicant's overall criminality in arriving at the head sentence and the lesser concurrent sentences. In the particular circumstances of this case her Honour's misapprehension as to the maximum penalty applicable to one of the offences did not appear to bear upon the fixing of the head sentence or even to affect the sentence for that particular offence.

Conclusion

[31] I would refuse the application for leave to appeal against sentence.

[32] **APPLEGARTH J:** I agree with the reasons of Margaret Wilson AJA and with the order proposed by her Honour.