SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCF* [2012] QCA 87
PARTIES:	**R** **v** **BCF** (applicant)
FILE NO/S:	CA No 264 of 2011 DC No 102 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gladstone
DELIVERED ON:	13 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	29 March 2012
JUDGES:	Muir JA and P Lyons and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal against sentence granted.** **2. The sentence imposed below is set aside.** **3. The applicant is sentenced to six years imprisonment.** **4. Parole eligibility is fixed at 24 August 2013.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant submerged the foot of her 18 month old son into boiling water – where the applicant plead guilty to intentionally doing grievous bodily harm – where the applicant was sentenced to nine years imprisonment with parole eligibility after serving three years – whether sentence manifestly excessive *R v Amituanai* (1995) A Crim R 558; [1995] QCA 80, cited *R v BBJ* [2007] QCA 375, distinguished *R v Chard; ex parte A-G (Qld)* [2004] QCA 372, considered *R v Collins; ex parte A-G (Qld)* [2009] QCA 350, considered *R v Corr; ex parte A-G (Qld)* [2010] QCA 40, distinguished *R v Elliott* [2000] QCA 267, applied *R v Hall; ex parte A-G (Qld)* [2002] QCA 125, considered *R v Holland* [2008] QCA 200, distinguished *R v Lowe* [2001] QCA 270, cited

R v Mitchell [2006] QCA 240, cited
R v Riseley; ex parte A-G (Qld) [2009] QCA 285, considered
R v SAV; ex parte A-G (Qld) [2006] QCA 328, considered
R v Woodman [2009] QCA 197, distinguished

COUNSEL: L D Reece for the applicant
S Vasta for the respondent

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

[1] **MUIR JA:** The applicant was convicted on her plea of guilty of intentionally doing grievous bodily harm to her son and sentenced to imprisonment for nine years with a recommendation that she be considered eligible for parole after three years. She applies for leave to appeal against her sentence on the ground that it was manifestly excessive. The following facts were recorded in a schedule of agreed facts placed before the sentencing judge.

> "The defendant was 22 years old when she intentionally submerged her misbehaving 18 month old son's …foot into a bowl of boiling water that had been set up to make jelly…
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> She held it there despite his screaming and flinching, which could be heard next door.
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> He suffered a deep burn affecting the entire right foot and anterior, lateral and medial sides of the ankle… The burn was a mixture of… (…second and third degree burns).
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> She put him down and went outside to call his biological father… [The child] came crawling out to where his mother was…
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> The defendant was interviewed by police on a number of occasions, each elaborating on a fanciful story about how the injury came about as a result of the children (she also has a slightly older son). Ultimately she told police the truth, that she 'lost the plot' and was responsible for the injury. She had become angry and felt as though she was the only one caring for [the child]. She got angry with him because he had been 'cracking up'. She picked him up and put his foot in the bowl. He started screaming. She felt 'awful'. She picked him put (sic) and put his foot down [deliberately] into the bowl of boiling water… She estimated that she had his foot submerged for about five minutes. She stopped when she realised he was struggling.
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> [The child's] foot and ankle were debrided and grafted with split skin grafts [which] took to the foot successfully… The scar therapy required will be… up to 18 months. He will require, until adulthood, follow-up as reconstructive surgery may be required as he grows. There will be permanent scarring and disability from the injury… if [the injury had been] left untreated, [it] would have caused major morbidity."

[2] The applicant had two unrelated prior convictions for offences involving dishonesty. She was examined by a psychiatrist who reported that the applicant had

used marijuana and consumed alcohol on the day of the offence "as a result of her poor coping skills in relation to bringing up two small children alone with limited help and support". The psychiatrist described the applicant as having low average intelligence.

[3] The thrust of the argument advanced on behalf of the applicant was that the sentence was manifestly excessive because the sentencing judge:

- erred in characterising the offending as "a most serious example of physical abuse by a parent of a child"; and
- gave insufficient weight to mitigating factors.

[4] During submissions, the sentencing judge commented, "Well it's difficult to think of a more serious case, isn't it, for the baby?". In his sentencing remarks, the sentencing judge said, "I agree with [the prosecutor] when he submitted that this is a most serious example of physical abuse by a parent of a child". In this regard, counsel for the applicant submitted that the case could not properly be characterised as a most serious example of this type of offence because it was spontaneous, lasted no more than five minutes, did not involve "abuse over a prolonged period" and did not result in any "permanent disability in terms of… mobility".

[5] I am unpersuaded by this limb of the applicant's argument. The meaning of the sentencing remarks was plain enough and they should not be construed by reference to observations made by the judge in the course of argument. On any view of the matter, the offending conduct was "a most serious example of physical abuse by a parent of a child". That is not to say that it was **the** most serious form of abuse an imaginative person could call to mind. In respect of any act of cruelty, it is almost invariably the case that man's capacity for inhumanity will have produced many examples of worse injuries perpetrated in more horrific circumstances which resulted in worse consequences for the victim.

[6] The mitigating circumstances on which the applicant's counsel relies are that:

- the applicant was a stressed young woman struggling to cope with the responsibility of raising two small children of her own; and
- the applicant's youth, lack of relevant criminal history, cooperation with authorities and early plea of guilty.

[7] The following comparable authorities were relied on with a view to demonstrating that the sentences were manifestly excessive.

[8] In *R v Riseley; ex parte A-G (Qld)*,[1] a sentence of eight years imprisonment imposed on the 21 year old offender for the manslaughter of the 19 day old child of the offender's de facto partner was not disturbed on appeal. The child had many injuries, the most serious of which was a lineal skull fracture to each of the left and right sides of the head consistent with severe blunt force injuries. The cause of death was severe brain injuries which produced haemorrhaging. It was held that the offender's violence was not prolonged and resulted from weariness and frustration on the part of a tired and immature young man of less than average intelligence. Keane JA, with whose reasons the other members of the Court agreed, remarked,[2]

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1 [2009] QCA 285.

2 At [36].

by reference to *R v Chard; ex parte A-G (Qld)*[3] and *R v Hall; ex parte A-G (Qld)*,[4] that:

> "…a sentence of eight years imprisonment, even without a serious violent offence declaration is a distinctly heavy sentence for this category of offence once mitigating factors such as the plea of guilty and the respondent's rehabilitation are taken into account."

[9] His Honour also remarked that there was no reason why the Court "should not continue to regard *Chard* and *Hall* as affording authoritative guidance in relation to this category of case."

[10] In *R v Hall; ex parte A-G (Qld)*,[5] a sentence of six years imprisonment was substituted for a sentence of four years imprisonment imposed on the 40 year old killer of his 19 day old son. The offender had shaken the child which had been screaming, causing a bruise on the left side of the neck and marked swelling of the brain. Medical evidence was to the effect that violent shaking was necessary to cause such brain injuries. The offender had been convicted of unlawful wounding when 20 years of age and when 23 he had been convicted of an assault occasioning bodily harm to his own 15 day old child. He also had other assault convictions.

[11] The 21 year old respondent in *R v Chard; ex parte A-G (Qld)*,[6] had a sentence of six years imprisonment with a recommendation for eligibility to apply for post-prison community based release after serving 18 months replaced, in substance, by a sentence of seven years to be served cumulatively on a sentence of 12 months imprisonment imposed in respect of another offence. The victim was seven and a half weeks old when he died as a result of multiple rib fractures, flattening of a lumbar vertebra and acute brain damage resulting from "episodes of sustained violence".

[12] In *R v SAV; ex parte A-G (Qld)*,[7] a head sentence of four years imprisonment suspended after 173 days with an operational period of four and a half years imposed on the 27 year old respondent after she pleaded guilty to one count of assault occasioning bodily harm whilst armed and one count of going grievous bodily harm was set aside and a sentence of five years imprisonment suspended after 12 months was substituted. The victim was the two year old child of the respondent and the step-child of her husband. The respondent, who was angry and overtired, knocked the victim "…hard to the floor with her knee. The back of his head hit the floor". She then marched him to his room and flung him forcefully inside. He hit either a piece of furniture or the wall and she heard a dull thud. The victim developed a temperature and his condition deteriorated over the following days. After the child, who had been whining and crying for a considerable period, began to convulse, he was taken to hospital. Some of the injuries, which were described as "devastating and permanent", were caused by repetitive shaking. After reviewing a number of authorities, McMurdo P noted that the established range was four to six years for offending of the type in question.

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3 [2004] QCA 372.
4 [2002] QCA 125.
5 [2002] QCA 125.
6 [2004] QCA 372.
7 [2006] QCA 328.

[13] In *R v Collins; ex parte A-G (Qld)*,[8] another baby shaking case, a sentence of three years imprisonment, imposed after a plea of guilty, on the 17 year old respondent for causing grievous bodily harm to his three and a half month old child, was not interfered with on appeal. The circumstances of the offending were not clearly established, but it was accepted that the injuries to the child, which included marked sub-retinal bleeding and subdural haemorrhaging overlying the front parietal lobes of the brain, had been caused by prolonged and repetitive shaking.

[14] In *R v Holland*,[9] leave to appeal against a sentence of five years imprisonment imposed for an offence of intentionally doing grievous bodily harm was refused. The 43 year old offender, whose response to the victim's provocative behaviour was "grossly excessive", kicked the recumbent, smaller and defenceless victim in the front of the head with his steel capped boots. The victim's jaw was broken in a number of places, requiring two remedial operations. The victim was left with no feeling in the area of his lower lip and lower jaw. The appellant had a prior conviction for assault occasioning bodily harm.

[15] In his reasons, with which Fryberg J agreed, Keane JA noted[10] that *R v Mitchell*[11] and *R v Lowe*[12] pointed to a range between four and seven years where grievous bodily harm has been deliberately inflicted by the use of a weapon by a mature offender with a record of personal violence. McMurdo P considered that the five year sentence cumulative upon a 12 month suspended sentence was at the high end of the appropriate sentencing range bearing in mind the injuries suffered by the victim.

[16] Counsel for the respondent submitted that the sentence was not excessive having regard to the following considerations. The applicant's conduct constituted "an appalling breach of trust". The violence was protracted causing great pain and distress such that the child's screams could be heard by neighbours. The applicant callously failed to seek immediate medical attention. Her post offence conduct demonstrated a lack of true remorse. The injuries were severe and the fact that the applicant's conduct did not cause more lasting physical disabilities was a matter of good fortune. If the complainant had died from his injuries the appropriate charge would have been one of murder, not manslaughter.

[17] For this reason, it was submitted, the authorities relied on by the applicant are of little assistance.

[18] The comparable cases on which the prosecutor relied were *R v Corr; ex parte A-G (Qld)*;[13] *R v BBJ*;[14] and *R v Woodman*.[15]

[19] In *Corr*, sentences of nine years imprisonment with a serious violent offence declaration, imposed on the 22 year old offender for raping and doing grievous bodily harm with intent to disable to the two and half year old child of his former female friend were set aside and sentences of 12 years imprisonment with serious

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8 [2009] QCA 350.
9 [2008] QCA 200.
10 At [63].
11 [2006] QCA 240.
12 [2001] QCA 270.
13 [2010] QCA 40.
14 [2007] QCA 375.
15 [2009] QCA 197.

violent offence declarations were substituted. The offending conduct and its immediate consequences were horrific. The respondent, who had become annoyed with the child's mother, took the child to a secluded laneway. The offender picked up the child from the laneway onto which he had fallen from his stroller, threw him to the ground which caused him to hit his head on a wall, punched him in the head and dropped him onto a garden bed covered in bark or wood chips. When found the child was bloody and unconscious, his airway was blocked by pieces of wood chip or bark and, apart from abrasions and bruising, he had a perforation of the anterior rectal wall accompanied by laceration to the anus. The injuries, which suggested anal penetration with a sharp object, were life threatening.

[20] In *BBJ*, the applicant had been convicted in the District Court of one offence of assault occasioning bodily harm, two offences of doing grievous bodily harm and with one offence of cruelty. The relevant facts are difficult to untangle, but it is apparent that the applicant perpetrated on the complainant, by use of some chemical such as caustic soda, severe burns to her groin and oesophagus. The injuries would have been painful and would have made the passing of urine and bowel motions extremely difficult. Treatment required a number of operations. There was no challenge to the 15 year sentences, the relevant issue being whether pre-sentence custody should have been taken into account. The decision is thus of very limited use for present purposes.

[21] In *Woodman*, the 27 year old offender was unsuccessful in an application for leave to appeal against a sentence of 11 years imprisonment imposed for intentionally doing grievous bodily harm to his partner. The offence was committed during the operational period of a partially suspended sentence and the offender was ordered to serve 16 months of the unexpired term of imprisonment concurrently with the 11 year sentence. The applicant had previous convictions for offences of violence, for breaches of domestic violence orders, stalking and possession of property suspected of being stolen.

[22] The offender had been convicted of assault occasioning bodily harm whilst armed in October 2006 and sentenced to two and half years imprisonment to be suspended after 14 months with an operational period of three years. The victim in that case was the offender's 20 year old partner who was 18 weeks pregnant. She was severely bashed with a brick.

[23] The offending for which the 11 year sentence was imposed occurred when the offender, who had been drinking methylated spirits, walked over to the complainant, threw the liquid onto her face and arms and set it alight. Others present threw a quilt around the complainant and rolled her on the ground to extinguish the fire. The offender walked past laughing. The complainant was admitted into Mount Isa Base Hospital in a critical condition with severe burns. She was later flown to the Royal Brisbane Hospital, where she was an inpatient for 14 days. She initially had difficulty opening her mouth to eat. She suffered permanent scarring and had three operations, including skin grafts. The sentencing judge noted that the offender had a shocking history for offences of violence, including violence against women.

[24] The three cases just discussed do not appear to me to offer any direct guidance for present purposes. *Corr* involved a protracted and violent attack in which the victim was left for dead with internal and external injuries which posed a high risk of imminent death. The internal injuries, which were not disclosed by the offender, were deliberately and sadistically inflicted.

[25] In *Woodman*, the horrendous offending conduct was perpetrated by a mature aged offender with a highly relevant criminal history during the term of a suspended sentence imposed for a violent attack on a female. The conduct gave rise to immediate and obvious risks of facial disfiguration, blinding and even death. There was no suggestion that the offender was acting under the influence of stress.

[26] *Holland* supports the view that the sentences relied on by the respondent were very much the product of the distinctive facts of those cases.

[27] The applicant's offending was appalling and it is difficult to comprehend how a mother could subject her young child to such prolonged, excruciating pain. The offending plainly calls for condign punishment. As counsel for the respondent pointed out, the offences upon which the applicant relies do not have as an element an intention to do grievous bodily harm. A distinguishing feature of these cases is that, generally, the offending conduct was spontaneous, of very brief duration and resulted from a temporary loss of self control. Nevertheless, the maximum penalty for manslaughter, like grievous bodily harm with intent, is life imprisonment and the consequences of manslaughter are far graver than the consequences of the applicant's offending. The harm suffered by the victim of a crime of violence is an important factor in sentencing.[16]

[28] After taking into account the timely plea of guilty, the sentence imposed in *Chard* for premeditated and protracted abuse resulting in death was seven years without a recommendation.

[29] The criminality of this case is graver than that in *Holland* because of the age of the victim, his relationship with the applicant, the applicant's deliberate cruelty and the extent of the permanent injury. However, the applicant is much younger than was Holland and has no relevant prior criminal history. It is also significant that the element of intention to do grievous bodily harm was proved by the applicant's admissions. Without her admissions, such proof would have been difficult.

[30] Having regard to the cases discussed above, particularly *Hall* and *Holland*, and the mitigating circumstances to which I have referred, I have concluded that the sentence imposed was outside the permissible range. Accordingly, I would order that:

- leave to appeal against sentence be granted;
- the sentence imposed below be set aside;
- the applicant be sentenced to six years imprisonment; and
- that the date of parole eligibility be fixed at 24 August 2013.

[31] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Muir JA, with which I agree. I also agree with the orders proposed by his Honour.

[32] **DALTON J**: I agree with the reasons of Muir JA and the orders he proposes.

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16 *R v Elliott* [2000] QCA 267; and *R v Amituanai* (1995) 78 A Crim R 588.