IN THE COURT OF APPEAL [1999] QCA 181

SUPREME COURT OF QUEENSLAND

C.A. No. 390 of 1998
C.A. No. 391 of 1998

Brisbane

[R v. R & S; ex parte A-G (Qld)]

THE QUEEN

v.

R

- and -

S

Respondents

EX PARTE ATTORNEY-GENERAL OF QUEENSLAND

Appellant

McMurdo P
White J
Muir J

Judgment delivered 28 May 1999

Separate reasons for judgments of each member of the Court; each concurring as to the orders made.

ATTORNEY-GENERAL'S APPEAL ALLOWED IN RESPECT OF EACH RESPONDENT. SENTENCES IMPOSED BELOW SET ASIDE. IN LIEU THEREOF EACH RESPONDENT SENTENCED TO 11 YEARS IMPRISONMENT IN RESPECT OF COUNT 1 AND CONVICTION IN RESPECT OF THAT OFFENCE DECLARED TO BE A CONVICTION OF A SERIOUS VIOLENT OFFENCE PURSUANT TO S.161B(1) OF THE *PENALTIES AND SENTENCES ACT* 1992; IN RESPECT OF COUNT 2 EACH RESPONDENT SENTENCED TO 4 YEARS IMPRISONMENT CONCURRENT WITH THE SENTENCE IMPOSED FOR COUNT 1. NO PENALTY IMPOSED IN RESPECT OF COUNTS 3 TO 12. STATE THAT BETWEEN 29 DECEMBER 1997 AND 20 OCTOBER 1998 THE RESPONDENTS WERE IN CUSTODY IN RESPECT OF THESE OFFENCES AND NO OTHERS. DECLARE THAT 296 DAYS IN IMPRISONMENT ALREADY SERVED UNDER THE SENTENCES.

CATCHWORDS: **CRIMINAL LAW - Attorney-General's appeal against sentence - Torture - Cruelty - Grievous Bodily Harm - Assault - Deprivation of Liberty - s. 16 Criminal Code - Whether declaration pursuant to s.161B(3) *Penalties and Sentences Act* 1992 should have been made - Whether sentence manifestly inadequate.**

De Simoni v The Queen (1981) 147 CLR 383
Malvaso v The Queen (1989) 168 CLR 227
Pearce v The Queen (1998) 72 ALJR 1416
Pennisi v Wyvill and O'Sullivan (1994) 74 A Crim R 168
R v Tricklebank [1994] 1 Qd R 330
R v Tait [1979] 46 FLR 386
R v Conquest; ex parte Attorney-General
CA No. 395 of 1995, 19 December 1995.
R v Melano; ex parte Attorney-General [1995] 2 Qd R 186
R v Elhusseini [1988] 2 Qd R 442
R v Goulden (1991) 53 A Crim R 404
R v Butcher [1986] VR 43
R v Chivers [1993] 1 Qd R 432
R v Marshall [1993] 2 Qd R 307
R v G CA No 486 of 1998, 19 March 1999

Counsel: Mr D Bullock for the appellant.
Mr A J Rafter for the respondent S.
Mr C J Clark for the respondent R.

Solicitors: Director of Public Prosecutions (Queensland) for the appellant.
Kimball Wood Solicitors for the respondent S.
Michael Lynch & Associates for the respondent R.

Hearing Date: 19 March 1999

REASONS FOR JUDGMENT - McMURDO P

Judgment delivered 28 May 1999

1 I have had the benefit of reading the reasons for judgment of White J in which the facts have been comprehensively set out. I am grateful for her identification of the significant issues in this case.

2 The respondents pleaded guilty to torture, cruelty to a child under 16 years, two counts of grievous bodily harm, three counts of assault occasioning bodily harm and five counts of deprivation of liberty. They were each sentenced to seven years imprisonment for torture, two and a half years imprisonment for cruelty, four and a half years concurrent imprisonment for grievous bodily harm, two years for assault occasioning bodily harm and 12 months concurrent imprisonment for deprivation of liberty. All sentences were concurrent but for the sentence for cruelty which was cumulative. The effective total sentence was nine and a half years imprisonment. Despite a request from the prosecution, no declaration was made that the respondents were serious violent offenders under Part 9A of the *Penalties and Sentences Act* 1992.

3 The Crown submitted below that a total sentence of 8-10 years imprisonment, including a cumulative sentence for the offence of cruelty, was appropriate. The appellant now submits the appropriate sentence is one of 13-14 years for the offence of torture.

4 I agree with White J that, on the facts of this case, as the offence of torture is a recent enactment without an established sentencing range, it is proper, despite the Crown submissions below, to consider the Attorney-General's appeals on their merits.

5 As White J points out, the propriety of the sentence imposed by the learned sentencing judge of seven years imprisonment for the offence of torture, two and a half years imprisonment cumulative for the offence of cruelty to a child under 16 years, and separate

concurrent sentences for each offence of grievous bodily harm, assault occasioning bodily harm and deprivation of liberty, is brought into question by the decision of the High Court in *Pearce v The Queen*.[1] Pearce was charged with one count of doing grievous bodily harm with intent and one count of breaking and entering a dwelling house and inflicting grievous bodily harm, together with other counts. On both counts, he was sentenced to 12 years imprisonment concurrent with each other but cumulative upon offences on a separate indictment. Pearce claimed firstly that he had been placed in double jeopardy through the prosecution in respect of both offences and that he had been twice punished for substantially the same act. As to double prosecution, the court confined the availability of a plea in bar to cases in which the elements of the offences charged are identical or in which all of the elements of one offence are wholly included in the other.[2] The court recognised however that a court has power to prevent an abuse of its process and where no plea in bar is strictly available there may be cases in which the repeated prosecution of an offender would amount to an abuse of process.[3]

6 McHugh, Hayne and Callinan JJ recognised that it is for the prosecution to decide which charges should be brought and that ordinarily all offences arising out of the one event or series of events will be preferred and dealt with at the same time. The charges brought must reflect the whole criminality of the accused. The principles established in *De Simoni v The Queen*[4] require an offender to be sentenced only for the offence or offences charged, excluding consideration of any part of the offender's conduct that could have been charged

---

1. (1998) 194 CLR 610.

2. Per McHugh, Hayne and Callinan JJ at 620; per Gummow J at 628; per Kirby J at 653.

3. Per McHugh, Hayne and Callinan JJ at 620; per Gummow J at 629; per Kirby J at 648..

4. (1981) 147 CLR 383.

separately.[5] In this case it was proper and indeed desirable for all the offences, including torture and cruelty, to be brought, as the elements of each of the offences of torture, cruelty, grievous bodily harm, assault occasioning bodily harm and deprivation of liberty are quite different. Each count of grievous bodily harm and deprivation of liberty referred to a separate, specified incident.

7 As to Pearce's claim that he had been twice punished in respect of the same acts, McHugh, Hayne and Callinan JJ, Gummow J agreeing,[6] concluded:

---

5. *Pearce v The Queen* (1998) 194 CLR 610; McHugh, Hayne and Callinan JJ at 621; Kirby J at 640, 653.

6. Per McHugh, Hayne and Callinan JJ at 623; per Gummow J at 629. See also Kirby J at 650.

> "**[40]** To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just desserts. ...
>
> **[42]** It is clear in this case that a single act (the appellant's inflicting grievous bodily harm on his victim) was an element of each of the offences under ss 33 and 110. The identification of a single act as common to two offences may not always be as straight forward. It should, however, be emphasised that the enquiry is not to be attended by "excessive subtleties and refinements". It should be approached as a matter of common sense not as a matter of semantics. ...
>
> **[49]** Looked at overall, it may well be said that the effect of the sentences imposed on this appellant was not disproportionate to the criminality of his conduct. Nevertheless, we consider that the individual sentences imposed on counts 9 and 10 were flawed because they doubly punished the appellant for a single act, namely, the infliction of grievous bodily harm. Further, to make the sentences imposed on those two counts wholly concurrent may also be said to

> reveal error in that to do so failed to take account of the differences in the conduct which were the subject of punishment on each count."[7]

8 I can see no valid reason for excluding the reasoning of the High Court in *Pearce* from application to s 16 of the *Criminal Code* which relevantly provides:

> "**[16]** A person cannot be twice punished ... under the provisions of this Code ... for the same act or omission, ... notwithstanding that the person has already been convicted of some other offence constituted by the act or omission."

9 In this case, there was considerable factual overlap between the offences in that they all arose out of the same course of cruel and violent conduct towards and neglect of the child during the same time period. The only particularisation of the count of torture appears to be the prosecutor's submission on sentence:

---

7. At 624.

> "In essence, the torture charge covers the entire period during which the child suffered appallingly at the hands of the two accused. The charge of cruelty relates to the failure to provide for the child during that period, particularly getting him the medical attention that he urgently needed. The other charges relate to the specific incidents of violence inflicted upon the child."

10 The offence of torture is set out in s 320A of the *Criminal Code*:

> "**320A.** (1) A person who tortures another person commits a crime. Maximum penalty - 14 years imprisonment.
> (2) In this section -
> **'torture'** means the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion.
> **'pain or suffering'** includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent."

The offence of torture relates to "acts" not "omissions" or the failure to do an act.

11 The offence of cruelty to children under 16 is set out in s 364 of the *Criminal Code*:

> "**364.** A person who, having the lawful care or charge of a child under 16 years, causes suffering to the child by -

(a) failing to provide the child with adequate food, clothing, medical treatment, accommodation or care when it is available to the person from his or her own resources; or
(b) failing to take all lawful steps to obtain adequate food, clothing, medical treatment, accommodation or care when it is not available to the person from his or her own resources; or
(c) deserting the child; or
(d) leaving the child without means of support;

commits a crime.
Maximum penalty - 5 years imprisonment."

The offence of cruelty relates to failures or omissions, desertion or leaving the child without means of support.

12 Both sections were introduced by the *Criminal Law Amendment Act* 1997 and became operational on 1 July 1997. The legislature apparently intended to make a distinction between the more serious offence of intentional infliction of severe pain or suffering by an act or series of acts (torture) and the less serious offence of failing to provide necessities including medical treatment, desertion or leaving the child without means of support (cruelty).

13 The prosecutor particularised the torture charge as incorporating all the remaining charges which involved "acts", that is all remaining charges but for the charge of cruelty. The prosecutor particularised the cruelty charge as failing to provide the medical attention urgently needed by the child during the period of the torture: the charge of cruelty cannot be a particular of the charge of torture here as it related to a failure or omission rather than "an act or series of acts".

14 Although there may be cases where the same conduct could be framed either as an "act" under s320A or as a "failure" under s364, this is not such a case.

15 Here the acts constituting the charge of torture were the same acts which constituted the charges of grievous bodily harm, assault occasioning bodily harm and deprivation of

liberty. The acts have the necessary unity of time and place: see *R v Hull (No 2)*.[8] A similar approach was adopted in *Pennisi v Wyvill and O'Sullivan*.[9] The situation is somewhat analogous to a trafficking charge, joined with counts of supplying a dangerous drug which also constitute particulars of the trafficking charge: see *R v Elhusseini*;[10] *R v Kiripatea*[11] and *R v Goulden*.[12]

16 With some regrets, as the already overly technical process of sentencing will become more so, it seems to me that, consistent with *Pearce*, the proper approach to the sentence here was to impose a penalty in respect of torture which effectively took into account the particulars of the torture, namely all the remaining counts other than the cruelty charge. Whilst pleas of guilty must be recorded in respect of all counts, there should be no separate punishment for the offences of grievous bodily harm, assault occasioning bodily harm or deprivation of liberty, not even a concurrent one. It would be prudent in cases where there has been a trial and there is necessarily therefore a prospect of an appeal against conviction for the judge to note the sentence which would otherwise have been imposed.

17 Appeals brought by the Attorney-General are not lightly allowed: see *Everett v The Queen*[13] and *R v Melano ex parte Attorney-General*.[14]

---

8. [1902] St R Qd 53, 57.

9. (1994) 74 A Crim R 168.

10. [1988] 2 Qd R 442, 455.

11. [1991] 2 Qd R 686; Williams J (with whom Ambrose J agreed) 701-702.

12. (1991) 53 A Crim R 404, 413.

13. (1994) 181 CLR 295, 299-300.

14. [1995] 2 Qd R 186.

18 The learned sentencing judge, however, erred in imposing separate terms of imprisonment on each count of grievous bodily harm, assault occasioning bodily harm and deprivation of liberty when the sentence imposed for the offence of torture already punished those acts. The learned sentencing judge was entitled to impose a separate sentence for cruelty which constituted a failure or omission not here covered by the offence of torture. Furthermore, I agree with White J that the effective sentence imposed below of nine and a half years imprisonment did not adequately reflect the gravity of the offences of torture and cruelty which were of the more serious of their kind. For these reasons, the appeal should be allowed.

19 The next issue is to determine the proper sentence and how it should be structured. It is of no consequence whether a cumulative or concurrent sentence was imposed if the total effective sentence is within the proper range.[15] This is especially so where the offences are associated and are in effect an aggravating feature of the principal offence.[16] As the offence of torture is relatively novel, there are few comparable sentences.

---

15. See *Kellerman v Pecko* [1998] 1 Qd R 419.

16. Ibid; Pincus JA at 422, Dowsett J at 427-8; *Griffiths v The Queen* (1989) 167 CLR 372, Gaudron and McHugh JJ at 393; *Attorney-General (S.A.) v Tichy* (1982) 30 SASR 84, 85; *R v Hodder* (1986) 33 A Crim R 295; *Papoulias v R* [1988] VR 858.

20 The only other sentence imposed for the offence of torture that has been considered by this Court, is *R v G*.[17] G was living in a de facto relationship with the child-victim's mother who initially tried to cover up G's violent behaviour. The particulars of the torture were that G had put faeces into the mouth of the child on about five occasions as punishment for defecating in the bath; held the child on a few occasions under water long enough for the child to gag for breath; winded the child by punching him below the chest a few times; kicked the

---

17. CA No 486 of 1998, 19 March 1999.

child in the bottom so hard that the child travelled some distance, landed on his face and received bruises to the front of the face and two black eyes, and on another occasion pulled the child's penis so hard that it caused the skin to tear away from the pelvis. G was 25 at the time of the offence and 26 at the time of sentence. He had no prior convictions. He subsequently married the child's mother. The child had returned to live with his natural father. There was no permanent physical injury and no demonstrated psychological injury at the time of sentence, although future psychological injury remained an unknown factor. G had a satisfactory work history and had voluntarily sought counselling and demonstrated remorse. References were tendered on his behalf. It seems the offences arose out of his inability to exercise self-control when trying to discipline the child. Both the Attorney-General and the respondent appealed or sought leave to appeal against sentence. This Court did not interfere with the sentence of six years imprisonment which made neither a recommendation for parole nor a declaration as a serious violent offender under Part 9A of the *Penalties and Sentences Act* 1992.

21 The cruel facts of the offences in this case have been set out by White J. The torture charge involved a number of separate vicious acts which caused fractures of the left leg and right superior pubic ramus; a traumatic head injury; multiple cigarette burns; multiple bruises, including black eyes; a laceration on the left side of the top of the scalp and soft tissue injuries. The fractured femur, head injury and laceration to the scalp were all potentially life-threatening. The child was locked in the small caravan cupboard for lengthy periods of time and was often tied up by the respondents, even after his leg had been broken. The cruelty charge involved a failure to get treatment for the injuries: lack of treatment resulted in blood loss which contributed to anaemia and infective complications. Furthermore, he was

malnourished and had not eaten for two days when he was rescued. The offences occurred over a 16 day period.

22 The respondents were the mother and de facto stepfather of the child. They shockingly abused their position of trust and power over a defenceless three year old whom they removed from the protective influence of his father and relatives in Adelaide. The case was much worse than *G*. Taking into account the age of the respondents and their pleas of guilty, I agree with White J that an overall sentence of 11 years imprisonment is appropriate on the facts of this case in respect of each respondent. This sentence can be properly reached either by imposing a term of imprisonment for torture which takes into account the aggravating factor that the respondents failed to provide urgently needed medical treatment and a concurrent sentence for cruelty or by imposing a sentence for cruelty which is cumulative upon the sentence for torture. Because of the closely related nature of the facts, I prefer the concurrent approach. Once the sentence imposed is or exceeds ten years imprisonment, the offenders must be declared serious violent offenders within s 161B(1) of the *Penalties and Sentences Act* 1992. In any case, I agree with White J that this is a fitting case for a declaration to be made.

23 I agree with the orders proposed by White J.

1. The appeals are allowed.
2. The sentences imposed below are set aside and in lieu thereof in respect of count 1 (torture) each respondent is sentenced to 11 years imprisonment. These convictions are convictions of serious violent offences pursuant to s 161B(1) of the *Penalties and Sentences Act* 1992.
3. In respect of count 2 (cruelty) each respondent is sentenced to four years imprisonment, concurrent with the sentence imposed for count 1.

4. In respect of the remaining counts, no penalty is imposed.

5. The dates between which each respondent has been in pre-sentence custody in respect of these offences and no others are 29 December 1997 to 20 October 1998, a period of 296 days which is declared to be time already served under the sentence.

REASONS FOR JUDGMENT - WHITE J

Judgment delivered 28 May 1999

1 This is an Attorney-General's appeal in respect of sentences imposed on the respondents in the District Court at Maroochydore on 20 October 1998. On that date the respondents pleaded guilty to 12 counts which involved inflicting harm on the respondent R's son who was then aged 3 years and 4 months. The respondent S was R's de facto husband. The period charged on the indictment was between 13 and 29 December 1997. Briefly described the offences were that the respondents:

- tortured the child (count 1);
- caused suffering to the child by failing to provide him with adequate medical attention and adequate food and care (count 2);
- did grievous bodily harm by inflicting a serious head injury (count 3) and causing a fractured femur (count 4);
- assaulted the child causing lacerations and bruises to his back (count 5);
- burnt with cigarettes various parts of his body (count 6);
- caused a laceration to his lip (count 7);
- deprived him of liberty by locking him up in various places in the interior of a caravan (counts 8-12).

2 The learned sentencing judge did not distinguish between the culpability of the respondents and imposed terms of imprisonment of seven years for the torture offence; two and a half years for cruelty; four and a half years for the two grievous bodily harm offences; two years for the assaults; twelve months for each deprivation of liberty charge; all to be served concurrently except for the two and a half year sentence for cruelty which was ordered to be served cumulatively on the seven year sentence for torture making an effective head

sentence of nine and a half years. The learned sentencing judge declined to make a declaration pursuant to s.161B of the *Penalties and Sentences Act* 1992 that these were serious violent offences and made no recommendation for parole earlier than the statutory scheme. His Honour made a declaration of 296 days as imprisonment already served under the sentence pursuant to s.158 of the *Penalties and Sentences Act*.

3 The Attorney-General contends that the sentences are manifestly inadequate bearing in mind the maximum penalties for the offences, their nature, extent and duration, and further that the learned sentencing judge ought to have declared counts 1, 3 and 4 to be serious violent offences pursuant to s.161B of the *Penalties and Sentences Act*.

4 R was aged twenty-three at the time that these offences were committed and S twenty-two years. R had no previous convictions while S had relatively minor drug and stealing offences and charges of unlawful sexual intercourse with a fifteen year old girl when he was about twenty-one years. The respondents also pleaded guilty on the same day to a summary offence of bringing into Queensland a motor vehicle suspected of being tainted property in respect of which there is no challenge. The car was bought with the proceeds of two alleged robberies in South Australia for which the respondents have not yet been dealt.

5 R had lived in a de facto relationship with the victim's father and their five year old daughter in Adelaide. That relationship broke down after she commenced a relationship with S. R left Adelaide with S and her two children and arrived in Queensland in late November 1997. Initially they lived with a family named G for whom S did some fencing work before moving to a caravan park on 9 December. Some information about the respondents' attitude to the children comes from the Gs. They concluded that R appeared more concerned about her relationship with S than for her children and that the children seemed undernourished and quiet. Comments were made to them by the respondents which suggested that strong

discipline was imposed upon the children by them both. The children were never seen in the caravan park and from time to time the respondents went out with the Gs for long periods which suggested that the children were left inside the closed caravan. On R's admission she left her son tied up in a box in a cupboard in the caravan for about 45 minutes whilst she was away collecting S.

6 During the period 21 to 28 December the Gs did not see the respondents and it seems that most of the injuries were inflicted upon the child during this period. On the afternoon of 28 December S told the Gs that he had broken up with R and intended staying with them. Later in the day and in the course of speaking with a young woman resident of the caravan park, a Ms X, R said that she thought her boyfriend had broken her son's leg but expressed reluctance at getting assistance. This conversation arose because Ms X had suggested that their two daughters play together. Ms X arranged for an ambulance, Children's Services Department and police to be called after she went to the respondents' caravan and saw signs of violence on the boy's body, including numerous cigarette burns, an untreated laceration to his head, a swollen bloodied mouth and two black eyes. He was taken to the Nambour Hospital on the evening of 28 December and treated for his injuries. His comments to the ambulance officer "you're not going to hurt me too, are you?" and "you're not going to put me in that box again are you?" are piteous.

7 In order to assess the adequacy of the sentences imposed a description of the injuries given by the director of paediatrics at the Nambour Hospital (R45) will enable the level of violence against the child to be comprehended.

"1. Orthopaedic injuries:

- Transverse fracture of left femur with external swelling

and deformity of pelvis and left thigh.

- Fracture of the right superior pubic ramus (this was identified on a skeletal survey at a later stage as an older healing fracture). [Not the subject of a separate charge]

2. Soft tissue injuries:

- Multiple bruises to face. Bilateral 'black eyes'. Large haematoma on left side of forehead. Bruises over back and lower limbs. The ages of the bruises varied from old and fading to recent.

- 8-10 cm long laceration on left side of top of scalp, with hair matted in wound with partial healing.

- Multiple cigarette burns to body. There were at least 76 separate burns, affecting his legs (6), genitals (6), scalp, eyes, ears, trunk and upper and lower limbs. The left lower limb and left forearm could not be visually examined because of bandaging at this stage. The ages of the burns varied from old and healed to very recent. [The cigarette burns were counted in Casualty and were in excess of 100].

- Soft tissue swelling and deformity to periorbital tissues, mouth, lips, face and scalp.

3. Neurological injuries:

- Traumatic head injury. The CT Scan of the brain reported a large left scalp haematoma. There was a band of hyper density in the right frontal region which may represent petechial haemorrhages. There was prominence of the basal cisterns and slight prominence of the ventricular system.

4. Haematological complications:

M was anaemic when his full blood count was performed on 29/12/1997, his haemoglobin level being 63. I believe this was multi-factorial and contributed to by blood loss.

5. Infective complications:

Although he only developed fever on 31.12.1997, his wounds

were infected at presentation, and the process of puss formation and abscess development were occurring before presentation at hospital. Subsequently these developed into puss collecting below the scalp laceration and between the ends of the fractured portions of the femur (osteomyelitis).

6. Malnutrition:

M demonstrated features of protein calorie malnutrition, with poor fat stores and muscle bulk. [He told a doctor at the hospital that he had had nothing to eat on 28 December or on the previous day].

7. Long-term psychological impact of his trauma:

This area requires assessment and treatment by an experienced child psychiatrist or psychologist.

Three of these injuries were potentially life-threatening:

(1) The fractured femur, which untreated can lead to osteomyelitis, septicemia, and fat embolism, each of which can be fatal;

(2) The head injury demonstrated on CT would have required substantial force; a potentially life-threatening head injury;

(3) The laceration of the scalp, which could cause profuse bleeding to the point of anaemia, and potentially cardiac failure, as well as secondary infection with subsequent abscess formation, and the potential for septic emboli, or local invasion of infection which can lead to septicemia, osteomyelitis of facial/scull bone, meningitis, cerebral abscess or cavernous sinus thrombosis."

The description of these injuries was confirmed by photographs taken at the hospital whilst the child was under anaesthetic.

8 Both respondents participated in records of interview with the police. S admitted to some burns and blows and an escalating level of violence by both himself and R against the child. He pleaded guilty to the grievous bodily harm charges involving the serious laceration to the scull and the broken femur on the basis that R inflicted those blows and he was a party to that violence. R initially denied that she had inflicted anything more than the odd slap in her record of interview but, as the interview progressed, admitted more serious misconduct

such as kicking the child and hitting him in the face and re-opening his wounds. She blamed S for most of the injuries seen on the child and strenuously denied burning him with a cigarette or at all. Both admitted binding the child hand and foot, sometimes gagging him, with torn up sheets and towels and placing him in confined places such as cupboards or in the base of the double bed in the caravan for hours at a time. Blood-stained bonds were found in the caravan which they agreed were used to bind the boy. Both admitted that he was bound after his leg had been broken. On one occasion S admitted setting alight to the bindings on the child's arms as a threat but said the flames were quickly extinguished.

9 In a covertly recorded telephone conversation between the respondents when they were in custody R admitted inflicting cigarette burns upon the child. She maintained that the child's leg was broken by forceful blows from a broom handle wielded by S. This he denied. There was some support for S' allegation that it was R who had caused the serious head injury to the child from the child himself who said that his mother had hit him over the head with a plank of wood.

10 R said to the police that she was in fear of S and did as he directed in respect to the child, but it was clear that the child was kept tied up when S was away for many hours during the day at work and she sought no help. It seems to have been accepted that R was obsessed with S and would do anything to retain his affection. Counsel for R conceded that both respondents were participating in an unspoken plan to act violently against the child and engaged in a regime of escalating violence against him and that each should be treated the same as the other so far as sentence was concerned.

11 This appalling violence against the child seems to have had its origin in the child's persistence in refusing to go to the toilet and soiling his clothes and the caravan. Both respondents told the police that they thought this conduct was because the child disliked S and

wanted to be re-united with his own father.

12 A difficulty for the Attorney-General is that the prosecutor below after submitting that the offences were the most serious of their types submitted an appropriate range for the head sentence was eight to ten years imprisonment. This is conceded to have taken into account the plea of guilty. The prosecutor had also submitted that the penalty for the offence of cruelty might be imposed cumulatively upon the penalties for the other offences which is also conceded to have been taken into account in nominating the head sentence. The Attorney-General now contends for a head sentence of 13 to 14 years for the offence of torture.

13 Although the Attorney-General may appeal as of right against sentence and does not depend upon a favourable exercise of the Court's discretion, nonetheless the Court may refuse to intervene on behalf of the Attorney-General to correct an error made in sentencing "if it has been caused or contributed to by a failure of the prosecution to do what was needed to avert that error in the court below", *R v. Tricklebank* [1994] 1 Qd R 330 per McPherson JA at 338. See also *R v. Tait* (1979) 46 FLR 386 at 388-9. Nonetheless, the sentencing discretion is to be exercised in the public interest and is not fettered by anything submitted by counsel, *Malvaso v. The Queen* (1989) 168 CLR 227 per Mason CJ, Brennan and Gaudron JJ at 233 and *Tricklebank*. It cannot be said that the nomination of a range which the Attorney-General now seeks to submit was too low, affected the course of the sentence proceedings such that, for example, evidence was not contested or not advanced on behalf of the offenders, a factor strongly inclining appellate courts against an Attorney-General's appeal, *Malvaso* and *Tait*, but the attitude of the prosecutor would have influenced the learned sentencing judge, *R v Conquest, ex parte Attorney-General* CA No 395 of 1995 per Macrossan CJ at p.8 of his Honour's reasons.

14 The offence of torture is a new criminal offence introduced into the Criminal Code in

1997 and the sentencing of these offenders was amongst the first, if not the first, to be considered. There were no comparative sentences to guide the prosecutor. He sought to assist the court by providing schedules of comparative sentences for violence (including manslaughter) against infants and referred to a number of cases concerning assaults and other physical abuse of children. They revealed in a number of instances what might be thought to be a low range of custodial penalty for serious offences against children. It is not suggested that the prosecutor failed in any way to draw to the court's attention other more relevant decisions.

15 Since this is a new offence in which some guidance might conveniently be given as to sentence and because the respondents were not disadvantaged in the way in which the proceedings were conducted by virtue of the approach of the prosecutor, the Attorney-General ought not be precluded from advancing the appeal. The offence of cruelty, also introduced in 1997, replaced the previous s.364 in the Criminal Code (desertion of children), widened the offence, extended it to children under the age of 16 years and increased the maximum penalty from 1 to 5 years and may also be regarded as a substantially new offence.

16 The principles to be applied in considering an Attorney-General's appeal are well established. In *R v. Melano; ex parte Attorney-General* [1995] 2 Qd R 186 the Court said at 189-90:

> "Unless the sentencing judge has erred in principle, either because an error is discernable or demonstrated by a manifest inadequacy or excessiveness, the sentence he or she has imposed will be 'proper': cf *Griffiths v. The Queen* (1977) 137 CLR 293, 310, 327, 329-30; *Everett* per Brennan, Deane, Dawson and Gaudron JJ at 878. Variation by this Court will not be justified in such circumstances, unless, perhaps, in exceptional circumstances; for example, to establish or alter a matter of principle or the sentencing range which is appropriate: cf *Everett* per McHugh J at 881.

The operation thus accorded to s.669A(1) of the Code is generally consistent

with the established principles relating to appeal against discretion. ...

> Support for the view that, ordinarily, this Court should not allow an appeal under s.669A(1) unless the sentence is outside the sound exercise of the sentencing judge's discretion is to be found in factors that are material to the exercise of the Court's discretion. For example, an appeal against sentence by the Attorney-General 'has long been accepted in this country as cutting across the time-honoured concepts of criminal administration by putting in jeopardy for the second time the freedom beyond the sentence imposed': *Everett* at 877."

17 On appeal Mr Rafter for S submitted that in imposing a cumulative sentence for the offence of cruelty on the sentence for the offence of torture the learned sentencing judge may not have had regard to s.16 of the Criminal Code. No one below was alert to a possible transgression of s.16 in respect of this combination of offences or of the offence of torture together with the balance of the offences. Section 16 prohibits a person being "twice punished ... for the same act or omission ...". To similar effect is s.45 of the *Acts Interpretation Act* 1954.

18 The offences of torture and cruelty were introduced by s.320A and s.364 into the Criminal Code by the *Criminal Law Amendment Act* 1997. Section 320A provides that a person who tortures another commits a crime with a maximum penalty of fourteen years imprisonment. Torture is defined to mean "the intentional infliction of severe pain or suffering on a person by an act or series of acts done on one or more than one occasion". Pain and suffering is defined to include "mental, psychological or emotional pain or suffering whether temporary or permanent". The dates on the indictment charging the offence of torture are from 13-29 December 1997. Those are the dates between which the other offences were charged as having occurred. The prosecutor said below:

> "In essence the torture charge covers the entire period during which the child suffered appallingly at the hands of the two accused. The charge of cruelty relates to the failure to provide for the child during that period, particularly getting him the medical attention that he urgently needed. The other charges relate to the specific incidents of violence inflicted upon the child" (R8).

19 The relevant conduct in respect of the cruelty offence is the failure to nourish the child and the failure to obtain medical treatment for the serious injury to his head (count 3) and his broken femur (count 4). Whilst the report from the hospital might suggest that the child's symptoms of malnutrition were longstanding, count 2 was limited to the period 13-29 December 1997. The other evidence about his malnutrition was the child's statement that he had had no food for two full days and his mother's admission that whilst shut in the cupboard or in other confined spaces for much of the day she fed him only bread and water. Food was deliberately withheld as a punishment, rather than neglect. It may be accepted that starvation involves the infliction of severe suffering. The medical evidence offered without contradiction from the bar table by the prosecutor was that the pain endured by the child after his leg was broken would have been "excruciating" and would have continued until he received treatment. In her record of interview R said that she was aware that her son needed treatment for his leg injury. Both she and S understood that he was suffering. Less clearly than in the case of failing to provide the child with adequate food, there is, nonetheless, an element of deliberately causing him pain and suffering in failing to obtain medical treatment for his injuries. There is some factual overlap between the continuous regime of the infliction of severe pain and suffering on the child constituting the crime of torture and the cruelty in failing to provide food and treatment for his physical injuries.

20 It is clear, however, that the several acts constituting counts 3 and 4 (grievous bodily harm), counts 5, 6, 7 (assaults) and counts 8-12 (deprivation of liberty) were the same acts relied on to constitute the offence of torture.

21 In *Pearce v The Queen* (1998) 194 CLR 610, McHugh, Hayne and Callinan JJ considering an appeal concerning, *inter alia*, double punishment, from New South Wales, which has no analogous legislative provisions to s.16 of the Code or s.45 of the *Acts Interpretation Act*, noted at para 42 of their joint judgment (623):

> "... The identification of a single act as common to two offences may not always be as straightforward [as the elements of the offences under consideration]. It should, however, be emphasised that the inquiry is not to be attended by 'excessive subtleties and refinements'. [quoting from Sir John Barry *The Courts and Criminal Punishments* (1969) at p. 14] It should be approached as a matter of common sense, not as a matter of semantics"

22 Looked at in a commonsense way I would conclude that to punish the respondents in respect of the "omissions" constituting count 2 is not to punish them for a second time for some of the acts constituting the conduct which brought about their conviction and punishment for the offence of torture, but they have been so punished in respect of the balance of the offences.

23 What ought then occur? In *R v. Elhusseini* [1988] 2 Qd R 442 an appellant was charged with trafficking in heroin and with two counts of supply and two counts of possession of dangerous drugs (which were accepted as particulars of the trafficking charge). The trial judge had concluded that a verdict of guilty on the trafficking charge had absolved the jury from returning verdicts on the other charges. Williams J observed, obiter, that since the charges were not in the alternative the jury ought to have returned a verdict on each count. He suggested that s.16 of the Code might apply and that the sentencing judge, having recorded convictions on each count, would not impose sentences for those counts which involved the same acts or omission as the trafficking count.

24 Similarly in *R v. Goulden* (1991) 53 A Crim R 404 the appellant was convicted of trafficking and of two counts of supplying a dangerous drug. Thomas J said that he provisionally took the same view as Williams J's provisional view in *Elhusseini* that since the charges were not in the alternative verdicts should be taken on all counts but that no further penalty "not even a concurrent one ought to have been imposed" at p. 413.

25 The majority in *Pearce* considered whether the imposition of concurrent sentences offended against the double punishment prohibition. Their Honours said at para 45 *et seq* (623-624)

> "To the offender, the only relevant question may be 'how long', and that may suggest that a sentencing judge or appellate court should have regard only to the total effective sentence that is to be or has been imposed on the offender. Such an approach is likely to mask error. A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.
>
> [46] Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematic precision. It is, then, all the more important that proper principle be applied throughout the process.
>
> [47] Questions of cumulation and concurrence may well be effected by particular statutory rules. If, in fixing the appropriate sentence for each offence, proper principle is not applied, orders made for cumulation or concurrence will be made on an imperfect foundation.
>
> [48] Further, the need to ensure proper sentencing on each count is reinforced when it is recalled that a failure to do so may give rise to artificial claims of disparity between co-offenders or otherwise distort general sentencing practices in relation to particular offences."

Gummow J agreed with the majority on the approach to sentence. Kirby J, although dissenting, but only to the extent that since the sentence imposed below was correct the appeal ought to be dismissed, agreed that the duplication of sentences even though to be served concurrently "may yet amount to double punishment" (para 121). With respect, that must be so.

26 I have concluded that no punishment apart from recording the plea of guilty should have been imposed with respect to counts 3 to 12 and the learned sentencing judge fell into error in imposing, in respect of those counts, any sentence.

27 Apart from allegations of the inadequacy of the periods of imprisonment imposed below, the Attorney-General contends that the learned sentencing judge erred in not making a declaration pursuant to s.161B of the *Penalties and Sentences Act*, that counts 1, 3 and 4 were serious violent offences. His Honour did not reveal why he declined to do so except in the following:

> "This is not a case, in my view, where such a declaration should be made. I acknowledge that the harm done to the little boy was severe and most cruel, nevertheless to my mind that and that alone is not sufficient to justify the declaration as sought by the prosecution" (R42).

His Honour had been provided with a copy of this Court's decision in *Collins* CA No. 238 of 1998 in which McPherson JA, with whom Ambrose J agreed, considered the proper approach to the new Part 9A of the *Penalties and Sentences Act* which contains s.161B and its relation to the governing principles set out in s.9. His Honour observed, in respect of a declaration of a serious violent offence for which a sentencing judge has a discretion, at para 9 of his reasons:

> "Moreover, since the effect of such a declaration is penal and prejudicial to the liberty of the subject, the conclusion necessary to sustain the declaration is not one that is to be reached unless it is fully warranted in the circumstances. ... That is not a result that is to be arrived at without proper judicial consideration, even if it is true that, as is often claimed, not all prisoners are granted parole before they have served out their sentence in full. "

28 As his Honour noted, the provisions of Part 9A provide no specific guidance about the way in which the discretion under s.161B(3) or (4) is to be exercised. The discretion arises to be exercised when a sentence of between 5 and 10 years imprisonment is imposed when an offender is convicted on indictment of an offence mentioned in the schedule or of counselling

or procuring the commission of, or attempting or conspiring to commit, such an offence, ss.(3); or, if the offender is convicted on indictment of an offence that involves the use of serious violence or counselling, procuring, conspiring or attempting to use such violence, or the offence resulted in serious harm to another and the offender is sentenced to a term of imprisonment, ss.(4). If the term of imprisonment imposed is 10 years or more for a schedule offence a declaration is required to be made. Not all of the offences listed in the schedule of themselves bespeak violence although most do. Examples of those that may not, include carnal knowledge of a girl under the age of 16 (s.215 of the *Criminal Code)*, maintaining a sexual relationship with a child (s.229B of the *Criminal Code*) and entering or being in premises and committing an indictable offence (s.421(2) of the *Criminal Code*); incest (s.222 and 223 of the *Criminal Code*); and the offences under the *Drugs Misuse Act* 1986 (ss.5, 6 and 8).

29 Where a declaration is contemplated pursuant to ss.(4) the starting point is that there be "serious violence" or "serious harm". This may be in respect of a non-schedule offence where a term of imprisonment of any length is to be imposed. It may also cover, it would seem, a schedule offence if a term of imprisonment of less than 5 years is to be imposed provided the criterion of involving "serious violence" or "serious harm" is satisfied. Thereafter other discretionary factors will operate, some of which are set out in s.9(4)(c)-(k).

30 The nature and extent of the violence used will, in most instances, be a major concern for a sentencing court when exercising that discretion. In the present case the nature and extent of the cruelty and acts of violence and terror perpetrated against this child fit them for the declaration of serious violent offences and, in my view, the learned sentencing judge erred in not making such a declaration.

31 I am of the view, however, that the sentences themselves in terms of years, even had

the declarations pursuant to s.161B been made, were manifestly inadequate and outside the range of a sound sentencing discretion. Whilst the sentences imposed for the manslaughter of infants and for the infliction of grievous bodily harm upon infants offer some guide, in my view they are different offences to that of torture and in few of the cases was the child subjected to prolonged and varied cruelty, both physical and psychological. Whilst this conduct may not be the worst example of torture that can be imagined it must be regarded as a very bad example of it, *R v Chivers* [1993] 1 Qd R 432 per Thomas J at 436. The systematic cruelty to and debasement of the child by his mother and the man who stood in a parental role to him calls for severe punishment. Aggravating this conduct was the fact that the child had been taken away from his customary place of residence where he had his father and other close relatives who would have watched out for his well being. The purpose set out in s.9(1)(d) of the *Penalties and Sentences Act* is, in my view, the dominant purpose for which the sentences should be imposed in respect of this conduct, namely:

> "... to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved."

32 The maximum penalty which is sought by the Attorney-General for the offence of torture makes no allowance for the pleas of guilty. It might be suggested that those pleas acknowledge the inevitable, nonetheless there has been a saving in not having a trial, both to the resources of the State and to witnesses and may be accepted as an indicator of remorse, *R v Marshall* [1993] 2 Qd R 307 per Macrossan CJ at 313. Further, both respondents are young and there is nothing in the pre-sentence reports or references which operates against an expectation of rehabilitation. I would substitute a sentence of 11 years for the offence of torture and declare the conviction to be a conviction of a serious violent offence; I would impose a sentence of 4 years for the cruelty offence concurrent on the torture sentence; I would impose no penalty for the balance of the offences.

33 The orders that I would make are:

- Allow the Attorney-General's appeal in respect of each respondent.
- Set aside the sentences imposed below.
- In lieu thereof sentence each respondent to 11 years imprisonment in respect of count 1 and declare the conviction in respect of that offence to be a conviction of a serious violent offence pursuant to s.161B(1) of the *Penalties and Sentences Act* 1992.
- In respect of count 2 sentence each respondent to 4 years imprisonment concurrent with the sentence imposed for count 1.
- Impose no penalty with respect to counts 3-12.
- State that between 29 December 1997 and 20 October 1998 the respondents were in custody in respect of these offences and no others.
- Declare that 296 days is imprisonment already served under the sentence.

REASONS FOR JUDGMENT - MUIR J

Judgment delivered 28 May 1999

1 I have had the advantage of reading the reasons in this matter of McMurdo P and White J. I agree with the orders proposed and am in general agreement with both sets of reasons.