SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chard; ex parte A-G (Qld)* [2004] QCA 372
PARTIES:	**R** **v** **CHARD, Peter** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 277 of 2004 SC No 19 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2004
JUDGES:	de Jersey CJ, Williams JA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Set aside the sentences imposed at first instance and in lieu thereof:** **(a) Order that the respondent serve 12 months imprisonment being part of the suspended sentence imposed on 10 January 2000** **(b) On the manslaughter charge order that the respondent be imprisoned for seven years to be served cumulatively on that part of the suspended sentence ordered to be served** **(c) Declare that such sentences date from 3 February 2004** **(d) Declare that the respondent was in custody from 21 May 2002 to 22 October 2003, a period of 520 days, and declare that such time be imprisonment already served under the sentence hereby imposed**
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 convicted of manslaughter of infant – where offence committed during operational period of suspended sentence – where learned sentencing judge sentenced respondent to six years imprisonment for manslaughter, ordered that he serve 12 months of suspended term of imprisonment cumulative on that six years and then made recommendation that respondent be eligible to apply for post-prison community based release after serving 18 months – whether learned sentencing judge erred in the way he structured the sentence – whether suspended sentence should be imposed first and the manslaughter sentence then be made cumulative on it – whether this error made the sentence manifestly inadequate

Penalties and Sentences Act 1992 (Qld), s 147, s 148

R v Hall; ex parte A-G (Qld) [2002] QCA 125; CA No 32 of 2002, 5 April 2002, considered

COUNSEL: A J Rafter SC for the appellant
P J Callaghan for the respondent

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

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Williams JA. I agree with the orders proposed by his Honour, and with his reasons.

[2] This was not a case of isolated cruelty borne of anger or frustration. It is the sustained character of the treatment meted out to the infant, that the respondent "contrived occasions to be alone with the child" during which he inflicted injury, and that the respondent endeavoured to conceal his responsibility by casting the blame onto others, which in my view placed this case in a plane beyond that applicable to *Hall* [2002] QCA 125.

[3] On the other hand, the respondent's plea of guilty, and his less serious criminal history (than Hall's), warrant a sentence of seven years imprisonment, in the context of the range of eight to nine years indicated in *Hall*.

[4] The orders proposed by Williams JA structure the penalties for the instant offence, and for the breach of the suspended sentence, more appropriately; and strengthen the overall response to reflect, again appropriately, the respondent's overall criminality.

[5] **WILLIAMS JA:** This is an appeal by the Attorney-General against a sentence imposed on the respondent for the manslaughter of an infant. At first instance the head sentence was six years imprisonment and an order was also made that the respondent serve 12 months of a suspended term of imprisonment cumulative on that six years. A recommendation was then made that the respondent be eligible to apply for post-prison community-based release after serving 18 months "of the term

to which I have sentenced you". In addition it was certified that the respondent had been in custody for 520 days with respect to that offence.

[6] The way in which the total sentence was structured caused some concern as to how the recommendation was to be implemented. The sentence was imposed on 3 February 2004 and the calculation ultimately preferred by Corrective Services established that the respondent became eligible to apply for post-prison community based release in August 2004. However, the respondent is precluded from making such an application until this appeal is decided: s 135(2)(b) of the *Corrective Services Act* 2000.

[7] It does appear that the learned sentencing judge erred in imposing the sentence for manslaughter first and making that part of the suspended sentence to be served cumulative on that. Section 147 and s 148 of the *Penalties and Sentences Act* 1992 empower the court to deal with the breach of a suspended sentence. Section 148 provides that if the court orders all or part of the suspended sentence to be served then "unless the court otherwise orders, the imprisonment must be served immediately" and concurrently with any other imprisonment previously imposed. That tends to suggest that the order requiring the offender to serve the whole or part of a suspended sentence should be made first, to be followed by the sentence imposed for the offence which constitutes the breach of the suspended sentence. It may then be ordered that the later sentence be served concurrently with or cumulatively upon the part of the suspended sentence ordered to be served. That is the course which is usually followed, and it certainly makes it easier to calculate release dates and eligibility for post-prison community based release. Any recommendation with respect to that eligibility would apply to the whole of the period of imprisonment to be served and not just to the sentence imposed for the substantive offence.

[8] I now turn to the facts of the present case.

[9] The deceased infant, Dallas James Withers, was born on 6 July 2001. He was the son of the respondent's de facto partner, Sheree Withers. Apparently for some time the respondent believed he may have been the father of the child, but that was not so. The de facto relationship began prior to the birth of the child and effectively ended with the death of the child on 30 August 2001 at the age of seven and a half weeks.

[10] The baby was born on the Gold Coast, but shortly thereafter the family moved to Mackay where they lived for a few weeks before returning to the Gold Coast on or about 13 August 2001. Medical examinations of the infant shortly prior to and after death revealed significant injuries. There were multiple rib fractures, particularly to the fourth, fifth and sixth ribs laterally on the right side and the third rib anteriorly on the left side. A review of x-rays established that the rib fractures would have occurred within the period from approximately 12 August to 16 August. The doctors also noted metaphyseal fractures of the left proximal tibia and right distal tibia. In addition there was periosteal reaction in both thigh bones. Again the medical evidence established that the metaphyseal fractures and periosteal reactions were dated as occurring between 12 August and 16 August 2001. It was also established that there was flattening of the fourth lumbar vertebra.

[11] A CT scan established low attenuation of the brainstem, basal ganglia and segmental areas of the anterior cerebral artery bilaterally consistent with extensive infarction.

[12] The post-mortem report confirmed the ultimate cause of death as acute broncho-pneumonia of the lungs, induced by acute brain damage resulting from oxygen deprivation.

[13] On the post-mortem examination a fresh periosteal haemorrhage was noted over the right forehead which was consistent with blunt trauma. There had also obviously been blunt trauma to the chest.

[14] It is clear that the infant had been subjected to substantial physical abuse prior to death.

[15] On 27 August 2001 the infant was left by his mother in the respondent's care at the family home. At about 6.30pm the respondent alerted a neighbour to the fact that the baby seemed unwell. The neighbour attended the child and noted that he seemed "unusually cold and unconscious". On arrival of the ambulance resuscitation was performed and the child taken to the Logan Hospital. Further resuscitation was carried out there and the baby was transported to the Mater Intensive Care Unit. Ultimately on 30 August 2001, after it was established that the baby was brain dead, life support machines were disconnected.

[16] There is no doubt, as was observed by the learned sentencing judge, that "the child died because of episodes of sustained violence which [the respondent] inflicted over the period of time". It is not possible to identify specific acts of violence on 27 August, but the medical evidence was able to rule out shaking as a cause of the injuries. Clearly the infant was subjected on that day to some severe blunt trauma.

[17] The respondent was born on 3 June 1980, making him aged 21 at the time of the offence and 24 when sentenced. He had a criminal history, although it did not involve convictions for offences of violence. He was first dealt with in the Children's Court in September 1995. He appeared in the Children's Court on a number of occasions for numerous property offences committed between September 1995 and November 1996. Penalties imposed included community service, detention with immediate release, and probation. Then he was dealt with in the Magistrates Court in August 1997 for another series of property offences. He was sentenced on that occasion to imprisonment for six months but that was wholly suspended with an operational period of 18 months. More relevantly, he was dealt with in the Southport District Court on 10 January 2000 for a series of property offences. The respondent then pleaded guilty to five offences but it was accepted by the learned sentencing judge that he had been taken advantage of by a more cunning and unscrupulous criminal. The sentence imposed was two years imprisonment wholly suspended with an operational period of three years. Thus the manslaughter offence was committed some seven months into that operational period.

[18] In sentencing the respondent for the manslaughter the learned judge observed that it was "of particular concern that you contrived occasions to be alone with the child and that on those occasions, I infer, you inflicted the injuries of the kind that I have outlined. You concealed or endeavoured, successfully for a time, to conceal your involvement by blaming others, notably your partner; or suggesting symptoms consistent with sleep disorder were exhibited by the child." It was also noted that

the respondent had a low IQ and had attended opportunity school. It was accepted that the plea of guilty to manslaughter was a timely one. The learned sentencing judge also noted that whilst in custody awaiting sentence the respondent had taken some steps to address his anti-social behaviour and that he was "not without prospects of rehabilitation".

[19] After referring to sentences imposed in a number of comparable cases the learned sentencing judge imposed the sentences outlined above.

[20] Much reference was made both before the sentencing judge and in this court to the decision of this court in *R v Hall; ex parte Attorney-General* [2002] QCA 125. The death of the infant in that case was caused by a single episode of shaking. The conduct of the respondent in the present case was more reprehensible because the physical abuse was sustained over a much longer period of time. Against that, however, Hall's criminal history was much worse than that of the respondent here; it contained convictions for a number of offences involving personal violence. On the Attorney's appeal in that case this court increased the sentence from four years imprisonment to six years imprisonment, noting a head sentence in the range eight to nine years imprisonment would ordinarily be called for given the circumstances of that case.

[21] The learned sentencing judge did not give reasons for requiring the respondent to serve only part, namely one half, of the suspended sentence, but inferentially he was motivated by the consideration that the totality of the penalty imposed should not be a crushing one on a young man, particularly as the sentences were to be served cumulatively. In the circumstances there has been no challenge to the order that the respondent should serve one half of the suspended sentence, namely 12 months, and that the sentence for the manslaughter should be cumulative on that. I would, however, for the reasons indicated above order that the suspended sentence be imposed first and the manslaughter sentence be made cumulative on it.

[22] I have come to the conclusion that the sentence as structured by the learned sentencing judge was manifestly inadequate. That is particularly so when the recommendation for eligibility to apply for post-prison community based release is considered in the context of the overall sentence.

[23] The prolonged abuse of a baby of this age would call for a head sentence at least in the range eight years to 10 years; the offence is far more serious than the isolated instance of shaking in *Hall*. The main discounting factor in this case is the timely plea to manslaughter after the prosecution agreed not to pursue the charge of murder with which the respondent was initially indicted. When all the relevant factors are taken into consideration the appropriate sentence in this case for the manslaughter of the infant was seven years.

[24] In the circumstances I would not make any special order with respect to eligibility for post-prison community-based release. That means that applying s 135(2)(e) of the *Corrective Services Act* 2000 the respondent would become eligible to make such an application after serving four years which would include the 520 days spent in custody prior to sentencing.

[25] I would therefore allow the Attorney-General's appeal, set aside the sentences imposed at first instance and in lieu thereof order as follows:

(i) order that the respondent serve 12 months imprisonment being part of the suspended sentence imposed on 10 January 2000;

(ii) on the manslaughter charge order that the respondent be imprisoned for seven years to be served cumulatively on that part of the suspended sentence ordered to be served;

(iii) declare that such sentences date from 3 February 2004;

(iv) declare that the respondent was in custody from 21 May 2002 to 22 October 2003, a period of 520 days, and declare that such time be imprisonment already served under the sentence hereby imposed.

[26] **JONES J:** I have read the reasons prepared by de Jersey CJ and Williams JA in this matter and I agree with those reasons and the orders proposed.