SUPREME COURT OF QUEENSLAND

CITATION:	*R v BBJ* [2007] QCA 375
PARTIES:	**R** **v** **BBJ** (appellant/applicant)
FILE NO/S:	CA No 103 of 2007 CA No 159 of 2007 DC No 204 of 2006 DC No 14 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence Sentence Application
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	2 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2007
JUDGES:	Jerrard and Keane JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against convictions dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – where the applicant/appellant was convicted of numerous charges relating to the physical abuse of children – where the applicant/appellant served time in pre-sentence custody – whether any pre-sentence custody should have been taken into account when sentencing the applicant/appellant *Penalties and Sentences Act 1992* (Qld), s 159A(1)
COUNSEL:	A J MacSporran SC for the applicant/appellant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant/appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **JERRARD JA**: On 13 November 2006 Mr BBJ pleaded not guilty to two counts of having unlawfully assaulted CD and thereby done her bodily harm, and not guilty to two further counts of having, with intent to do CD grievous bodily harm, unlawfully done her grievous bodily harm. He pleaded guilty that day to one count of having caused CD suffering by failing to take all lawful steps to obtain adequate medical treatment for CD when he had the lawful care of CD, and when adequate medical treatment was not available to CD from her own resources. That last offence was described as a plea to a count of cruelty, for which provision is made in s 364 of the *Criminal Code 1899* (Qld).

[2] After a trial, Mr BBJ was convicted by a jury of one count of assault occasioning bodily harm to CD committed between 1 June 2005 and 26 September 2005, and constituted by his conduct in throwing CD against a wall of a house in a fit of anger, because she had wet her pants. The bodily harm consisted in her ribs being fractured. The period in which that offence occurred (between 1 June 2005 and 26 September 2005) was the period covered by the dates on the count of cruelty, to which he had earlier pleaded guilty. Mr BBJ was acquitted by the jury on a second count of assault occasioning bodily harm, allegedly committed between those same dates.

[3] The appeal record does not establish the facts which constituted that second count of assault occasioning bodily harm, and the jury at that trial were unable to agree on either of the two counts charging Mr BBJ with having done grievous bodily harm to CD when intending to do her grievous bodily harm. The dates of those two offences were allegedly in the period between 1 August 2005, and 26 September 2005, being a period of two months shorter duration than the time or period during which he allegedly assaulted CD and did her bodily harm, and during which he was guilty of cruelty to her.

First sentence

[4] On 27 November 2006 the learned judge, who had presided at the trial in which there was a conviction for one count of assault occasioning bodily harm, sentenced Mr BBJ for that offence, and for the offence of cruelty. The learned judge took into account in Mr BBJ's favour that Mr BBJ had no prior convictions, and had pleaded guilty, although at the beginning of the trial. The judge considered there was no evidence of remorse for Mr BBJ's conduct. The crime of cruelty carried a maximum of seven years imprisonment, and the crime of assault causing bodily harm a maximum penalty of 10 years imprisonment. The sentencing remarks record that that learned judge had sentenced CD's mother on 14 November 2006, on her plea of guilty, to five years imprisonment for an offence of cruelty to CD, and the judge, when sentencing Mr BBJ, stated that the mother's sentence had been mitigated by other circumstances, including her prior clear record. She had shown remorse, had made an early indication of a plea of guilty, and co-operated with the authorities. She gave evidence for the prosecution at Mr BBJ's trial. In contrast, in what the judge described as a combative series of interviews, Mr BBJ had denied any responsibility for the child's injuries, and had maintained that neither he nor the child's mother had done anything wrong. The judge concluded that nothing could be further from the truth, and that Mr BBJ and his partner had deliberately lied about the true state of affairs, both to medical practitioners and to the police. The judge found that they had both concocted a story about nappy rash, tried to self treat the child's fractured arm by making a crude splint, and had done nothing about her

very obvious oesophageal problem. The judge remarked that CD must have been in very severe pain from the combination of the physical insults which she had suffered, and that Mr BBJ's protestations to the contrary in the interviews with police were both callous and self serving, and rejected entirely by the judge.

[5] Counts 3, 4, and 5 (the first two charging doing grievous bodily harm with intent, and the last the charge of cruelty) reflected the situation on CD's presentation to a hospital at Mackay on 27 September 2005, and subsequently upon further examination after she was transferred to a hospital in Brisbane. It was ascertained that she had suffered severe burn injuries to her body, in the two quite separate areas of her groin and her oesophagus. Medical opinions were that the burns in each case were the result of the application of a chemical such as caustic soda, found in products like Drano, were some weeks old, and were in the condition in which they were because of the failure of Mr BBJ and the child's mother to obtain any medical assistance for the child at any earlier stage. The burn in the groin area was described as deep and into the underlying tissues, and assessed as between 10 and 14 days old when first seen by a Dr Kimble on 29 September 2005. The doctor observed blackened dead tissue present in the pubic and perineal area, with an exposed tendon, and with a burn extending up the right side of the abdomen with evidence of splash marks, which were in the doctor's opinion pathognomonic of a fluid injury. The doctor attested that that injury would have been painful and would have made the passing of urine and bowel motion extremely difficult. Treatment required separate operations under general aesthetic, to de-bride and dress the area and to de-bride and apply a skin graft. The burning to the oesophagus was discovered when attempts were made to insert, and difficulties were encountered in inserting, a nasogastric tube, and when it was discovered that there was a stricture of the oesophagus. Generally CD appeared wasted and had bruises on her body, and five separate healing rib fractures were discovered on X-ray examination. Those were between one to two weeks old, and possibly much older.

[6] The cruelty was constituted by not obtaining medical assistance for the injured groin and oesophagus. The judge described those as terrible injuries, suffered by the child when Mr BBJ and his partner were the persons responsible for the child's care and protection, and when they must have known of the severity of those injuries, despite which the child was – as the learned judge described it – callously and irresponsibly denied urgently needed medical intervention. When presented at the Mackay Base Hospital on 26 September 2005, CD was about five kilograms or so below her expected body weight for her height. The judge recorded that CD would never be able to swallow properly, and some foods would always be ones that she must avoid. Her groin area remained seriously disfigured, and would never have a normal appearance, or the growth of pubic hair. Medical opinion was also that the posterior or back rib fractures to CD must have been caused by compression of the chest, and her side rib fractures may have occurred either by way of chest compression or by a force or blow of an impact. The judge was satisfied that those rib injuries would have caused significant pain and discomfort.

[7] The learned judge recorded that Mr BBJ had originally been given bail, but, contrary to his bail conditions, had resumed his relationship with CD's mother. Bail was subsequently revoked and he was returned to custody. The judge considered that there was no basis for the judge specifically taking into account the whole period in which Mr BBJ had been in custody, namely from February 2006, but recorded that the sentence to be imposed would reflect some of the period of custody prior to 13

November 2006, that date when pleas of guilty were entered, and when Mr BBJ was remanded in custody after that. The judge imposed a term of six years and three months imprisonment in respect of the charge of cruelty, and specified a parole eligibility date of 13 July 2009. The learned judge did not impose any further term of imprisonment in respect of the offence of assault occasioning bodily harm

Second sentence

[8] On 30 March 2007 Mr BBJ was sentenced by a different judge, before whom had been conducted a second trial of Mr BBJ on the two counts of doing grievous bodily harm with intent to CD, the counts on which the other jury had been unable to agree. Mr BBJ was convicted on the second trial on both counts, by a verdict returned on 28 March 2007, and was sentenced on 30 March 2007. That sentencing judge remarked that the aggravating features relating to his convictions for doing grievous bodily harm with intent on two separate occasions including the extreme youth of the victim, that his conduct was deliberate, and that there were two distinct and serious injuries, both of which had had devastating physical and undoubtedly mental effects on the child throughout her life. The judge described the offences as close to unspeakable, and remarked that it was very hard to comprehend how they could have been committed. The judge expressly took into consideration what the judge described as the totality principle, and imposed concurrent sentences of 15 years imprisonment on each of those matters of doing grievous bodily harm with intent.

[9] The judge made no reference to any time spent in pre-sentence custody, and the submissions made to the judge by the Crown – not challenged by counsel for Mr BBJ – included that none of the time in pre-sentence custody could be declared by that judge as time already served, because it did not answer the statutory description in s 159A(1) of the *Penalties and Sentences Act 1992* (Qld). That was time in which Mr BBJ was held in custody in relation to proceedings for the offence for which he was being sentenced, and for no other reason. He was first held in custody between 14 October 2005 and 20 October 2005 (six days), then released on bail. On 22 February 2006 he was returned to custody, because he had breached his bail conditions. He was sentenced to 12 days imprisonment, to be served cumulatively, on 3 January 2007, for that breach of bail. He had also been held in custody since 30 August 2006, without bail, on charges involving other children, namely two of his sons.

Third sentence

[10] Mr BBJ was sentenced a third time on 13 June 2007, on which date he pleaded guilty to two counts of assault causing bodily harm to one of his sons, and a further count of unlawful assault of a second son. Those offences were committed in the period between 1 January 1998 and 14 January 2003, in respect of one son, and between 1 January 2002 and 31 December 2004, in respect of the second son. The sentencing judge on that occasion remarked that the three charges were serious because of the ages of the children, who were his sons and under his care.

[11] The offence of assault occasioning bodily harm occurred when Mr BBJ's son was aged between 4 and 6, and Mr BBJ threw the boy into a cupboard, causing the door of the cupboard to break, and leaving a noticeable scar on his son's arm. The second count in respect of the same boy was when the child was aged between five and

nine, and happened when Mr BBJ stubbed a burning cigarette out onto the boy's arm two or three times, that left blisters. The third count, of assault in respect of the second child, occurred when that child was aged between seven and 10, and consisted in Mr BBJ deliberately setting fire to his son's hair with a cigarette lighter. The judge imposing sentence on 13 June 2007 referred to Mr BBJ's sadism, and concluded that it was unlikely that the judge who passed sentence on 30 May 2007 would have imposed any greater sentence than the 15 years given on that date, had that judge then also been passing sentence for the offences committed on Mr BBJ's own two sons some years earlier. The respondent Director does not challenge that conclusion on this application by Mr BBJ.

[12] It thus appears that none of the time spent in custody before 30 March 2007 satisfied the strict requirements of s 159A(1) in respect of the two offences of doing grievous bodily harm with intent, for which he was sentenced that day. He was always in custody for other matters as well. So what the learned judge was told on 30 March 2007 was correct, regarding s 159A(1). That was a consequence of his being sentenced on different dates for separate offences.

[13] Neither counsel referred the learned judge to s 159A(4), to which reference was made by Mr MacSporran SC, appearing for Mr BBJ on this application, though not at the sentence. That section provides:

> "**159A(4)** If –
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> (a) an offender is charged with a number of offences committed on different occasions; and
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> (b) the offender has been in custody since arrest on charges of the offences and for no other reason;
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> The time in pre-sentence custody must be taken, for the purposes of subsection (1), to start when the offender was first arrested on any of those charges, even if the offender is not convicted of the offences which the offender was first arrested or any 1 or more of the number of offences with which the offender is charged."

[14] Mr MacSporran SC submitted that all of the time Mr BBJ had been held in custody (the six days from 14 October 2005 until 20 October 2005 and then from 22 February 2006 onwards until 30 March 2007), fell within the description in s 159A(4) of time held in pre-sentence custody, and in respect of which Mr BBJ had been in custody since his initial arrest on those charges, and for no other reason.

[15] Mr BBJ presented a written outline on this application, challenging the head sentences imposed on 30 March 2007, and the parole eligibility date fixed on 13 June 2007 (30 March 2019, being 12 years (80% of 15 years) after 30 March 2007). Counsel argued that the judge imposing sentence on 30 March 2007 should have had regard to pre-sentence custody between:

(a) 14 – 20 October 2005 (6 days); and

(b) 22 February 2006 – 26 November 2006 (278 days);

totalling 284 days.

Counsel did not make any submissions challenging Mr BBJ's convictions on any count, and the notice of appeal dated 13 July 2007 only describes that Mr BBJ wants to appeal against his sentence so as to allow this Court to fix a parole eligibility date, in respect of the counts of doing grievous bodily harm with intent.

[16] The written outline is consistent with Mr BBJ's notice of appeal, being restricted to an application for leave to appeal against the sentence. Despite that, Mr BBJ submitted a handwritten argument, received by this Court on 4 July 2007, in which he seemed minded to challenge those convictions for doing grievous bodily harm with intent. He wrote "Through all my interviews I never once said I did it. That's why I took it to trial, and [my partner] never said I did it. It was only [the complainant] that said I'd done it some 12 months later."

[17] That may well all be accurate, but the complainant child gave evidence and was cross-examined, in proceedings which were video recorded, and which were conducted before the judge who ultimately passed sentence on 30 March 2007. That evidence specifically described Mr BBJ making the child drink "black stuff" which "did burn my throat", which "started to close up" and which resulted in the child saying she "couldn't eat."[1] It also included the child saying that Mr BBJ "that he did pour a little bit on my wee wee", apparently meaning to say that Mr BBJ poured the "black stuff" on her groin, and that Mr BBJ had "throwed me against the wall" when she was four.[2] The child said of the "black stuff" that it felt like a drink, and tasted like "poo". She was cross-examined, and it was put to her that Mr BBJ did not give her a drink which hurt her throat, that he did not pour any "black stuff" around her wee wee, and he did not throw her against the wall. She responded quite firmly to each suggestion that he did do each of those things. She also specified that her mother had not hurt her in any way. That evidence was relatively unequivocal in both evidence-in-chief and in cross-examination, and was capable of sustaining the conviction. I add that Mr BBJ neither gave nor called evidence at that trial.

[18] Returning to the pre-sentence custody complaint, and assuming that Mr BBJ was taken into custody on 14 October 2005 and granted bail on 20 October 2005, as appears from the pre-sentence custody certificate at AR 304, the learned judge passing sentence on 27 November 2006 recorded that Mr BBJ had breached the conditions of that bail, by resuming cohabitation with CD's mother. That would explain why he was then held in custody from 22 February 2006 onwards, namely he was alleged to have breached his bail. That means he was not held in custody for any other reason than the alleged commission of the offences for which he was subsequently sentenced. Although counsel submitted that that 284 days (or nine months) related only to the charges dealt with on 27 November 2006, 30 March 2007, and 13 June 2007, that submission overlooks that he was returned to custody because accused of breaching his bail condition; and he was later convicted of that offence.

[19] The written submission for Mr BBJ referred to a fine imposed on 23 February 2006 for breach of the bail condition, and to a default period for non-payment of that fine. The submission assumes the fine was unpaid and the default period enforced. If so, at least that default period would mean that the time spent in custody between 22 February 2006 and 26 November 2006, the last day before sentences were imposed

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1 At AR 18-19.

2 At AR 18.

on 27 November 2006, would not satisfy the description in s 159A(1) of the *Penalties and Sentences Act* of "any time that the offender was held in custody in relation to proceedings for the offence and for no other reason." Counsel had submitted that s 159A was not limited in application to situations where the pre-sentence custody related solely to the particular offences for which a sentence or sentences were imposed on a particular occasion, but that submission seems contrary to the terms of s 159A(1).

[20] The judge imposing sentence on 30 March 2007 was not told any details about any pre-sentence custody. That judge clearly enough intended to impose a 15 year sentence that began on that date, in respect of which the parole eligibility date would be after 12 years, namely on 30 March 2019. If the judge had been told of the 284 days of pre-sentence custody served before 27 November 2006, the judge would also have had to have been told of the default period for the fine imposed for breaching the bail condition, and of the fact of the breach of bail, lending to Mr BBJ being returned to jail.

[21] Mr M Copley for the respondent was willing to concede that the learned sentencing judge possessed a general discretion to reduce the 15 year head sentence, should the judge have been so minded, to take account of the approximately 13 months of pre-sentence custody, from 22 February 2006 until 30 March 2007. The judge imposing sentence on 30 March 2007 had been told of all the time in custody before that date, and unmistakably intended to impose a lengthy sentence that began on that date. The judge could have reduced the head sentence in the exercise of a general sentencing discretion, but has not been shown to be in error in not doing that. It follows that Mr BBJ's complaint that his parole eligibility date has been fixed at 30 March 2019 does not in fact reveal any error.

[22] No ground has been shown for setting aside the convictions regarding the two counts of doing grievous bodily harm with intent, and counsel has not demonstrated that the judge imposing sentence on 30 March 2007 on those two counts was misled by not being told more about the details of the pre-sentence custody. Since there is no challenge to the sentences of 15 years, and the only challenge is as to whether any pre-sentence custody should have been taken into account, Mr BBJ has not shown reason for granting his application for leave to appeal against those sentences. Accordingly, his applications should be dismissed.

[23] **KEANE JA**: I agree with the reasons of Jerrard JA and with the orders proposed by His Honour.

[24] **PHILIPPIDES J**: I have had the advantage of reading the reasons for judgment of Jerrard JA. I agree with the reasons of His Honour and with the proposed orders.