SUPREME COURT OF QUEENSLAND

CITATION:	*R v Collins; ex parte A-G (Qld)* [2009] QCA 350
PARTIES:	**R** **v** **COLLINS, Jamie Wayne** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 235 of 2009 DC No 122 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Hervey Bay
DELIVERED ON:	13 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2009
JUDGES:	Keane and Holmes JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – APPEALS BY CROWN – EXERCISE OF DISCRETION – GENERALLY – where respondent convicted on own plea of one count of causing grievous bodily harm – where respondent sentenced to three years imprisonment and parole release date fixed at sentencing date – where injuries to three and a half month old baby complainant consistent with prolonged and repetitive shaking – where respondent complainant's father and 17 years old at time of offence – where appellant argued on appeal period of actual detention necessary – whether sentence imposed a proper sentence *Criminal Code* 1899 (Qld), s 669A *R v FJ; ex parte A-G (Qld)* [2005] QCA 15, distinguished *R v Irvine; ex parte Attorney-General (Qld)* [1997] QCA 138, cited *R v KU & Ors; ex parte A-G (Qld)* [2008] QCA 154, cited *R v Lacey; ex parte A-G (Qld)* [2009] QCA 274, applied *R v Osmond; ex parte Attorney-General (Qld)* [1987] 1 Qd R 429, cited

R v SAV; ex parte A-G (Qld) [2006] QCA 328, distinguished

COUNSEL: A W Moynihan SC, with L P Brisick, for the appellant
M A Green for the respondent

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

[1] **KEANE JA:** On 2 September 2009 the respondent was convicted on his own plea of one count of causing grievous bodily harm. He was sentenced to three years imprisonment, and 2 September 2009, ie the day on which he was sentenced, was fixed as his parole release date.

[2] The Honourable the Attorney-General appeals against that sentence pursuant to s 669A(1) of the *Criminal Code* 1899 (Qld) on the ground that the sentence was inadequate and not a proper sentence.

Circumstances of the offence

[3] In the early evening of 12 June 2006 the respondent inflicted grievous bodily harm on KWJ, a three and a half month old baby boy ("the child") who was his biological son. The mother of the child is KD with whom the respondent was living at a unit in Hervey Bay. KD was 16 years old. The respondent was 17 years old.

[4] At about 6.00 pm the respondent took the child upstairs to put him to bed. The child's mother heard the baby crying. The crying stopped. The respondent then called out to her and she went to the foot of the stairs where she saw the respondent cradling the child in his arms. The child was pale, his arms were dangling and he was gasping for air. She took the child to the Hervey Bay Hospital.

[5] On 15 June 2006 the baby was discharged from hospital into the care of his mother and the respondent. The child did not settle and so they returned to the Hervey Bay Hospital later that afternoon. On 19 June 2006 the child was transferred to the Royal Children's Hospital in Brisbane.

[6] Examination at the Royal Children's Hospital revealed that the child was suffering from retinoschisis with marked sub-retinal bleeding associated with widespread retinal haemorrhages extending across the entire retinal area. This injury was the consequence of prolonged and repetitive shaking. There was also bleeding inside the skull from subdural haemorrhages overlying the front parietal lobes of the brain.

[7] The child underwent surgery to minimise the extent of the loss of sight which would otherwise have resulted from his injuries. The child was hospitalised for five weeks.

[8] The information put before the learned sentencing judge as to the permanent consequences of the injury of 12 June 2006 was somewhat imprecise. When the child was examined in September 2007, there was still significant loss of vision attributable to his injury. On 18 August 2009, however, medical opinion was that the child's visual acuity is currently normal for his age: he does not need spectacles. Reference was made, however, to the likelihood that the child will suffer problems with visual processing because of brain damage. The likely impairment was described as "subtle" but it may adversely affect the child's ability to read. As will

be seen, the learned sentencing judge came to the view that, on this evidence, he could not conclude that the child had suffered serious permanent injury.

[9] The respondent was interviewed by police on 25 June 2006. At this time he denied shaking the baby, saying that the baby had developed difficulty breathing after he had been put to bed on 12 June 2006.

[10] On 28 June 2006 the respondent admitted to the baby's mother that he had hurt the child. In September 2007 he admitted to the child's mother that he shook the child because he would not stop crying. He admitted to her that he had a problem with anger management and said that he would go to counselling if they got back together. He did attend some counselling and they did get back together.

[11] The Department of Child Safety was notified of the injury. After a period of access to the child supervised by officers of the Department of Child Safety, the respondent was allowed unsupervised access to the child after KD turned 18 years of age. During this time the respondent did not harm the child.

[12] In February 2008 the child's mother became pregnant with the respondent's second child. They separated in late March or early April of 2008. The child's mother gave a statement to police after the respondent moved out.

[13] The child's mother has now formed another relationship, as has the respondent. Nevertheless, they continue to have contact with each other and he has access to his children.

[14] The respondent was arrested on 18 February 2009. He was allowed to continue unsupervised access to his children after he was charged.

[15] The charge against the respondent proceeded by a full hand-up committal without cross-examination. The respondent declined to enter a plea at the committal. The matter was listed for trial and the respondent indicated his intention to plead guilty to the charge in April 2009.

The respondent's circumstances

[16] The respondent was 20 years old when he was sentenced. He was in the relationship with KD for a total of approximately five years. That period was interrupted by a break-up after the injury to the child. For one year of their time together, they lived with Ms KD's grandmother. Otherwise, while they lived together they lived independently of adult supervision.

[17] The circumstances of the respondent's upbringing were unclear. It appears that as a child he was diagnosed with attention deficit hyperactivity disorder. At the sentencing hearing the learned sentencing judge was told that the respondent has a close relationship with his three sisters.

[18] The respondent was educated to year 12. He has a good employment record, and his physical health is good.

[19] Since the offence in question, the respondent has been convicted of one offence of possessing a weapon in a public place, one offence of failing to stop a motor vehicle in contravention of the *Police Powers and Responsibilities Act* 2000 (Qld) and one offence of dangerous operation of a motor vehicle.

[20] As I have noted, he has had counselling for anger management.

The sentence

[21] At sentence the prosecution submitted that considerations of personal and general deterrence and the need to denounce the respondent's conduct towards a vulnerable child warranted a sentence in the range between three to five years imprisonment. A head sentence of four years imprisonment was proposed by the prosecution.

[22] On the respondent's behalf it was said that he was very young at the time of the offence. It was urged that his immaturity also played a part in his failure to take responsibility for what he had done. It was submitted on his behalf that a sentence of three years imprisonment with release on parole after nine to 12 months should be imposed.

[23] The learned sentencing judge acknowledged that for this kind of offence a sentence involving a period of actual custody should be imposed in the absence of exceptional circumstances. The learned sentencing judge discussed a number of considerations which he regarded as warranting exceptional leniency in sentencing the respondent. The first of these considerations was that the child appears to have suffered no serious permanent injury. His Honour's view of the facts in this regard was not seriously challenged on the appeal. His Honour said:

> "It seems to me it's appropriate that I should work on the basis that this is, indeed, an early plea; that you have co-operated at least with the administration of justice by instructing your legal advisers that you would take the course you did today and plead guilty. My understanding is the matter has not come on earlier because of the need for the Crown, quite properly, to put proper evidence or at least satisfy themselves as to the prognosis for the child.
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> As I already mentioned, that prognosis seems to me, and from what I've been told, to be remarkably good considering the damage which was initially occasioned. I've already referred to the authority of *Amatawami* which, as I understand it, suggests that, in cases involving grievous bodily harm - admittedly, of course, *Amatawami* was not a case involving a child complainant, but Mr Justice Pincus did say in that case that the gravity of the long-term consequences was a matter that must be taken into account when imposing sentences in respect of these matters.
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> As I've said to counsel, it seems to me the converse does apply; that is, when, as in this case, fortuitously, the prognosis for the complainant seems to be good, that may permit a Judge to take a more lenient course than would otherwise be demanded."

[24] The learned sentencing judge went on to consider "unusual" aspects of the case which indicated that the need for personal deterrence did not loom large in this case:

> "There are a number of factors about this case which strike me as being unusual. As one would expect, the Department of Children's Services became involved once this matter was known to the authorities. Having investigated the matter, they required you to undertake some courses which, as I understand it, you did undertake, and they then concluded that you might be permitted to have

unsupervised access to the child. That happened and you did have such access, as I understand it.

That suggests to me that I perhaps may more safely conclude that so far as personal deterrence is concerned, that need not feature as significantly in my thinking as would otherwise be the case. I think I should credit the Department with having, I can only assume, made a thorough investigation, and if they've come to the conclusion that you might be permitted to have ongoing unsupervised access to the child, then, as I say, that leads me to think that I might fairly readily conclude that personal deterrence is not an issue, or not a significant issue in this case.

I take into account that it seems to me that you've been in a long relationship with the mother of the child and you were both very young at the time. Parenting a first child, of course, I think is, as anyone who has done it will know, always a difficult and challenging time. That you were so young at the time, it would seem to me, would compound some at least of those difficulties.

I take into account that you and the mother of the child resumed your relationship after these matters were known, and, indeed, she became pregnant to you again and a child of you and her was born in August of last year. As I understand it, it was after that relationship with the mother of the child broke down again that these proceedings were commenced.

As a result of the bail requirements which were imposed upon you, as I understand it, since these proceedings were commenced, you've not, in fact, had further contact with the complainant child and, I assume, nor with the new-born child. It seems to me that I'm entitled to take into account that it must surely be in the interests of both those children that you should have as good a relationship with each child as the circumstances will permit."

[25] Next, the learned sentencing judge referred to matters concerning the rehabilitation of the respondent:

"I'm satisfied that you have taken a number of steps to try to address problems that you may have with anger management, and I take into account the matters set out in the exhibit which was tendered by your counsel, which is Exhibit 2. You have had, I'm told, a good work record; I take that into account.

I'm indebted to learned Crown counsel for referring me to a number of cases. It will appear from the record what those cases are, and I don't think I need re-state them. Those cases, I think, establish, as I have already discussed, that a sentence of imprisonment must be imposed in respect of these matters, and that time must be served in, one would imagine, all but exceptional cases.

It does seem to me that a significant distinguishing factor between this case and each of the cases to which counsel referred me is the

> fact of your youth at the time of committing this offence. As I've already said, you were 17; the youngest of the prisoners in the matters to which I've referred was 21 and the oldest was 27. The law, I think, has been notoriously lenient so far as young first offenders are concerned. The emphasis in such cases has long been said to be that of rehabilitation rather than the more punitive sides of the sentencing process."

[26] His Honour concluded:

> "I have not found this matter an easy one to decide. I come to the conclusion that I should impose a sentence of three years imprisonment. I think that will hopefully serve the deterrent and denunciatory aspects of sentencing. Giving effect to the mitigating factors, particularly your youth at the time of committing this offence, and the other matters which I've touched upon, I intend to fix your parole release date as today; that is, the 2nd of September 2009."

The Attorney-General's argument in this Court

[27] On the appellant's behalf it is submitted that the sentence which was imposed does not reflect the gravity of the offence, failed to take sufficiently into account the need for general deterrence against attacks on vulnerable infants[1] and gave too much weight to personal factors in mitigation of sentence.

[28] It is said on behalf of the appellant that the decision of the learned primary judge not to impose a period of actual custody as part of the sentence reflected insufficient regard for the powerful claims of the need for denunciation and general deterrence in cases of assaults upon infants in the care of the offender. It is argued that, even allowing for the respondent's youth and his prospects of rehabilitation, the nature of this crime was such as to call for a period of actual detention: even the respondent's own counsel recognised that a term of actual imprisonment for nine months at least was necessary to meet the needs of general deterrence and to denounce crimes of violence against the most vulnerable members of our community. A proper sentence could not be less, so it is said, than that suggested by the respondent's counsel at sentence.

Discussion

[29] The approach which this Court must take in exercising its function under s 669A(1) of the *Criminal Code* was explained in *R v Lacey; ex parte A-G (Qld).*[2] This Court must have regard to the sentence appealed from in order to decide whether to vary it, the question for this Court being whether this Court disagrees with that sentence "as a matter of judgment for reasons of substance reflected in a variation which is not merely trivial or arbitrary."[3]

[30] In *R v FJ; ex parte A-G (Qld),*[4] a 21 year old offender caused bodily harm and grievous bodily harm to his eight month old son by excessive shaking. The two offences occurred over a three week period. The baby made a full recovery, and although there was a risk of later learning difficulties, the baby had reached all

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1 *R v Irvine; ex parte Attorney-General (Qld)* [1997] QCA 138 at 3.
2 [2009] QCA 274 at [130], [147] – [148].
3 *R v Osmond; ex parte Attorney-General (Qld)* [1987] 1 Qd R 429 at 434.
4 [2005] QCA 15.

developmental milestones since the offences. The offender had no history of similar offending and had the benefit of a plea of guilty. He had also demonstrated remorse, had supervised contact with the child and demonstrated good prospects of rehabilitation. This Court held that a sentence of five and a half years imprisonment with a recommendation for parole after serving 22 months was not manifestly inadequate.

[31] In *R v SAV; ex parte A-G (Qld)*,[5] after a review of the decided cases of grievous bodily harm to infants, it was said that the range of sentence for such offences was between four and six years imprisonment. In this Court it was accepted on behalf of the appellant, as it was by the prosecution below, that the circumstances of this case were sufficiently different from those in the cases cited to justify the view that a head sentence of three years imprisonment was within the range of proper sentences. The respondent's extreme youth distinguishes this case from *R v FJ* and the cases reviewed in *R v SAV*.

[32] The respondent is to be sentenced for a serious assault upon a defenceless infant who was in his care. The injury done to the child by the respondent could have left the child with a grave disability. That the child was not left terribly disabled was due only to the high quality of the medical treatment he received. It does appear, however, that the learned sentencing judge was entitled to conclude that, fortunately for all concerned, this case is not in that category where long term serious harm has been caused to the child.

[33] There must also be recognition of the lengthy period which elapsed between the respondent's confession to the child's mother and his sentence, and his conduct during that period. One must ask what good purpose is now served by a sentence which includes a period of actual incarceration after such a long delay. The sentence imposed below recognised that the respondent's conduct subsequent to the offence was such as to lessen the need for personal deterrence in sentencing him. One cannot lose sight of the facts that the Department of Child Safety and the child's mother were content to allow the respondent access to the child, and that further incidents of violence did not occur during that time.

[34] So far as general deterrence is concerned, this crime was not one of calculation but a spur of the moment explosion of anger and frustration. It is important here to keep steadily in mind that the respondent was little more than a child himself at the time of the offence. How the respondent came to find himself at the age of 17 years in the position of father to a three and a half month old baby without the assistance of adult supervision and care was not satisfactorily explained. In particular, there was no explanation of the role played in the lives of these young people by their respective parents. It does seem, however, that the social structures which should have been in place to prevent the appalling situation in which the care of the child was left to the respondent and the child's 16 year old mother were, lamentably, absent.

[35] That circumstance is not of itself sufficient reason to deny the role of the criminal law in seeking to protect innocent members of the community who are unable to protect themselves: in such circumstances, the protective role of the criminal law may be the only form of protection of the innocent.[6] That having been said, it

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5 [2006] QCA 328 at [24] – [28].

6 *R v KU & Ors; ex parte A-G (Qld)* [2008] QCA 154 esp at [113].

would, I think, be disproportionate to the respondent's criminality if he were to be sentenced as the person with sole responsibility for his inadequacy as the father of an infant.

[36] In relation to general deterrence, I consider that the suggestion that juvenile fathers, similarly situated to the respondent, will be deterred by reflecting upon a custodial element in the sentence imposed on the respondent when they are minded to act violently towards an infant in their care out of tiredness, frustration and personal inadequacy is not so compelling as to persuade me that this consideration affords a "reason of substance" to conclude that this Court should impose a sentence which includes a period of custody.

Conclusion and orders

[37] In my respectful opinion, to accede to the arguments advanced on behalf of the appellant would be to vary the sentence imposed below for reasons which I would not regard as reasons of substance.

[38] Accordingly, I would dismiss the appeal.

[39] **HOLMES JA:** I agree, for the reasons given by Keane JA and Fryberg J, that the appeal should be dismissed.

[40] **FRYBERG J:** The task of the sentencing judge in this case was made more difficult than it should have been by the paucity of evidence from which to assess the criminality of the respondent's conduct. The Crown, through the then Department of Child Safety, became involved in the care of the child from about the time of the offence until some time in 2008, when the mother turned 18. It required the respondent to undertake anger management and parenting courses. He did so and was allowed unsupervised contact with the child from about August or September 2007.

[41] His Honour directed the prosecutor's attention to these matters, but despite this he was told virtually nothing about the Department's assessment of the situation. This meant that he knew nothing of state of the relationship between the respondent and the mother prior to the offence, and not much about it after the offence. Defence counsel told him, "There had been some aggravation within the relationship prior to the incident; some yelling in the evening." In April 2008 the respondent again attended counselling to provide support "in addressing relationship issues surrounding domestic violence relationship with son's mother KD and son KWJ's injuries". It is unclear whether this is a reference to the incident the subject of the conviction or to a prolonged history involving either or both respondent's girlfriend and his son.

[42] It is also unclear how two children came to be living alone with their baby and what family support they had.

[43] The Crown could easily have placed information on these topics before the court; there is no reason to suppose it was not available from departmental officers and the child's mother. As his Honour observed, "There's nothing else in his history to suggest he's a violent person." It emerged at the hearing of the appeal that the Crown had not even made disclosure of the relevant departmental file.[7] Counsel for

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[7] The Court was subsequently informed that disclosure took place after the appeal, but neither side sought to tender any fresh evidence.

the respondent told the judge that his client had made admissions "to [the Department of] Child Safety", but what these admissions were and when they were made was unknown.

[44] Whatever might be the position in a case where an accused, even a young accused, has a history of violence or threatened violence toward his partner or a child, or where he commits the offence in the course of a dispute with his partner, the material before the sentencing judge disclosed no sufficient basis for treating this as other than a case of a momentary aberration by someone not yet himself an adult in a situation beyond his experience.

[45] For these reasons, and for those advanced by Keane JA, the appeal should be dismissed.