SUPREME COURT OF QUEENSLAND

CITATION:	*R v Purcell* [2017] QCA 111
PARTIES:	**R** **v** **PURCELL, Jiah Rhys** (applicant)
FILE NO/S:	CA No 1 of 2017 DC No 220 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns – Date of Sentence: 24 November 2016
DELIVERED ON:	31 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2017
JUDGES:	Sofronoff P and Gotterson JA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to dangerous operation of a vehicle causing death and five summary traffic offences – where four of the summary offences were committed while the applicant was on bail for the indictable offence – where the applicant was sentenced to eight years' imprisonment for the indictable offence, six months' imprisonment for failing to stop and two months' imprisonment for each of the other summary offences to be served concurrently – where the applicant will be eligible for parole after serving one-third of his head sentence – where the applicant was also disqualified from holding a driver's licence for two years – where the learned sentencing judge considered the range reflecting the totality of the offending and arising from comparable sentences was eight to nine years' imprisonment – where the learned sentencing judge adopted an eight year sentence because the applicant's driving was not deliberately reckless – whether the learned sentencing judge erred in concluding the sentencing range was between eight and nine years – whether the sentence was manifestly excessive

	Criminal Code (Qld), s 328A
	House v The King (1936) 55 CLR 499; [1936] HCA 40, cited *R v Blackaby* [2010] QCA 84, distinguished *R v Goodwin; Ex parte Attorney-General (Qld)* (2014) 247 A Crim R 582; [2014] QCA 345, cited *R v Hopper* [2011] QCA 296, considered *R v Pham* (2015) 256 CLR 550; [2015] HCA 39, cited *R v Thomas* [2015] QCA 20, distinguished
COUNSEL:	F D Richards for the applicant N Rees for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P**: I agree with the reasons of Gotterson JA and with the order his Honour proposes. I have nothing to add.

[2] **GOTTERSON JA**: The applicant, Jiah Rhys Purcell, pleaded guilty to an indictable offence and a summary offence committed on 6 February 2015 and to four summary traffic offences committed on 2 August 2015. He was sentenced for all offending on 24 November 2016 in the District Court at Cairns.

[3] The offences were as follows:

6 February 2015

- an indictable offence against s 328A(4)(b) *Criminal Code* (Qld), dangerous operation of a vehicle on the Cairns Western Arterial Road causing the death of Ricky Dillon Arthur Veit ("the deceased") with the aggravating circumstance that he was adversely affected by an intoxicating substance; and
- a summary offence against s 79(2)(a) *Transport Operations (Road Use Management) Act* 1995 ("TORUM Act") being the holder of a provisional licence driving over the general alcohol limit but not over the middle alcohol limit.

2 August 2016

- a summary offence against s 754(2) *Police Powers and Responsibilities Act* 2000 ("PPR Act"), failing to stop a motor vehicle;
- a summary offence against s 790(1) PPR Act, obstructing a police officer;
- a summary offence against s 80(5A) TORUM Act, failing to provide specimen of breath for a breath test; and
- a summary offence against s 79(2A)(a) TORUM Act, being the holder of a provisional licence driving over the no alcohol limit but not over the general alcohol limit.

[4] The applicant was sentenced to eight years' imprisonment on the indictable offence. Concurrent sentences of six months' imprisonment for failing to stop and two months' imprisonment on each of the other summary offences were also imposed.

Some 122 days pre-sentence custody were declared time served under the sentence. A parole eligibility date at 25 March 2019, when the applicant will have served one-third of his head sentence, was set. The applicant was disqualified from holding a driver's licence for two years.

The circumstances of the offending

[5] The applicant and his long-time friend, the deceased, were socialising on the afternoon of 6 February 2015. The applicant, who held a provisional licence, which carried a 0.0 per cent blood alcohol content requirement, drove them in his mother's Holden Commodore to the Courthouse Hotel in Cairns. The rear wheels of the vehicle had insufficient tread and, as the applicant knew, needed replacement.

[6] At about 7 pm, they were joined at the hotel by two female acquaintances. During the afternoon, the applicant and the deceased had each drunk three beers over a period of one to two hours. They continued to drink at the hotel, the applicant drinking both rum and beer.

[7] They all left the hotel at 11 pm to drive home the deceased who had a headache. The deceased sat in the rear driver's side seat. He did not fasten his seat belt. Torrential rain fell and the car's windscreen fogged up. At one point, the applicant veered to the wrong side of the road and one of the female passengers yelled at him to correct his driving.

[8] They stopped for takeaway alcohol at a leagues club then continued on to Redlynch. Music was playing loudly on the car stereo. The same female passenger shouted at the applicant to slow down. He ignored her. They turned onto Cairns Western Arterial Road which has two lanes in each direction separated by a grassed median strip. The speed limit on that road is 80 kph.

[9] At about 11.25 pm, the car lost traction with the road surface. It skidded as it entered a left-hand bend. It then broadsided into a light pole on the driver's side. The rear driver's door connected with the pole at speed, causing it to top over. The vehicle continued on sliding across the strip before coming to rest about 100 metres down the road in a ditch.

[10] At the time of impact, the deceased was lying across the back seat with his head on the arm rest of the door that impacted the pole. He suffered significant head injuries from which he later died.

[11] The applicant attempted to drive the vehicle but it did not go far. He started to run, yelling "don't tell my Mum", but he then returned to try to resuscitate his friend. A breath test disclosed a blood alcohol content of 0.091 per cent.

[12] The summary offences on 2 August 2015 arose from police observation of a black Holden utility driven by the applicant, failing to give way to pedestrians as it turned left from Spence St onto Lake St, Cairns. The applicant failed to stop in response to police intervention. Once stopped, he disrupted a police attempt to handcuff him and he refused to give a breath specimen. His appearance and breath smell, together with an open can of Toohey's New beer on the centre console, strongly suggested that he had been drinking alcohol. Ultimately, he admitted to a blood alcohol content of 0.037 per cent. This offending occurred while the applicant was on bail for the February offending.

The applicant's personal circumstances and history of offending

[13] The applicant was 21 years old at the time of the offending and is now 23 years old. He is single. He was educated to year 12 level. Since leaving school the applicant has worked in the hospitality and construction industries. At one stage, he had a lawn mowing business.

[14] Brief medical evidence prepared by the applicant's general practitioner and tendered at the sentence hearing indicated that the applicant was receiving counselling for post-traumatic stress disorder ("PTSD") following the death of his best friend in the accident. His mood was "very low" and he was anxious. He was described as being "extremely remorseful".

[15] The applicant had a very poor history of traffic offending, dating from April 2010. The offending involved unlicensed driving, driving while disqualified, speeding and driving with a blood alcohol content while unlicensed. Numerous fines had been imposed for this offending.

The sentencing remarks

[16] The learned sentencing judge referred to the circumstances of the offending in February 2015 and its catastrophic consequences. He mentioned the distress caused to the deceased's parents.

[17] His Honour stated that the applicant had driven in a dangerous manner "for some period of time" and had failed to heed the calls of at least one passenger to desist. He was of the opinion that general and personal deterrence were important considerations in sentencing the applicant. He described the applicant's traffic history as "disgraceful" and said that it caused him to doubt references which spoke of him as a responsible young man.

[18] To the applicant's credit, his Honour took into account his timely plea of guilty, his reasonable work history and his anxiety and depression.

[19] The learned sentencing judge stated that the comparable sentences to which he had been referred had guided him as to an appropriate sentence. The range was eight to nine years' imprisonment with the higher end more appropriate for deliberately reckless driving with an element of foolish behaviour. As that was not a feature of the applicant's dangerous driving, his Honour adopted an eight year sentence. In his view, a prison term of that duration was appropriate for the totality of the offending conduct for which the applicant was being sentenced. Conformably with that approach, the short prison sentences imposed were ordered to be served concurrently with the head sentence.

The grounds of appeal

[20] The applicant relies on the following two grounds of appeal:

1. the learned sentencing judge erred in concluding that the sentencing range was one of eight to nine years; and

2. the resulting sentence was manifestly excessive in all the circumstances.

It is convenient to consider both grounds together.

[21] **Applicant's submissions**: The applicant referred to the three decisions of this Court put before the learned sentencing judge, namely, *R v Hopper* [2011] QCA 296 and *R v Blackaby* [2010] QCA 84 by the prosecutor, and *R v Thomas* [2015] QCA 20 by defence counsel. It was submitted that these cases show that the range for offending of the type before his Honour extends below eight years.

[22] It was contended for the applicant that insufficient recognition had been given to his youth or his PTSD. No mention had been made of his remorse.

[23] The applicant further submitted that, given his youth, the absence of deliberate recklessness or excessive speeding in his driving on 6 February 2015 and the mental anguish he has suffered through the death of his friend, and notwithstanding his prior traffic history, a head sentence of between six and seven years was appropriate.

[24] **Respondent's submissions:** The respondent referred to the observations of Fraser JA in *R v Goodwin; Ex parte Attorney-General (Qld)* [2014] QCA 345; (2014) 247 A Crim R 582 at [5], that whether or not a sentence is manifestly inadequate or manifestly excessive is not to be decided by reference to a predetermined range of available sentences but by reference to all the factors relevant to sentence. Reference was also made to the clear statement made by French CJ, Keane and Nettle JJ in *R v Pham* [2015] HCA 39; (2015) 256 CLR 550 at [28] that appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that had been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.

[25] The respondent submitted that, having regard to the importance of general and personal deterrence where a fatality had occurred, the applicant's antecedent poor history of traffic offending, the continuation of traffic offending on bail after this fatality, and the imposition of concurrent, and not cumulative, sentences for the summary offending, the sentence of eight years was within sound discretion. It did not bespeak a misapplication of principle. Nor was it within the category of discretionary error described in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 at 505 as "unreasonable or plainly unjust".

[26] **Discussion:** Turning first to the sentencing decisions put before his Honour, I would accept the applicant's contention that they disclose a range of sentences for dangerous driving causing death which extends below eight years' imprisonment. In *Hopper*, a 20 year old offender who drove recklessly, stubby in hand, at speeds up to 130 kph in a 60 kph zone and ignored requests from passengers to slow down, lost control of his vehicle. It clipped a power pole and collided with a fence. A passenger was killed instantly. The offender's blood alcohol content was 0.144 per cent. He had prior convictions for driving under the influence, careless driving and speeding. His sentence of eight years' imprisonment with parole eligibility after three years was not disturbed on appeal.

[27] The offender in *Blackaby* was 22 years old with a dysfunctional background. She drove with a blood alcohol content of 0.227 per cent. As she was driving, she reached for an object in the centre console and lost control. Her car veered off the road and under the tray of a parked truck. Her partner suffered fatal head injuries. The offender had a history of street and stealing offences and convictions for unlicensed driving,

driving while disqualified and driving under the influence of liquor. She was sentenced to seven years' imprisonment with parole eligibility after 18 months. On appeal it was acknowledged by this Court at [53] that, while some comparable decisions might have suggested that the sentence was severe, it was not manifestly excessive.

[28] In *Thomas*, the offender, aged 26, was collecting his three children and the child of a friend from school and day-care. He failed to negotiate a curve. His car left the road and hit a tree. The friend's child died of a broken neck and his children were injured, one seriously. The offender was a regular user of methylamphetamine and on this occasion had a concentration of 1.22 mg/kg, which adversely affected his ability to drive. He had an antecedent traffic history including convictions for driving under the influence of liquor, speeding, unlicensed driving and driving while disqualified. After the subject offending, he committed further traffic offences for speeding, unlicensed driving, disqualified driving and failing to fulfil the duties of a driver after a crash. He was sentenced to nine years' imprisonment with parole eligibility after three years. On appeal, the sentence was reduced to a sentence of seven years' imprisonment with parole eligibility after two years and four months. The appellate court regarded it as significant that the dangerous operation of the vehicle in that case was "of limited duration and did not involve any element of deliberately reckless driving".

[29] Thus in two of these sentencing decisions, the sentence imposed was seven years' imprisonment. However, I do not understand his Honour to have propounded a range of eight to nine years' imprisonment for dangerous operation of a motor vehicle causing death. Properly understood, his Honour was expressing a conclusion that he had drawn from the comparable cases put before him, including sentencing decisions referred to in those cases, as to the sentencing range that would reflect the totality of the criminality in the offending conduct for which the applicant was being sentenced. That included not only the offending on 6 February 2015, but also the offending on 2 August 2015 when the applicant was on bail.

[30] The central question for the Court then is whether the sentence imposed was manifestly excessive. I am unpersuaded that it was for the following reasons.

[31] Whilst the applicant's driving did not have features of foolish recklessness, it was plainly dangerous. He drove with a substantial blood alcohol level when, for his licence, the requirement was 0.0 per cent. The dangerousness of the driving was heightened by the poor condition of the vehicle's tyres, the torrential rain and the fogged windscreen.

[32] In my view, it is highly significant that the dangerous driving had continued over some time. He had veered onto the wrong side of the road before they stopped at the leagues club and continued after they resumed the journey when the vehicle skidded in the left-hand bend. In this respect, the applicant's driving resembled the driving of the similarly-aged offender in *Hopper*, and is clearly distinguishable from the much shorter spans of dangerous driving in *Blackaby* and *Thomas*. Moreover, the applicant twice ignored the request of a passenger to correct his driving.

[33] It is true that whilst his Honour referred to the applicant's depression and anxiety, he did not refer specifically to remorse. That, I think, is understandable, given the serious subsequent offending in August 2015. His Honour referred to that offending as demonstrating a lack of insight into the seriousness of his earlier offending.

[34] It is important to keep in mind that the applicant was also being sentenced for that later offending. It was serious in itself but the more serious for having been committed while the applicant was on bail.

[35] For these reasons, I am of the view that the sentence imposed, though arguably a stern one, was within the bounds of a proper exercise of the sentencing discretion. It does not bespeak a misapplication of principle.

[36] In the circumstances, I would refuse leave to appeal against the sentence.

Order

[37] I would propose the following order:

1. Application for leave to appeal against sentence refused.

[38] **NORTH J:** I agree with the reasons of Gotterson JA and with the order his Honour proposes.