SUPREME COURT OF QUEENSLAND

CITATION:	*R v Burnett-Greenland* [2017] QCA 159
PARTIES:	**R** **v** **BURNETT-GREENLAND, Kurtis John** (applicant)
FILE NO/S:	CA No 105 of 2017 DC No 333 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 24 April 2017
DELIVERED ON:	Orders delivered 13 July 2017 Reasons delivered 28 July 2017
DELIVERED AT:	Brisbane
HEARING DATE:	13 July 2017
JUDGES:	Sofronoff P and Gotterson JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Orders delivered ex tempore 13 July 2017:** **1. Leave to appeal granted.** **2. Appeal allowed.** **3. Sentence imposed on 24 April 2017 set aside.** **4. The appellant is sentenced to a term of imprisonment of two years, such sentence to be suspended after the appellant has served five months' imprisonment with an operative period of two years.** **5. Pre-sentence custody between 24 April 2017 and 12 July 2017 is declared as time served.** **6. The appellant is disqualified from holding or obtaining a Queensland driving license for a period of 12 months from 13 July 2017.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – where the applicant pleaded guilty to dangerous driving of a vehicle causing grievous bodily harm with a circumstance of aggravation – where the sentencing judge misstated the circumstances of the offence and classified the applicant's conduct as 'repeated recklessness' – whether the sentencing judge erred in his understanding of

the facts of the offence

Criminal Code (Qld), s 328A(4)(c)

R v Coutts [2016] QCA 206, cited
R v Etheridge [2016] QCA 241, cited
R v Hooper; ex parte Cth DPP [2008] QCA 308, cited
R v MacDonald (2014) 244 A Crim R 148; [2014] QCA 9, cited

COUNSEL: B J Power for the applicant
G P Cash QC for the respondent

SOLICITORS: Robertson O'Gorman Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Applegarth J.

[2] **GOTTERSON JA:** I agree with the reasons given by Applegarth J.

[3] **APPLEGARTH J:** On 24 April 2017 the applicant was convicted on his plea of guilty on a count of dangerous operation of a vehicle causing grievous bodily harm. A circumstance of aggravation was that he left the scene of the incident before a police officer arrived.[1] He was sentenced to two and a half years' imprisonment, with release on parole after serving nine months.

[4] At the hearing of his application for leave to appeal against sentence on 13 July 2017, the Court was persuaded that the sentencing judge erred in his understanding of the facts of the offence. The Court ordered:

(1) Leave to appeal granted;

(2) Appeal allowed;

(3) The sentence imposed on 24 April 2017 is set aside;

(4) The appellant is sentenced to a term of imprisonment of two years, such sentence to be suspended after five months' imprisonment with an operational period of two years;

(5) The appellant be disqualified from holding or obtaining a driver's licence for a period of 12 months.

Pre-sentence custody for the period between 24 April 2017 and 12 July 2017 was declared as time served. These are the reasons for those orders.

The circumstances of the offences

[5] The essential facts are that late on the night of 13 May 2016 the applicant drove a car in a residential area at excessive speed and failed to safely negotiate a corner.

---

1 The *Criminal Code* (Qld) s 328A(4)(c).

[6] The applicant, who was aged 19, had attended a family birthday party at his aunt's home. At around 11.30 pm he was asked to go to the shop to buy cigarettes. His two cousins agreed to accompany him. He drove his aunt's car.

[7] As the car approached the corner it did not slow down and as it turned into the next street the rear of the car spun out, causing the rear tyres to mount the gutter. The applicant then oversteered in correcting the turn and applied the brakes, causing the car to fishtail, skid and collide on its left side with a power pole.

[8] A resident who had observed these things from her bedroom window immediately called 000 and ran to the car. As she approached, she saw the driver get out of the car and run away. She then observed two passengers in the rear seat. They were both unconscious and neither was wearing a seatbelt. One of the passengers suffered minor injuries. The other sustained injuries which included various fractures, a small frontal subdural haematoma and bruising. He spent two weeks in hospital and was in significant pain for the first three days. He required surgery to place pins through his shoulder to secure a fracture until it healed. If this fracture had been left untreated it would likely have caused permanent injury to his health by way of a decreased amount of power and movement in the upper arm. That passenger, who is the applicant's cousin, was unable to work for ten weeks due to his injuries.

[9] After the incident the applicant returned to his aunt's home. The car was registered in her name and when police attended he denied knowing anything about the crash. However, the next afternoon he attended the local police station and stated that he wanted to "come clean about the crash". He admitted to being the driver.

[10] The schedule of facts, which became an exhibit at the sentencing hearing, referred to an earlier episode that night, at around 8.30 pm, when a car was observed doing "burnouts" which caused smoke and loud noise. This prompted the resident who later observed the crash to call police and report the incident. In his interview with police the applicant admitted that he had been the driver at the time. As the applicant's counsel noted, this earlier episode was a matter that placed the later incident in context so as to refute any possible claim that the offending conduct was an isolated error of judgment. The earlier episode was not charged. It did, however, provide evidence of the applicant's poor attitude to road rules and responsible driving, as did the fact that he was driving whilst unlicensed.

The applicant

[11] The applicant had just turned 19 at the time of the offence, and was still aged 19 at the time of sentence. He had no criminal history. His traffic history recorded that on 28 May 2014, whilst a learner driver, he failed to display L plates and drove when not under the direction of another person. This resulted in six demerit points and two fines totalling $352. Because of the demerit points his learner's permit was suspended. Because the fines had not been paid it remained suspended at the time of the offence.

[12] The fact that there would be a plea of guilty was indicated at the time of the hand-up committal in the matter. The applicant's plea was treated as an early plea. There was other evidence consistent with his remorse and preparedness to accept responsibility for his offending. There were also favourable references.

[13] After leaving school the applicant took up an apprenticeship as a boilermaker before taking up other work with a carpenter. He had expressed to present and past employers his shame and remorse for his actions. His work ethic was commended and he had the prospect of future permanent employment. The President of Neighbourhood Watch in the area, who had known the applicant for over 16 years, attested to his being a polite and thoughtful young man who had regularly visited an elderly gentleman in the street and assisted him in various ways. This neighbour also detected that the burden of the applicant's actions rested heavily upon him, including the serious consequences which had befallen his cousin.

[14] The applicant was and remains in a stable relationship, and he and his partner are expecting a child in November 2017.

The appeal

[15] The amended notice of appeal contains four grounds. Two allege that the sentencing judge erred in his understanding of the facts. Another is that he failed to give adequate weight to the applicant's relevant mitigating circumstances. However, this does not itself constitute a viable ground of appeal,[2] and on the hearing of the appeal counsel for the applicant relied upon these matters as supportive of the remaining ground of appeal, namely that the sentence was manifestly excessive in all of the circumstances.

Did the judge err in his understanding of the facts of the offence?

[16] The agreed schedule of facts did not allege a protracted period of dangerous driving. The offending conduct related to the speed at which the applicant approached the corner, such that he failed to negotiate it safely, resulting in the crash. The eye witness' account which formed the basis of the schedule of facts did not allege that the car was fishtailing or that it mounted the kerb as it drove down the street and approached the corner. Instead, she observed the car approaching the intersection at speed (the speed was not estimated) and not slowing down for the corner, after which its rear tyres mounted the gutter and the applicant then oversteered to correct the turn. It was after this that the application of brakes caused the car to fishtail, skid and collide on the left side with a power pole.

[17] This, however, was not the sequence of events described by the sentencing judge. His sentencing remarks stated:

> "On the way to the shop, you drove at speed in a 50km/h zone in suburban streets. You were fishtailing and mounting the kerb and your tyres were screeching. As you approached a particular intersection to turn right, you did not slow down. The back end of the car spun out. The rear tyres mounted the gutter. You oversteered to correct the turn and applied the brakes. That caused the car to fishtail and skid and collide with a power pole."

The description of events in the second sentence was not supported by the evidence. The applicant's cousin who was in the back seat of the car recalled the applicant driving fast and the car "fishtailing as they rounded a corner and mounting the kerb". That description is not inconsistent with the account given by the witness

---

2 *R v Coutts* [2016] QCA 206 at [4].

who observed matters from her bedroom window. If, however, it was inconsistent, the evidence of the resident would command acceptance over the recollection of the backseat passenger, who was highly intoxicated.

[18] In any event, the sentencing judge's description of the episode did not reflect the evidence. Counsel for the respondent accepts that a reading of the sentencing remarks implies that the fishtailing and mounting the kerb occurred before the applicant attempted the turn. However, he submits that it is being overly critical of the language used by the sentencing judge to conclude that he erred in the manner claimed by the applicant. The sentencing remarks were delivered *ex tempore*, and for that reason imprecision in language may have less significance than in other cases.[3]

[19] The applicant's case that the sentencing judge misapprehended the facts, rather than used imprecise language, is supported by a later passage in the sentencing remarks in which the sentencing judge stated:

> "Your driving was not momentary inattention. It was repeated recklessness".

The applicant's conduct in driving too fast and attempting to turn at the intersection without slowing down warranted the description "reckless". However, the reference to "repeated recklessness" suggests that the sentencing judge apprehended that the vehicle was fishtailing and mounted the kerb before it approached the intersection and that such reckless conduct was followed by further recklessness in not slowing down in order to negotiate the corner.

[20] In the circumstances, there was a misapprehension as to the facts of the offence. Such a misapprehension was a matter of significance in the sentencing process.

Did the sentencing judge err in his understanding of the applicant's traffic history?

[21] The sentencing judge stated that the applicant's traffic history consisted of "a number of breaches of the traffic law, principally for the accumulation of points". In fact, there were only two breaches of the traffic law, both of which occurred on the same day. The suspension of the applicant's permit was an administrative process, not the result of further offending. The sentencing judge's misstatement of the number of breaches may have been induced by the prosecutor's statement that there had been breaches of the conditions of the applicant's learner's permit on two occasions.

[22] However, this error may not have had any real significance upon sentence. The issue of whether the applicant breached his learner's permit in two respects on different occasions or on one occasion in two respects was relatively insignificant compared to his behaviour on the night in question which included the earlier episode at around 8.30 pm and the decision to drive whilst unlicensed.

[23] It is unnecessary to determine whether the misapprehension as to the applicant's prior traffic history was of such significance as to alone justify granting leave to appeal. The more fundamental and significant misapprehension about the offending conduct justifies this course.

---

3 *R v Hooper; ex parte Cth DPP* [2008] QCA 308 at [23].

Conclusion

[24] The sentencing judge erred in his understanding of the facts of the offence. This was an error of significance in the sentencing process. It warrants orders granting the application and the appeal with the result that the Court is required to re-exercise the sentencing discretion.

[25] It is unnecessary, in the circumstances, to address the applicant's arguments as to whether the sentence was manifestly excessive.

The most appropriate sentence in the circumstances

[26] Mr Cash QC, who appeared for the respondent on the appeal, made helpful submissions on all matters, including an appropriate sentence in the event this Court was required to resentence the applicant. At the Court's request he ventured a range of between 18 months and two and a half years and suggested a sentence of two years with release after serving about one third of that sentence. Counsel for the applicant made a similar submission about the most appropriate sentence.

[27] It is unnecessary to review the authorities to which reference was made on the appeal or before the sentencing judge since it was accepted that none of them were closely comparable. The judge was taken to cases which were substantially more serious than the present case by the prosecutor who appeared at the sentencing hearing and who urged a sentence in the range of three to four years. The range suggested by Mr Cash QC on appeal is more appropriate to reflect the circumstances of the offending and the applicant's personal circumstances.

[28] In every case of this kind "the crucial issue is not what category ("momentary inattention" or otherwise) best fits the facts. Rather, the crucial issue is … the level of seriousness of the actual driving of the offender."[4]

[29] A number of factors are relevant to the exercise of the sentencing discretion. One is the seriousness or quality of the actual driving. Another is its consequences. The personal circumstances of the applicant need to be considered and compared with the circumstances of offenders in broadly comparable cases.[5]

[30] As noted, this was not a case, like some, in which there was a protracted period of dangerous driving. However, the offending conduct involved a serious error of judgment by an inexperienced young driver. His conduct, which can be described as reckless, was aggravated by the fact that it occurred whilst driving without a licence. His driving earlier that night also provided a context in which to assess his offending conduct. Overall, it demonstrated a poor and immature attitude.

[31] A further aggravating circumstance is that the applicant left the scene before police arrived. This was charged as a circumstance of aggravation. While serious, the applicant's conduct in that regard is not as serious as this feature in other cases, for example, leaving the scene of an accident where an injured pedestrian is left without assistance or a case in which a driver, whose car struck a pedestrian, did not stop and did not allow another passenger to call emergency services.[6] The applicant left

---

4 *R v MacDonald* (2014) 244 A Crim R 148; [2014] QCA 9 at [17].
5 Ibid at [80].
6 c.f. *R v Etheridge* [2016] QCA 241.

the scene in order to avoid police but he was entitled to expect that police would be called, along with an ambulance to treat any injuries sustained by his passengers. Still, leaving the scene before police arrived and later that night disclaiming knowledge of the crash were aggravating circumstances.

[32] Matters in mitigation included:

(a) his youth;

(b) his lack of any criminal history;

(c) that his cousin, who was injured in a way which constituted grievous bodily harm, was able to recover from his injuries;

(d) that after the incident the applicant was remorseful and law-abiding;

(e) his early plea of guilty, which also demonstrated his genuine remorse.

[33] In all the circumstances, a sentence of two years' imprisonment is appropriate by way of denunciation, deterrence and punishment for the actual consequences suffered by the passengers and the potential consequences of the applicant's dangerous driving to himself, his passengers and other citizens.

[34] The applicant's period of actual imprisonment to date and a further period of actual imprisonment serves the goal of personal deterrence. The absence of previous criminal convictions, his general good character and the prospect of employment upon his release from custody suggest that he does not necessarily require supervision and support by way of release on parole. The parole authorities can direct their resources to other cases. The threat that all or part of a suspended sentence will be activated if the applicant commits an offence punishable by imprisonment is apt to deter him from further offending.

[35] A timely plea of guilty is often reflected in a term of imprisonment being suspended or subject to a parole order after a third of the sentence is served. However, this is a "rule of thumb" to reflect a timely plea of guilty. In this case it is appropriate to suspend the sentence of two years' imprisonment, after the applicant has served five months. Such a sentence reflects the leniency which is generally accorded to youthful offenders, particularly those with no previous criminal convictions, whilst reflecting the objective seriousness of such offending by young and immature drivers who fail to heed public education about the dangers of driving at excessive speed.

[36] For a 19 year old who has not encountered the criminal justice system before, the requirement to serve several months of actual custody involves a real and substantial punishment, coupled with the threat of the balance of the sentence being activated. A period of actual custody of more than five months may jeopardise the applicant's prospects of rehabilitation without corresponding advantages in terms of personal deterrence or general deterrence. A sentence which is suspended after five months is appropriate to provide conditions for the applicant's rehabilitation, including the resumption of his employment and personal relations. The applicant is further punished through the period of disqualification.

[37] A sentence of two years' imprisonment, suspended after he serves five months, is an appropriate and just punishment in all the circumstances.