SUPREME COURT OF QUEENSLAND

CITATION:	*R v Browning* [2018] QCA 337
PARTIES:	**R** **v** **BROWNING, Scott Cameron** (applicant)
FILE NO/S:	CA No 304 of 2018 DC No 581 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns – Date of Sentence: 19 November 2018 (Clare SC DCJ)
DELIVERED EX TEMPORE ON:	5 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	5 December 2018
JUDGES:	Sofronoff P and Philippides JA and Boddice J
ORDER:	**The application for leave to appeal against sentence is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – where the applicant was sentenced to 18 months imprisonment for one count of dangerous operation of a vehicle causing death – where the applicant was a professional truck driver – where the applicant had a not insubstantial traffic history – where the applicant drove a heavy vehicle that had only one of six brakes working and worn suspension – where the applicant's mother was the person killed – whether the sentence was manifestly excessive *R v Illin* (2014) 246 A Crim R 176; [2014] QCA 285, cited *R v Todd* [1982] 2 NSWLR 517, cited
COUNSEL:	A J Kimmins appeared for the applicant C N Marco for the respondent
SOLICITORS:	McGinness & Associates as town agent for Mellick Smith & Associates for the applicant Director of Public Prosecutions (Queensland) for the respondent

BODDICE J: On 18 May 2018, the applicant entered a plea of guilty to one count of dangerous operation of a vehicle causing death. On 19 November 2018, the applicant was sentenced to imprisonment for 18 months for that offence. That sentence was ordered to be suspended, after the applicant had served a period of three months imprisonment, for an operational period of two and a-half years. The applicant was also disqualified from holding or obtaining a driver's licence for six months.

The applicant seeks leave to appeal that sentence. In his initial application, the applicant relied upon one ground of appeal, should leave be given, namely, that the sentence imposed was manifestly excessive in all of the circumstances.

At the hearing of the application, the applicant was granted leave to amend his proposed ground of appeal to allege that the sentencing judge erred in her sentencing discretion, in that she failed to:

(a) state in open Court that she had taken account of the guilty plea in determining the sentence imposed, as required under s 13(3) of the *Penalties and Sentences Act*;

(b) take into account the delay between the date of the offence and the date of the applicant's sentence;

(c) give sufficient and adequate weight to the victim impact statement and extracurial punishment by the applicant as a result of the death of his mother;

(d) invite submissions of the parties in relation to a sentence involving actual custody.

The applicant was born on 4 October 1967. He was 51 years of age at sentence and 47 years of age at the time of the commission of the offence. The applicant is a professional truck driver. He has a not-insubstantial past traffic history. It contains many entries for exceeding the speed limit.

The offence occurred on 13 April 2015. On that date, the applicant was transporting cattle in a double-decker trailer. There was no allegation that he was driving whilst under the influence of alcohol or that he was driving in a deliberately dangerous manner. Instead, the applicant was sentenced on the basis he had driven that heavy vehicle in circumstances where only one of the

six brakes in the trailer was working and there was worn suspension, increasing the prospect of a sideways slide.

The applicant was also sentenced on the basis he was driving that defective vehicle in a manner which was not safe for the conditions. He had driven uphill and into a bend at a speed which required him to brake hard, only a short distance from point of impact. The area in question had warning signs of the dangers of trucks tipping, and the relevant speed limit dropped from 100 to 60 kilometres per hour. When the applicant braked in order to disengage the cruise control, the cruise control did not disengage. He then braked heavily upon entering the bend. He lost control of the vehicle. His mother, who was a passenger, was pinned in the wreckage for almost seven hours. The applicant stayed by her side. Despite receiving extensive medical care, his mother died four days after the accident.

It was accepted at sentence that the applicant had paid an unimaginable price for his driving on the day in question. There was no challenge to his expressed genuine remorse for the death of his mother. At sentence, the applicant's sister spoke of the devastation her mother's death had had on the applicant. She sought mercy in respect of any sentence, noting that with the loss of mother, she did not want to suffer the anguish of the applicant going to prison.

The sentencing judge noted the applicant had pleaded guilty, had genuine remorse, had already paid an unimaginable price and took into account the applicant's sister's plea for mercy. The sentencing judge observed that matter could not hijack a proper exercise of the sentencing discretion.

After noting the applicant had a limited and dated criminal history but more significant traffic history, the sentencing judge noted there had been three breaches relating to safety regulations since the offence, suggestive of a relevant attitude or carelessness, even following the offence, in relation to a regulatory scheme designed to ensure the safety of vehicles on the road.

The sentencing judge held that, having regard to the gravity of the offence, and loss of life, there must be sentence of imprisonment. After noting that the question was whether the criminality involved was such that there ought to be imposed a period of actual imprisonment,

the sentencing judge found that general deterrence remained important and that notwithstanding the factors in the applicant's favour, the protection of the community in relation to the safety of roads and the protection of general road users against large and dangerous vehicles was such that there ought to be imposed a period of actual imprisonment.

The ground of appeal relied upon by leave today relies upon four specific alleged errors on the part of the sentencing judge. Those alleged errors are without substance.

First, while it is correct that the sentencing judge did not expressly state she had taken into account the applicant's plea of guilty, a consideration of the sentencing remarks reveals that on two separate occasions, the sentencing judge expressly referred to the fact the applicant had pleaded guilty to the offence in a way which was apparent the judge was giving regard to the fact of that plea of guilty.

Second, whilst the applicant contends the sentencing judge failed to give sufficient and adequate weight to the victim impact statement and the extracurial punishment suffered by the applicant as a result of the death of his mother, a consideration of the sentencing remarks reveals specific reference to each such matter and a specific acknowledgement that the death of the applicant's mother was a relevant matter to take into account. There is no substance in a contention that the sentencing judge failed to give sufficient or adequate weight to those factors.

Third, the exercise of the sentencing discretion does not require a sentencing judge to invite specific submissions in relation to a sentence that properly falls within the exercise of that sentencing discretion. The submission that the sentencing judge had an obligation to invite submissions from the parties in relation to a sentence involving actual custody fails to give proper regard to the fact that such a sentence was always within the relevant exercise of the sentencing discretion.

The fourth alleged error is that the sentencing judge failed to take into account the delay between the date of the offence and the date of the applicant's sentence. A perusal of the sentencing remarks does support a conclusion that there was significant delay, in excess of three and a-half years. However, that delay was not delay of a character deserving specific leniency.

The last six months of that delay was in circumstances where it was specifically at the request of the applicant that the sentence be delayed to allow for his personal circumstances. The balance of the delay does not seem to have arisen in a way which is suggestive of inappropriate inaction on the part of the prosecution.

Having regard to the acceptance of the significant impact of the death of his mother upon the applicant and the genuine remorse, the consequence of delay, in some circumstances, can properly be taken into account when determining whether an appropriate exercise of the sentencing discretion necessitated the imposition of a period of actual imprisonment. Delay and consequent rehabilitation of an offender should, in an appropriate case, be taken into account in the exercise of that sentencing discretion: *R v Illin* [2014] QCA 285, at [21].

In an appropriate case, that passage of time between offence and sentence may give rise to considerations of fairness, necessitating a degree of leniency being extended that might not otherwise be the case: *R v Todd* [1982] 2 NSWLR 517, at 519. There is, however, in this particular case, no particular evidence of delay worthy of such special leniency over and above that evidenced by the sentencing judge having ordered the applicant's release after he had served a period of three months, that is, one-sixth of the sentence of imprisonment that had been imposed. That release date was well below that normally afforded to an offender for even an early plea of guilty.

There is no substance in the submission that the delay in the present case warranted a finding that there was an error on the part of the sentencing judge in failing to having specifically referred to that delay in the present case. Accordingly, the second ground relied upon by the applicant is not made out.

In respect of the first ground – namely, that the sentence imposed was manifestly excessive – it is important to note the circumstances of this offending. The applicant's dangerous driving was significant. He had driven a heavy vehicle in circumstances where he was at least aware of a difficulty with its mechanics, if not aware of the full extent of the difficulty. The submissions made before the sentencing judge indicated there was at least a concession to that extent. The

consequence of his driving was significant; it resulted in the tragic death of his mother. There was a significant risk to road users as a consequence of the manner of driving on the day in question. The applicant, although he pleaded guilty, did not plead guilty at an early stage; it was recognised to be a timely plea of guilty. His remorse, it was accepted, was profound.

However, balancing all of those matters against the need for deterrence, and even allowing for the extended period of time over which the applicant has had to live with the consequences of his actions, not knowing of his sentencing fate, it cannot be said that a proper balance of the sentencing discretion did not include an order that the applicant serve an actual period of imprisonment. The need for deterrence always looms large in offences of dangerous operation of a motor vehicle causing death, particularly when involving a professional truck driver driving a heavy vehicle.

There is nothing in the particular circumstances of this case that warrants a conclusion that the sentence imposed was manifestly excessive, in that it evidences a failure on the part of the sentencing judge to take into account appropriate sentencing principles or otherwise indicates a misapplication of principle.

A consideration of the authorities relied upon by the applicant supports a conclusion that the sentence of 18 months imprisonment, suspended after a period of three months imprisonment, for an operational period of two and a-half years, was well within a proper exercise of the sentencing discretion.

I would refuse leave to appeal the sentence.

SOFRONOFF P: I agree.

PHILIPPIDES JA: I also agree.

SOFRONOFF P: The order of the Court is that the application for leave to appeal against sentence is dismissed.