[2019] QCA 38

COURT OF APPEAL

FRASER JA
GOTTERSON JA
PHILIPPIDES JA

CA No 247 of 2018
DC No 163 of 2018

THE QUEEN

v

BARNHAM, Wayne **Applicant**

BRISBANE

THURSDAY, 7 MARCH 2019

JUDGMENT

GOTTERSON JA: The applicant, Wayne Barnham, pleaded guilty to dangerous operation of a motor vehicle causing the death of Tina Maree Johnson. The offending took place on 24 September 2017 on the Burnett Highway. At the time, the applicant was adversely affected by alcohol and he was speeding. In further aggravation of the offending, he left the scene of the accident before a police officer arrived.

The applicant was sentenced in the District Court at Rockhampton on 29 August 2018 for this offence and for two summary offences committed on 24 September 2017 to which the applicant also pleaded guilty. They were driving a motor vehicle under the influence of liquor on the Burnett Highway and failing to remain at the scene of the accident to render assistance to Ms Johnson.

For the dangerous driving and causing death offence, the applicant was sentenced to nine years imprisonment. The learned sentencing judge declined to make a serious violent offence declaration sought by the prosecution. However, no order for parole was made. A period of 70 days pre-sentence custody was declared to be time served under the sentence. It was further ordered that the applicant be disqualified from holding or obtaining a driver's license absolutely. For the summary offences, the applicant was convicted but not further punished.

On 24 September 2018, solicitors acting for the applicant filed an application for leave to appeal his sentence. The ground on which the application is based is that his sentence is manifestly excessive.

The applicant is no longer legally represented. He appears on his own behalf at the hearing of this application.

The circumstances of the subject offending are, of course, relevant to this application. They were summarised in the Schedule of Agreed Facts tendered at the sentence hearing. The schedule discloses the following facts.

The applicant had spent the day travelling around in his vehicle with three others including the deceased, Tina Johnson. He had organised one of the three, Anthony Rayner, to drive. During the day, the applicant consumed a quantity of beer. It was estimated that ultimately there were 20 empty beer bottles at his feet.

After they stopped at a service station, the applicant demanded that he drive. Mr Rayner resisted, but the applicant became aggressive and insistent in his demand. He was obviously affected by alcohol. Mr Rayner relented.

The applicant drove along the Bruce Highway and then onto the Burnett Highway, in all for about seven kilometres. He was speeding and swerving all over the road. The two surviving passengers estimated that his speed was between 150 and 170 kilometres per hour and both told him to slow down.

The applicant lost control of the vehicle near an intersection. It moved to the left out of the lane. He steered to the right. The rear of the vehicle slid out to the left. It travelled across both lanes of traffic in a yaw movement before leaving the road and sliding through a barbed wire fence. The vehicle moved diagonally across a paddock, travelled through a fence, and began to roll. The rear passenger door opened and Ms Johnson, who was not wearing a seatbelt, was thrown from the vehicle. It stopped when it hit a tree.

Calculations reveal that at the time the vehicle left the road, it would have been travelling at a speed of at least 153 kilometres per hour.

The other occupants of the vehicle exited it. They saw Ms Johnson lying on the ground in an awkward position. The applicant also saw Ms Johnson. He started walking away. He approached the occupants of a vehicle who had stopped to render assistance and asked for a lift into town. He stated that he was the driver and that he had been drinking and needed to get out of there. They declined. He continued to walk off.

The applicant flagged down another vehicle and told the occupants that his friend had been the driver and that his friend had been drinking. They agreed to take the applicant into town so that he could go to the hospital.

Police and emergency services attended the scene. They transported Ms Johnson to hospital where she was later pronounced dead. The other two passengers were also injured.

The applicant went to the hospital as did police. A sample of his blood was taken late that evening. It revealed a blood alcohol content of 0.099 per cent at that time. It was calculated that at the time of the crash, the applicant would have had a blood alcohol content of 0.199 per cent.

The applicant was 51 years old at the time of the offending. He had prior convictions in Queensland for motor vehicle and dishonesty offences. Notably, he had five speeding convictions, the most recent of which was in 2015. He also had five convictions for driving with an above-limit blood alcohol content. These convictions were between 1985 and 2006.

In sentencing the applicant, the learned sentencing judge outlined the circumstances of the offending. His Honour described it as "particularly egregious" because of not only the reckless manner in which the applicant drove, but also his conduct after the incident. It exhibited a "wanton disregard and indifference to the lives of others", both the occupants of the vehicle and other road users.

His Honour referred to the death of the deceased and the impact that that had had not only on her own children, but also on her father and her siblings. To leave the scene was a "cowardly and shameful act". It was exacerbated by falsely blaming someone else for the driving.

Reference was also made to the applicant's history offending, particularly as it related to the use of motor vehicles. His Honour was conscious that the drink driving convictions were "somewhat dated".

The learned sentencing judge remarked that he had been presented with a number of authorities which suggested that a sentence in the order of eight to 10 years imprisonment was appropriate. The decision of this court in *R v McDougall & Collas*,[1] his Honour noted, reminded that sentencing is a practical exercise which has regard to the needs of punishment, rehabilitation, deterrence, community vindication, and community protection.

The learned sentencing judge regarded both punishment and deterrence as important considerations in sentencing the applicant. General deterrence was particularly significant but specific deterrence also had a role to play given the applicant's drink driving history. In light of that, community denunciation was "plainly called for", his Honour said.

His Honour did accept that there was remorse on the applicant's part. He was of the view that the applicant's behaviour towards the occupants of the first vehicle to stop, would have been influenced by both consumption of alcohol and panic.

As I have noted, the learned sentencing judge decided not to make a serious violent offence declaration. In that context, his Honour remarked that had a declaration been made, a head

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1 [2006] QCA 365; [2007] 2 Qd R 87.

sentence at the lower end of the range would have been appropriate in order to avoid imposing a sentence that was oppressive.

The applicant does not suggest that the learned sentencing judge made a specific legal error in sentencing him. His case is that the sentence is manifestly excessive. To make that out, he needs to show that the sentence is unreasonable or plainly unjust such that it gives rise to an inference that there must have been some misapplication of principle in sentencing him.[2]

An applicant who challenges a sentence as manifestly excessive conventionally identifies a difference between his or her sentence and sentences for comparable offending and submits that the difference gives rise to an inference of the kind to which I have referred. Here, the applicant has not identified such a difference. Indeed, having regard to the sentences imposed in the several cases to which I shall refer, it would have been difficult for him to have done so.

In *R v Vessey; Ex parte Attorney-General (Qld)*,[3] this court increased the sentence imposed from one of six and a half years imprisonment with parole recommended after 26 months to a sentence of nine years imprisonment with parole eligibility after four years. There, the offender had driven on the wrong side of the road for about 150 metres. He caused another vehicle to take evasive action. He then drove around a corner and on to an intersection. At the intersection, he drove through a "give way" sign. He collided with another vehicle, killing the driver of it. At the time, the offender had a blood alcohol content of at least 0.2 per cent. As well, he was unlicensed to drive.

The decision in *Vessey* was referred to in the later decision of this court in *R v Frost; Ex parte Attorney-General (Qld)*.[4] In that case, the offender pleaded guilty to dangerous operation of a motor vehicle causing death while adversely affected by alcohol. The Attorney General's appeal against sentence was allowed to the extent of removing a recommendation for parole for the sentence of nine years imprisonment. The offender was 24 years of age when he

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2 *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [59].
3 [1996] QCA 11.
4 [2004] QCA 309.

offended. He had a poor traffic history including post-offending traffic infringements. The offender drove dangerously for about 14 kilometres and was swerving back and forth across the road. The passenger in the vehicle cautioned him, told him to stop, and asked to be let out of the vehicle. The offender swerved on to the road shoulder and hit three pedestrians. All three died from the injuries sustained.

The offender in *Frost* was heavily intoxicated with a blood alcohol content of at least 0.237 per cent at the time of the incident. However, there was no allegation of excessive speeding. After hitting the pedestrians, the offender drove on despite the request of his passenger to stop. He ultimately let the passenger out but continued to drive swerving across the road. He called a friend for assistance for himself. The Court was of the view that the actual offending was significantly worse than that of the offending in *Vessey*.[5]

The more recent case of *R v Moody*[6] involved offending by the dangerous operation of a motor vehicle causing death and grievous bodily harm while adversely affected by an intoxicating substance. There was no allegation of excessive speed or leaving the scene. The offender, with a significant level of methylamphetamine in his system, drove his vehicle onto the wrong side of the road and collided head on with a family of five travelling in the other direction. The mother was killed and two teenagers were left paraplegics and suffered other significant injuries. A serious violent offence declaration was ultimately not imposed because of the absence of deliberate recklessness in the driving prior to the point of the accident. The offender in that case was 44 years of age. He had a relevant traffic and criminal history. His sentence of nine years imprisonment without a fixed parole eligibility date was not disturbed on appeal.

The sentences in the three cases to which I have referred were all imposed when the maximum of the offence charged was 14 years imprisonment. The same maximum applies to the applicant's offence.

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5 At [19].
6 [2016] QCA 92.

The sentences imposed in those cases show clearly that the applicant's sentence of nine years imprisonment is consistent with sentences imposed in cases involving broadly comparable offending. Indeed, in certain respects, the criminality of his conduct overall was greater than that of the offenders in *Vessey* and *Moody*. The applicant's sentence of nine years imprisonment is clearly not manifestly excessive.

Further, in both *Frost* and *Moody*, no parole eligibility date was fixed with the consequence that each offender had to serve one half of the sentence in order to become eligible for parole. In the face of those two sentences, it would be difficult for the applicant to maintain that his sentence is manifestly excessive by reason of a parole eligibility date not having been set.

In summary, the applicant has failed to establish that his sentence is in any respect manifestly excessive. His application for leave to appeal against sentence must therefore be refused.

FRASER JA: I agree.

PHILIPPIDES JA: I also agree.

FRASER JA: The order of the Court is that the application is refused.