SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pavey-Rees* [2020] QCA 29
PARTIES:	**R** **v** **PAVEY-REES, Brandon** (applicant)
FILE NO/S:	CA No 324 of 2018 SC No 1 of 2017 SC No 33 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Maryborough – Date of Sentence: 2 November 2018 (Applegarth J)
DELIVERED ON:	28 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	18 February 2020
JUDGES:	Holmes CJ and Morrison and McMurdo JJA
ORDER:	**The application for leave to appeal is 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 one count of vehicular manslaughter – where a sentence of ten years imprisonment was imposed with the result that the applicant was convicted of a serious violent offence and was not eligible for parole until he had served eight years in custody – whether the sentence for manslaughter is manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant contends that the sentencing judge failed to have adequate regard to his youth, immaturity and prospects of rehabilitation – where the applicant argues that the sentence ought to have been reduced having regard to the fact that he was not receiving medication for a psychiatric condition at the time of the offence – where the applicant disputes the facts on which the sentencing judge relied in sentencing – where the sentencing judge expressly took the applicant's youth, immaturity and prospects of rehabilitation into account – where there was no evidence that the applicant suffered from relevant symptoms at the time of

the offence or that medication would have made any difference to his conduct – where the sentencing judge was entitled to rely on the statement of agreed facts tendered at sentence – whether any error is shown

R v Clark [2009] QCA 361, distinguished
R v Derks [2011] QCA 295, considered
R v Glenbar (2013) 240 A Crim R 22; [2013] QCA 353, considered
R v Kelly [1999] QCA 296, cited
R v Robertson [2010] QCA 319, cited

COUNSEL: The applicant appeared on his own behalf
D Balic for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** The applicant, who was self-represented, sought leave to appeal against a sentence of 10 years imprisonment imposed on him for manslaughter, with the automatic consequence that he was deemed convicted of a serious violent offence and was not eligible for parole until he had served eight years. He was at the same time convicted of summary charges of driving while disqualified from holding a driver licence and failing to stop his motor vehicle when given a direction to do so by a police officer. The ground of the proposed appeal is that the sentence for manslaughter was manifestly excessive, but at the hearing of the application it became apparent that the applicant wanted, rather, to agitate his concerns about the factual basis of the sentencing. Indeed, in oral submissions (in contrast to his written submissions) he expressed the view that on the factual basis on which the sentencing judge had actually proceeded, the sentence was not manifestly excessive. He did not, however, abandon the application.

The facts on which the applicant was sentenced

[2] The victim of the manslaughter was a woman, Mrs Janet Tucker, who was killed when the applicant's car collided with hers on 15 April 2016. The applicant was 21 years old at the time. He had a long criminal history, beginning when he was a child, generally of minor offending: wilful damage, obstructing police, contravening requirements, committing public nuisance, assault and failing to appear, for all of which he was dealt with by way of fine or probation. However, on 22 March 2016, he was sentenced in the Bundaberg Magistrates Court for a breach of probation, possessing dangerous drugs and utensils, a failure to appear and, significantly, a charge of dangerous operation of a vehicle and another of failing to stop a motor vehicle. The dangerous operation of the vehicle involved his driving, while intoxicated, on the wrong side of the road and mounting a kerb, with his vehicle becoming airborne before colliding with and destroying a power pole. He was sentenced to a total of nine months imprisonment, with a parole release date fixed at 16 April 2016, and he was disqualified from holding or obtaining a driver licence for two years.

[3] The agreed facts put to the sentencing judge as to the events surrounding the fatal collision were as follows. The applicant was released from prison on the morning of 15 April 2016 and was collected by his mother just after 10 am; she was driving a V6 Holden Commodore. Shortly after arriving at her home at a caravan park in Elizabeth Street, Urangan, he drove off in the Commodore, telling his sister and brother, who attempted to dissuade him, that he was going to visit his father at work. He promptly had a series of collisions in the car. The first was with a telephone box on a footpath; the box was completely destroyed. A nearby pedestrian felt glass from the telephone box strike the back of her legs. The applicant reversed back and drove away at speed. The applicant's brother and sister had driven in the brother's car to look for him; the applicant overtook them on a corner and crashed into a fence, about 250 metres from the telephone box. His brother yelled at him to pull over and stop but he responded that he couldn't, and drove away.

[4] The applicant's brother described him zigzagging through back streets, overtaking another car at speed, and again at speed driving through a roundabout on which pedestrians were standing. Another description of the applicant's driving involved his entering a roundabout from the wrong side of the road and travelling onto the central island in order to get across the intersection. At one point the applicant stopped, and his brother approached him. The applicant agreed to follow him home. However on seeing a police car, he performed a U-turn and drove past it along Elizabeth Street. The police car activated its lights and sirens. A speed camera being operated on the street captured an image of the applicant's vehicle travelling at 152 km/h. He drove erratically, overtaking vehicles on both their left and right sides and at one point driving on the footpath, narrowly missing a pedestrian.

[5] The collision happened when the applicant crossed onto the wrong side of the road to overtake a heavy vehicle and struck the vehicle driven by Mrs Tucker. She died at the crash scene. Data retrieved from the Commodore showed that it was accelerating prior to impact with Mrs Tucker's car and was travelling in second and third gear. Five seconds prior to impact, it was travelling at 101 km/h. The distance from the damaged fence to the fatal crash was 7.5 kilometres; the area through which the applicant had driven was a built up area of residential streets.

[6] After the crash, the applicant ran away to the caravan park, where police located him hiding in the toilets. His explanation for his conduct, essentially, was that after hitting the telephone box he was afraid of being returned to jail and drove too fast, and seeing the police car sped up after in an endeavour to evade it and get back to the caravan park.

[7] Mrs Tucker's husband made a victim impact statement in which he said that he and his wife had been married for 54 years. Both were in good health and had plans for travel and time with their grandchildren. They had five children and 12 grandchildren, all of whom had, of course, suffered from her loss.

The sentencing remarks

[8] The learned sentencing judge noted that the applicant's youth at the time of the offending was a relevant factor in sentencing because of the associated immaturity and lack of foresight and also because of the superior rehabilitation prospects of a younger person. His Honour recorded that the applicant had had a dysfunctional family upbringing, had been diagnosed as suffering from attention deficit

hyperactivity disorder, and had in the past needed psychiatric care. His time in custody had been difficult because he had been stood over by other prisoners, had self-harmed and had required treatment for depression. His guilty plea was a mitigating factor and his early indication of preparedness to plead guilty was a sign of remorse, to be taken with other expressions of remorse in conferences with his lawyers and a letter to the court.

[9] There was no suggestion, the sentencing judge noted, of alcohol or drugs being involved in the offending; the driving was the product of the applicant's impulsivity, stupidity and deliberate antisocial conduct. He had a history of traffic offences and no penalty had been sufficient to deter him from further offending. Other aggravating factors were that the applicant was on his first day of parole, having recently been convicted of dangerous driving; the driving which led to Mrs Tucker's death was over a long distance and he persisted in it, despite warnings from members of his family; and it was through suburban streets, with considerable risk to pedestrians and the drivers of other vehicles.

[10] The sentencing judge considered a series of manslaughter cases involving dangerous driving in which sentences of between nine and 11 years were imposed for that offence: *R v Kelly*;[1] *R v Clark*;[2] *R v Robertson*;[3] *R v Derks*;[4] and *R v Glenbar*.[5] None of the cases, his Honour observed, was closely comparable, but they supported the Crown Prosecutor's submission that a sentence of no less than 10 years was appropriate in a case like the applicant's. His Honour acknowledged that a slightly lower sentence might have been appropriate, having regard to the applicant's youth and other mitigating features, but for the aggravating circumstance that he was on his first day of parole release after an offence of dangerous driving. Taking all considerations into account, his Honour concluded that the appropriate sentence was one of 10 years imprisonment with the automatic serious violent offence declaration.

Manifest excess?

[11] In his written submissions, the applicant contended that the sentence was manifestly excessive, having regard to his youth and immaturity. He argued that the sentencing judge must have based the sentence on the cases of *Derks* and *Glenbar*, when, in his view, the decision of *Clark*, in which the sentence was reduced on appeal from 10 years to nine years was directly comparable because he, like the applicant in that case, suffered from mental health problems. But it is clearly not the case that the sentencing judge, who did not regard any of the cases cited as closely comparable, placed any particular reliance on any of those decisions in sentencing the applicant. In any event, to the extent that they might provide yardsticks, they do not assist the applicant. The results in *Derks* and *Glenbar* suggest that the sentence imposed on him was not outside a proper exercise of discretion, while *Clark* is readily distinguishable.

[12] In *Derks*, the applicant was (like this applicant) 21 years old at the time of his offending. He pleaded guilty to manslaughter, stealing, three counts of unlawfully

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1 [1999] QCA 296.
2 [2009] QCA 361.
3 [2010] QCA 319.
4 [2011] QCA 295.
5 [2013] QCA 353.

using a motor vehicle, dangerous operation of a motor vehicle, unlawful possession of a motor vehicle, dangerous operation of a motor vehicle with a circumstance of aggravation and unlicensed driving. He committed the offences three days after release on parole from imprisonment for property offences. The most serious offending entailed his speeding away from police in a stolen vehicle, accelerating through a red light, reversing into a police motorcycle and driving over some traffic islands before driving at approximately 140 km/h for about 580 metres down the wrong side of the Bruce Highway and hitting an oncoming vehicle which had pulled up, killing its driver. That applicant had a blood alcohol content of about .219. The case unquestionably involved a worse set of circumstances than the present: the driving was somewhat worse, there were more offences and the fact that the applicant in that case was under the influence of alcohol was an aggravating factor. But those features were reflected in the sentencing; that applicant was sentenced to a considerably longer term: 11 years for the manslaughter, with another two year sentence imposed cumulatively for the offence of dangerous operation of a motor vehicle with a circumstance of aggravation.

[13] In *Glenbar*, the applicant pleaded guilty to two counts of manslaughter of pedestrians he had struck when his vehicle failed to take a bend, and one count of causing grievous bodily harm to his passenger. He was driving with a blood alcohol level of somewhere between .16 and .22 per cent. That applicant was 42 at the time of the offending. He had some minor criminal history several years in the past, but relevantly had twice been convicted of driving with a blood alcohol content well above the legal limit, on the second occasion with a blood alcohol content of .127 per cent, about eight months before the subject offence. He was driving a friend home when police recorded his speed at 134 km/h and pursued him. While being chased, he hit and killed the two pedestrians, who were on the road shoulder. Speeding away, he attempted to overtake another car, which he struck and pushed off the road; no one was injured in that vehicle. He did not stop until he hit a street sign some 3 kilometres on.

[14] The majority in *Glenbar* declined to set aside the sentence imposed at first instance, of 10 years imprisonment, concluding that the sentencing judge had made no error, and the sentence was not outside a sound exercise of discretion. Some circumstances of the offending in that case were worse, in that the applicant was driving while under the influence of alcohol and killed two people and injured another. On the other hand, the relevant driving was in a semi-rural area; it carried some risk of injury to others, which unfortunately was realised. In contrast, the applicant's driving was such as to make injury or death to pedestrians or other drivers virtually inevitable. And the case lacked the feature which the sentencing judge here rightly identified as requiring a higher level of sentence: the fact that the offending occurred at a time when the applicant had just been released on parole for an offence of dangerous driving. As well, the applicant in *Glenbar* had an excellent work history and over a period of more than three years on remand had demonstrated excellent rehabilitation; mitigating features absent from the present case. When one has regard to the balancing features of aggravation and mitigation as between the two cases, the result in *Glenbar* does not suggest any disproportion in the sentence imposed on the applicant; and, of course, *Glenbar* stands for no more than that a ten year sentence was not manifestly excessive, not that it was the highest sentence which might have been imposed.

[15] In *Clark*, the decision on which the applicant relied in written submissions to contend that his sentence should have been lower, the applicant had pleaded guilty to two counts of manslaughter and had been sentenced to 10 years imprisonment on each count, to be served concurrently. In her hurry to keep an appointment she drove onto the footpath in order to get past a car in front of her, striking and killing two teenage boys. When police arrived she told them a false story about how the collision had occurred. She was unlicensed, with a history of car accidents while driving under the influence of prescription drugs. At the relevant time, she was very significantly affected by a cocktail of drugs: prescription painkillers and sedatives, and cannabis. Psychiatric and psychological evidence was put before the sentencing court about the applicant's bipolar affective disorder and prescription drug dependence, and the likelihood that the bipolar disorder had impaired her capacity to understand the consequences of, and her capacity to control, her actions.

[16] This court held that there had been error in the sentencing process because the sentencing judge had failed to act on the undisputed evidence that the applicant's behaviour was not solely the consequence of voluntary stupefaction and had failed to have regard to the applicant's prospective rehabilitation, despite evidence that her disorder was amenable to treatment. A sentence of nine years imprisonment was substituted, having regard to the applicant's reduced moral culpability, her plea of guilty and her prospects of rehabilitation. *Clark* is distinguishable from the present case, because there was here no evidence of any psychiatric condition which might have contributed to the applicant's conduct.

Other matters raised by the applicant

[17] But this brings me to another aspect of the applicant's submissions, advanced both orally and in writing. He contends that his culpability, like that of the applicant in *Clark*, ought to be regarded as reduced because he should have been, but was not, medicated with mood stabilisers while in custody before his release on parole. The difficulty is that there was no evidence before the sentencing judge or here that there were indications for his treatment in that way at that time, or that it would have made a difference to his conduct. To the contrary, his counsel informed the sentencing judge that the applicant had been admitted to a hospital for psychiatric treatment in March 2015 after suffering paranoid delusions, in the context of cannabis use and other personal stresses, and had at that time been prescribed an antipsychotic and a mood stabiliser. The period of treatment had ended in November 2015; his compliance and follow up had been poor; and his counsel acknowledged that he had done nothing since then to obtain any sort of treatment. Counsel also informed the court that there was no record of the applicant's having any psychotic symptoms on his release from prison, and that the only explanation was that given to the police about his anxiety at the prospect of the return to jail. There is, in short, no reason to suppose that the applicant could at any stage demonstrate the kind of impairment which led to a lowering of the sentence in *Clark*.

[18] Other matters arising from the applicant's submissions are these. He appears to argue that the sentencing judge failed to take into consideration his immaturity and prospects of rehabilitation. That is clearly not the case; his Honour expressly took both into account. The applicant also contends that he was encouraged to drive on the day in question and that his siblings had invented their account of trying to dissuade him from driving; indeed, he went so far as to suggest that there was

something of a conspiracy on the part of the prosecution to prevent a true account being put before the court. If any issue were to be raised about a conflict in versions as between the applicant and his siblings, the opportunity was before the sentencing judge, not in this court. It may well be that the applicant's counsel thought a contest on those issues at sentence very unlikely to improve the outcome for him; if that were the approach, it was probably a prudent one. The fact remains that there was an agreed statement of facts at sentence upon which the sentencing judge was entitled to act, and there is no basis on which the court would now depart from it.

[19] Finally, the applicant wished to dispute whether he or his mother owned the Commodore involved in the collision. The agreed statement of facts tendered said that his mother was the owner, and it was taken without permission. His counsel, however, while conceding, accurately, that nothing turned on the point, informed the sentencing judge that while the facts of the incident as set out in the agreed statement were otherwise accepted, the applicant said that the vehicle was his. His Honour did not make any contrary finding or have any regard to the question of ownership of the vehicle in his sentencing decision; his concern was solely with the manner in which it was driven, and the consequences.

Conclusion

[20] The sentence of 10 years imprisonment, with the consequence that the applicant must serve eight of those years before eligibility for parole, is a heavy one for someone of his youth. But the sentencing judge had regard to all relevant considerations and made no error as to the facts put before him; and his Honour's reasoning cannot be faulted. The sentence was plainly within a proper exercise of discretion. The application for leave to appeal should be refused.

[21] **MORRISON JA:** I have read the reasons of Holmes CJ and agree with those reasons and the order her Honour proposes.

[22] **McMURDO JA:** I agree with Holmes CJ.