

COURT OF APPEAL

McPHERSON JA  
MACKENZIE J  
ATKINSON J

CA No 76 of 2002

THE QUEEN

v.

WAYNE RICHARD HESS

Applicant

BRISBANE

..DATE 30/05/2002

JUDGMENT

McPHERSON JA: In February 2002, the applicant pleaded guilty in the District Court of Brisbane to an indictment charging one count of dangerously operating a motor vehicle contrary to section 328A of the Criminal Code, with two circumstances of aggravation in that he was intoxicated and that he had previously been convicted of a similar such offence in 1990.

He also pleaded guilty to two charges of summary offences of failing to provide his correct name and address and failing to take proper precautions with respect to a syringe, which was found in the vehicle.

In respect of the count under section 328A, he was sentenced to imprisonment for two years with a recommendation for parole after nine months. No further punishment was imposed in respect of the two summary offences.

At the time the offence was committed, the applicant was on parole after serving part of a sentence of five and a-half years for an offence of wounding with intent to disfigure for which he had been convicted in 1998. On his being arrested for the subject offences, he was returned to custody to serve the remainder of that sentence in terms of which his full-time discharge date was or would have been 20 April 2003. However, under s.156A of the Penalties and Sentences Act, the learned sentencing Judge was required to and did make the sentence of two years cumulative upon the balance of the existing five and a-half year sentence that the applicant was bound to serve out in full.

The applicant complains that the two year sentence with the recommendation for parole mentioned is excessive and urges that the sentence should have been of the order of 18 months

wholly or partly suspended.

The circumstances of the offence under section 328A are summarised in the written outlines in the following way. The date on which the offence occurred was Sunday, 1 April 2001. At about 5.20 p.m. on that day, police officers conducting a mobile patrol in the Moorooka area, while driving an unmarked car and travelling inbound on Ipswich Road, saw a Commodore vehicle driven by the applicant overtake them in the police vehicle. The Commodore vehicle was travelling at between 80 and 90 kilometres an hour in a 60 kph zone. The police activated their lights and siren and pursued the vehicle being driven by the applicant.

As the applicant's vehicle arrived at the intersection of Ipswich Road and Gow Street, it drove straight through a red light. It then travelled further along Ipswich Road to the intersection of that road with Beaudesert Road. At that point, the Commodore stopped and the police vehicle pulled up alongside it. The police told the applicant to pull over. Instead, he accelerated his vehicle through the intersection and across and in front of the police vehicle. He then performed a U-turn and headed outbound along Ipswich Road. At stages during the course of this pursuit, the police vehicle reached speeds of about 120 kph in order to keep up with the applicant's vehicle.

After a short distance, the applicant's vehicle stopped again and the police car pulled up alongside it. On this occasion, the police officers could see that there was another person in the back of the applicant's vehicle. That person was lying down and appeared to be trying to touch the gears or the hand brake of the applicant's vehicle in an evident attempt to stop it from continuing.

The applicant's vehicle was then driven a further short distance of approximately 60 metres and again came to a stop.

The police vehicle pulled up beside it and one of the police officers got out of the police car and stood some distance in front of the applicant's car. The officer drew his gun and shouted at the applicant, "Stop there. Show me your hands." As this officer stood in front of the vehicle, the applicant accelerated his car towards the police officer and the vehicle struck him on the right knee.

It should be said at this point that the plea of guilty was accepted by the Crown on the basis that there was no intention to strike the officer as the applicant drove towards him in the vehicle.

After the police officer was struck, he fired about four shots at the applicant's vehicle. Two of the tyres on that vehicle were struck and deflated but the applicant continued to drive it. The police officers continued their chase as the

applicant went off through a number of other streets and a further police car joined in the pursuit.

The applicant's vehicle turned off Ipswich Road into Colebrook Street and the police observed that it was swerving from one side of the road to the other. They also noticed that the applicant's vehicle braked heavily and suddenly a number of times as it drove down the street. It then proceeded down Mackie Street, again continuing to swerve from one side of the road to the other and braking heavily at different points.

The applicant's vehicle turned into two further streets eventually coming to a complete stop on the wrong side of the road. The applicant got out of the vehicle and ran a short distance before he was apprehended by another police officer from the accompanying second police car. When the applicant was asked why he had run away, the applicant replied, "I've got a fix", apparently referring to a syringe in the motor vehicle. A distance of about one kilometre was covered during the course of this chase.

The applicant was subsequently tested for a blood alcohol reading which showed an alcohol concentration of .176 per cent.

A medical report was tendered relating to the injuries suffered by the police officer who had been struck by the

applicant's vehicle. He has some disability in the right knee which interferes with his running activities and has restricted his running schedules to some extent. The experience of being struck in that way has also left him with a minor psychiatric adjustment disorder and he has said that it is possible that he may be disbarred from continuing as a member of the police squad in which he has been employed.

At the committal hearing altogether seven witnesses were cross-examined, the cross-examination being directed towards the allegation that the applicant had intended to strike the police officer.

The applicant's personal details can be, I think, summarised in this way. He is a young man who was 28 at the time of offending and 29 at the time of sentencing, and is a bricklayer by trade. He has a good work record and some impressive references from individuals, some of whom are willing to offer him work and have helpfully commented that it would be better for the applicant to be working than in prison. No one can doubt the accuracy of that observation. But the public has to be protected against people who drive in this fashion, with all the obvious dangers that it involves. The maximum penalty for this offence with circumstances of aggravation is imprisonment for five years.

The learned sentencing Judge, in dealing with the matter and arriving at the conclusion that he did about the extent of the sentence, remarked in the course of what he said that innocent people can be killed by dangerous driving where alcohol is involved, that there is a popular demand for imposing heavy penalties for offences of this kind, and that, if it were not for the current lengthy sentence the applicant was already serving, a much heavier sentence would have been imposed.

He took into account the plea of guilty and the references tendered on behalf of the applicant, which he described as very good, and he also observed that the applicant had a good future if he was prepared to take responsibility for himself and his actions. The Judge also recommended to the Parole Board that the references be considered by the Board when the question of parole arose.

This was, it may be said, a deliberate protracted course of reckless driving. The applicant set out to avoid apprehension by the police and drove very dangerously through city streets. His offence was seriously aggravated by the extent to which he was adversely affected by alcohol. In the course of what he did he succeeded in striking one of the police officers causing him an injury to his leg.

The circumstances were so serious that the police must be regarded as justified in drawing and firing a weapon in order

to restrict further dangerous driving of this kind. It also seems evident that the applicant was intent on playing a kind of cat and mouse game with the police by stopping, letting them catch up with him, and then taking off again. What he was doing, it may also be inferred, was sufficiently serious to invite the attempt, as it seemed to have been, by his passenger to prevent further use of the vehicle in that way.

When these matters are taken into account, and having regard to other sentences for offences of this kind, I do not think it can be said on any rational basis that the head sentence of two years' imprisonment is excessive. Indeed, the Judge gave indications that he was imposing it at a somewhat lower level than he might otherwise have done had it not been for the existing five and a-half year sentence which the applicant was bound to serve out. It seems to me, because of that and other matters, that he was treated perhaps more leniently than he might have expected or was justified in all the circumstances.

I can see no basis for interfering with the sentence that was imposed in the Court below, and I would refuse the application for leave to appeal against it.

MACKENZIE J: I agree.

ATKINSON J: I agree.

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

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