

SUPREME COURT OF QUEENSLAND

CITATION: *R v McGuire; ex-parte A-G* [2002] QCA 439

PARTIES: **R**
v
McGUIRE, Christian Daniel
(respondent)
EX PARTE ATTORNEY-GENERAL OF
QUEENSLAND
(appellant)

FILE NO/S: CA No 197 of 2002
DC No 1113 of 2002

DIVISION: Court of Appeal

PROCEEDING: Appeal against Sentence by A-G (Qld)

ORIGINATING COURT: District Court at Brisbane

DELIVERED EXTEMPORE ON: 18 October 2002

DELIVERED AT: Brisbane

HEARING DATE: 18 October 2002

JUDGES: McMurdo P, Davies JA and Holmes J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **Appeal allowed.**

Instead of ordering the imprisonment be suspended forthwith, order that the term of imprisonment be suspended after serving a period of six months' imprisonment.

Vacate the order for payment of a \$7,000 fine.

Order a bench warrant issue for the arrest of the respondent to lie in the Registry for seven days.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE - where respondent convicted by own plea of one count of dangerous operation of a motor vehicle causing grievous bodily harm with a circumstance of aggravation – where respondent also pleaded guilty to a

summary charge of driving a motor vehicle whilst under the influence of liquor – where sentence wholly suspended – where deterrent sentence necessary – where comparable sentences support a term of actual imprisonment – where appeal allowed

Everett v R, Phillips v R (1994) 181 CLR 295, referred to
R v Hine [2002] QCA 212, CA No 31 of 2002, 21 June 2002, referred to
R v Hoffman; ex-parte A-G (1997) 98 A CrimR 177, referred to
to
R v Melano; ex-parte A-G [1995] 2 Qd R 186, referred to
R v Purcell; ex-parte A-G [1999] QCA 316, CA No 192 of 1999, 17 August 1999, referred to
R v Rowley [1998] QCA 324, CA No 240 of 1998, 26 August 1998, referred to

COUNSEL: M J Copley for the appellant
A F Maher for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Lees Marshall Warnick for the respondent

THE PRESIDENT: McGuire pleaded guilty to one count of dangerous operation of a motor vehicle causing grievous bodily harm with a circumstance of aggravation that he was adversely affected by alcohol exceeding 150 milligrams of alcohol per 100 millilitres of blood. He also pleaded guilty to a summary charge of driving a motor vehicle whilst under the influence of liquor.

On the first offence he was sentenced to imprisonment for two years fully suspended with an operational period of four years and fined \$7,000 with two years to pay and disqualified from holding or obtaining a driver's licence for a period of four years.

The appellant, the Attorney-General, contends the sentence imposed for that offence was manifestly inadequate and that a

sentence of three to four years' imprisonment should be imposed with a recommendation for post prison community based release after about 16 to 18 months.

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The facts of the offence are as follows. At about 12.30 a.m. on 30 March 2001 three police officers were performing speed detection and random breath testing duties on the Pacific Motorway near the Kessels Road overpass and in the area where roadworks were being conducted.

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The police officers were wearing reflective vests and carrying torches. The speed limit was 80 kilometres per hour and then reduced to 60 kilometres per hour because of the roadworks. The respondent was driving his vehicle toward the Gold Coast. Police observed it was travelling very fast and recorded his speed at 129 kilometres per hour. He was in the far left hand lane and was preceded by another vehicle travelling at about 70 kilometres per hour.

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A police officer waved his torch and stepped on to the roadway to flag down the respondent's car. Unfortunately, but understandably, the vehicle preceding the respondent slowed down and stopped. Police unsuccessfully attempted to wave that car on and continued to wave down the respondent's vehicle. The respondent did not slow down until he was about 50 metres from the car in front. He then braked heavily. His vehicle skidded and it collided with the rear of the stationary vehicle in front of him causing it to spin across

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the road into the rear of a third vehicle, a police car parked nearby.

At sentence, the respondent's counsel pointed out that the respondent was unable to avoid the accident by swerving because of the positioning of police officers and the barriers on the roadway.

One police officer ran about three metres to his left to avoid being hit by the spinning second vehicle and in doing so jumped on to a concrete barrier and injured his knee. Another police officer also jumped on to the concrete barrier to avoid injury and a third officer ran into the middle of the roadway to avoid injury.

The driver of the stationary vehicle had to be cut from her car and was taken to hospital suffering injuries to her neck, shoulder and back and bruises to her waist, upper leg and buttocks. Her passenger was uninjured and released from hospital later that day.

The injury to the police officer's knee was the sole injury constituting the grievous bodily harm. The police officer required an arthroscopy, debridement and physiotherapy. The prosecutor conceded that it was a technical grievous bodily harm in the sense that if the injury had been left untreated it would have caused permanent impairment to his knee function. The police officer's knee has completely recovered.

The respondent's passenger received some superficial cuts to his legs and although taken to hospital, was like the others, released later that day.

The road, weather and lighting conditions were all good. Electronic message signs erected along the Motorway announced the roadwork ahead and advised drivers to proceed with caution.

The respondent's blood alcohol level was recorded at 0.16 percent. The respondent told police he drank about five to six pots of beer and three to four rums during the evening. He did not think he was over the prescribed limit and believed he was travelling at about 70 kilometres an hour.

He had been drinking at the Ferny Grove Tavern with friends after work and was returning to his home at the Gold Coast. He did not see the message boards on the freeway. He was aware of the roadworks because he travelled that route daily to work.

He explained that the incident occurred when his passenger grabbed something which caused him to look down and when he looked up he saw the police waving the torch and immediately braked heavily but too late to avoid the car stopped in front of him.

The respondent, who was 28 at sentence and 27 at the time of his offending, had no criminal history but had a very

significant traffic history. In 1994 he was convicted of drink driving with a blood alcohol content of 0.091 percent for which he was disqualified from driving for four months and fined \$400. In 1998 he was again convicted of drink driving, this time with a blood alcohol level of 0.133 percent. He was disqualified from driving for ten months and fined \$750. He had nine speeding offences exceeding the speed limit from between 15 and 30 kilometres per hour between 16th September 1992 and 27th September 2000. On 2 January 2001 his licence had been cancelled due to an accumulation of demerit points. We are told today that at the time of the offence he was driving on a special provisional licence.

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On his behalf at sentence it was said that his prior convictions for drink driving did not involve actual drink driving. In the first instance he was asleep in the back of his car. In the second he parked his car and was covering his golf clubs with a view to leaving the car for the evening. These contentions were raised for the first time at sentence but were not disputed by the prosecutor.

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The respondent had a good work history and was a regular participant and instructor in a variety of community sports. A large number of references were tendered on his behalf. His stepfather, a police officer, spoke of the respondent's genuine remorse, changed drinking patterns and efforts at rehabilitation. Other references attested to his good character, hard work and remorse. Some references were signed by ten or more referees. A number of the references spoke of

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the futility of sending the respondent, who had excellent future prospects, to prison.

The respondent's father was an alcoholic and he was raised in that dysfunctional environment. He has not drunk alcohol since these offences but it emerged at his sentence that he had not drunk alcohol for five months prior to the events of this evening.

It should also be noted that, to his credit, the respondent has repaid \$568.32 to the Main Roads Department for damage to its barriers on the roadway.

Although the grievous bodily harm suffered by the unfortunate police officer was at the lower end of the scale of seriousness, the respondent has pleaded guilty to an offence punishable by up to 14 years' imprisonment; this is an offence more serious than dangerous operation of a motor vehicle in which no-one suffers grievous bodily harm.

The penalty imposed should reflect that the grievous bodily harm suffered was at the lower end of the scale but it must also reflect the respondent's objectively serious conduct in driving with a blood alcohol level of 0.16 on the Pacific Motorway at high speeds in an area where roadworks were being undertaken. This was grossly irresponsible and caused injury to a number of people including a police officer carrying out his duties. It is very fortunate no-one was more seriously injured. A great deal of property damage also resulted.

The respondent's early plea of guilty by way of ex officio indictment, his genuine remorse, cooperation with the authorities, attempts at rehabilitation and otherwise good character are all matters greatly in his favour. On the other hand he has an appalling traffic history including prior convictions for drink driving. Accepting that these offences did not actually involve drink driving, he did not heed the warning they provided of the dangers of drinking whilst being responsible for a motor vehicle.

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Courts are reluctant to lightly interfere on an Attorney-General's appeal against sentence. *R v Melano ex parte Attorney-General* [1995] 2 Qd R 186, *Everett v R*, *Phillips v R* (1994) 68 181 CLR 295. No Court enjoys sending a 28 year old to prison for the first time. It is almost certain that the respondent's best interests would not be served by imposing a custodial sentence.

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That is, however, not the only consideration for this Court. Deterrence is an important factor in offences of this kind. A review of comparable sentences of this Court clearly shows that ordinarily offenders who drive dangerously at speed on a major highway with a blood alcohol level in excess of 0.15 and who cause potentially serious injuries to others will receive a substantial punishment which includes a period of actual imprisonment.

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See, for example, R v Hine [2002] QCA 212, CA No 31 of 2002, 21 June 2002, R v Rowley [1998] QCA 324, CA No 240 of 1998, 26 August 1998 and R v Purcell, Ex Parte Attorney-General [1999] QCA 316, CA No 192 of 1999, 17 August 1999. It is true that those matters involved the infliction of injuries more serious than in this case, but on the other hand, some aspects of this offence are more serious than those.

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The significant mitigating factors in this case referred to by the learned sentencing Judge did not, unlike in R v Hoffman; Ex Parte Attorney-General (1997) 98 A Crim R 177, warrant the full suspension of the two year term of imprisonment. Bearing in mind that this is an Attorney's appeal and the moderating effect of that, in my view, a sentence of two years' imprisonment, suspended after serving six months, adequately recognises the important mitigating factors in this case, whilst still imposing the necessary deterrent sentence.

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I would allow the appeal and instead of ordering the imprisonment be suspended forthwith, order that the term of imprisonment be suspended after serving a period of six months' imprisonment. In those circumstances, I would also vacate the order for payment of a \$7,000 fine. I would otherwise confirm the sentence imposed at first instance. I would also order a bench warrant issue for the arrest of the respondent.

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DAVIES JA: I agree.

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HOLMES J: I agree.

THE PRESIDENT: That is the order of the Court. Mr Maher, do you want the bench warrant to lie for seven days?

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MR MAHER: Yes, please, your Honour.

THE PRESIDENT: Yes. I also order the bench warrant not issue for seven days.

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