SUPREME COURT OF QUEENSLAND

CITATION:	*R v Misumi* [2002] QCA 491
PARTIES:	**R** **v** **MISUMI, Kenji** (applicant)
FILE NO/S:	CA No 256 of 2002 DC No 140 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED EXTEMPORE ON:	12 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2002
JUDGES:	de Jersey CJ, Williams JA, Mullins J Separate reasons for judgment of each member of the court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – GENERALLY – where applicant sentenced to six months imprisonment to be served by way of intensive correction order for dangerous operation of a motor vehicle causing grievous bodily harm – conviction recorded – where applicant driving under speed limit – where applicant indicated and turned right but collided with complainant's vehicle which the applicant did not see – where applicant had no prior criminal or traffic history – whether sentence imposed is manifestly excessive – where sentence within range *R v Brown,* CA No 167 of 1993, 4 August 1993, distinguished *R v Edwards* [1996] QCA 141;CA No 430 of 1995, 31 January 1996, distinguished *R v Hamilton* [2000] QCA 286; CA No 75 of 2000, 21 July 2000, considered *R v Harris; ex parte A-G (Qld)* [1999] QCA 392; CA No 161 of 1999, 21 September 1999, considered *R v Russo* [1994] QCA 388; CA No 140 of 1994, 5 October 1994, considered

COUNSEL:	M E Johnson for the applicant D L Meredith for the respondent
SOLICITORS:	Price & Roobottom for applicant Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: I invite Justice Mullins to deliver the first judgment.

MULLINS J: The applicant applies for leave to appeal against the sentence of six months' imprisonment, to be served by way of intensive correction order, imposed on him in the District Court at Southport, on 1 August 2002, for dangerous operation of a motor vehicle, causing grievous bodily harm.

The applicant was driving his Landrover four wheel drive in a northerly direction along Bailey Crescent, Southport, on 11 December 2000 and the complainant was driving his Ford Festiva sedan in the opposite direction.

The complainant was seen to be drinking from a bottle of beer and immediately prior to the impact between the two vehicles, the complainant's vehicle was seen to veer towards the centre of the carriageway, but not cross the centre line, before correcting its path of travel.

The applicant's vehicle was travelling slower than the designated speed limit of 50 kilometres per hour. The right turn indicator was activated and the applicant's vehicle was then seen to turn right, cutting the corner across the path of the oncoming vehicle and a collision occurred.

The applicant told police that he had not seen the complainant's vehicle and nothing obstructed his view and when interviewed some months later, repeated that he did not see the other vehicle and when pressed as to why not, said that, "maybe the sun was shining" or he had a headache.

The complainant was injured. The most significant injury was a compound fracture to his right leg. The complainant was hospitalised for several weeks. It was not in issue that the complainant's injuries amounted to grievous bodily harm.

The Crown case was that the applicant failed to keep a proper look out and effected a premature turn. The applicant was born on 24 March 1970 and was therefore 30 years old at the date of the accident. He had no prior criminal or traffic history.

The applicant was born in Japan, but lives in Australia, on a permanent residence visa. At the time of sentencing, he was working as a machinist, which was described as a specialised position, making casting dyes for the manufacture of plastic bottles and containers. He had worked in a similar position in Japan, the United States and Canada, before coming to Australia in 1993.

The learned sentencing Judge sentenced on the basis that the usual sentence for dangerous driving in such circumstances was six to 12 months' imprisonment, wholly suspended, but "as the

proceedings cost the community", the applicant should give something back and therefore imposed the six months' imprisonment, to be served by way of intensive correction order.

It is submitted on behalf of the applicant that this was a case of momentary inattention and at the lower end of the scale of seriousness and that it is not the case that the usual sentence for dangerous driving in these circumstances is a sentence of imprisonment of between six to 12 months, wholly suspended.

It is also submitted that the cost to the community aspect could be dealt with by way of a community service order. In particular, it is submitted that the recording of a conviction against the applicant, having regard to the circumstances of the offence and the personal circumstances of the applicant, where it could be foreseen that he would travel to countries outside Australia in the future, was not warranted.

The applicant relies on authorities where a conviction was not recorded, or a sentence less than imprisonment was imposed, in circumstances which are submitted to involve more culpability than the applicant's case. These authorities are Brown, CA No 167 of 1993, 4 August 1993, Russo, CA No 140 of 1994, 5 October 1994 and Edwards, CA No 430 of 1995, 31 January 1996.

I do not accept that the facts in Brown and Edwards support the submission that the applicant's case is one of less culpability. The offender in Russo was 18 years old, went through a stop sign when her attention was diverted, as she was lost and a conviction was recorded.

The respondent relies on Hamilton [2000] QCA 286 and Harris, CA No 161 of 1999, 21 September 1999. In both these cases, relatively young offenders were sentenced to 12 months' imprisonment, to be served by way of intensive correction order.

Even taking into account the matters which favour the applicant, a short term of imprisonment, accompanied by an order to avoid actual imprisonment, was within range. The sentence, therefore, cannot be described as manifestly excessive. I would refuse the application.

THE CHIEF JUSTICE: I agree.

WILLIAMS JA: I agree.

THE CHIEF JUSTICE: The application is refused.
