SUPREME COURT OF QUEENSLAND

CITATION:	*R v Vogiatzis* [2003] QCA 19
PARTIES:	**R** v **VOGIATZIS, Israel Immunual** (applicant/appellant)
FILE NO/S:	CA No 441 of 2002 DC No 215 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Mackay
DELIVERED EX TEMPORE ON:	4 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2003
JUDGES:	Davies and Williams JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence granted.** **2. Appeal allowed.** **3. Set aside the orders imposed below and in lieu:** **(a) record a conviction for the offence;** **(b) impose a term of imprisonment of 12 months to be served by way of intensive correction order to contain the requirements set out in s 114 of the *Penalties and Sentences Act* 1992 (Qld);** **(c) the applicant be disqualified from holding or obtaining a driver's licence for a period of three years.**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENDER - where applicant convicted of dangerous driving - where applicant had no previous criminal or traffic history - whether sentence was manifestly excessive *R v Hamilton* [2000] QCA 286; CA No 75 of 2000, 21 July 2000, considered
COUNSEL:	A J Moynihan for applicant/appellant R G Martin for respondent

SOLICITORS: Legal Aid Queensland for applicant/appellant
Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: On 4 December 2002 after a trial that day the applicant was convicted of dangerous operation of a motor vehicle. On the following day he was sentenced to 12 months imprisonment to be suspended after he had served two months with an operational period of three years. He was, in addition, disqualified from holding a driver's licence for three years. He seeks leave to appeal against that sentence.

At the time of the offence and conviction the appellant was a 17 year old school boy. He was due to resume his schooling in 12th grade this year. He has no other criminal convictions or any traffic convictions. There is nothing to indicate that, apart from the circumstance of this offence, he is other than a normal 17 year old school boy.

The applicant was observed by police travelling at 132 kilometres an hour in a 100 kilometre per hour zone. A police officer directed him to pull over. He failed to obey that direction and a police chase ensued. It is, perhaps, unsurprising how often such chases result in driving which is increasingly dangerous. That is what occurred here.

At one point towards the end of the police chase the applicant reached 210 kilometres an hour, by which time he had overtaken over double white lines endangering the occupants of a car travelling in the opposite direction. Fortunately, no one was injured.

The sentence imposed on the applicant by her Honour was not one contended for by the prosecution who had suggested a non-custodial sentence. The factors which appear to have persuaded her Honour to impose a sentence which included a period of actual custody were:

(1) the applicant's failure to plead guilty, which her Honour described as the most significant factor; and

(2) the nature of the offence which she described as a sustained course of conduct which put other people in peril.

Her Honour's primary emphasis on the first of these factors was criticised in his written submissions by Mr Moynihan, who appeared for the applicant. He submitted, rightly, that if the nature of the incident and other factors were not sufficient to warrant a custodial term then the plea of not guilty should not have caused her Honour to impose one.

On the other hand, in my opinion, the conduct in this case was such that the imposition of a custodial sentence would not ordinarily be outside the range of a sound sentencing discretion. Her Honour's description of the appellant's conduct was, in my opinion, correct with this qualification. At the time of his most dangerous driving, it must be realised, he was a young school boy placed in the unusual and, no doubt, frightening position of being pursued by police.

That is not an excuse for his conduct but it does, at least in part, explain it.

Although, because of the applicant's extreme youth and complete absence of any previous criminal or traffic offences a non-custodial sentence would have been within range, I would not disturb a sentence of 12 months imprisonment. However, because of the matters I have mentioned, I think that her Honour erred in requiring the applicant to serve any part of it in prison. In R v. Hamilton [2000] QCA 286 Thomas JA and I remarked on the potential harm which a short period in prison may cause a young person of the applicant's age; it may introduce him to hardened criminals whom he might not otherwise meet, and to hard drugs and it may subject him to the risk of injury or to degrading conduct. That is one reason why the law permits a sentence of imprisonment to be served by way of an intensive correction order which I think is an appropriate order in this case. The applicant has already spent two days in gaol which would, no doubt, have given him some indication of what gaol is like.

On the other hand I think her Honour was correct in imposing the disqualification which she did. I would therefore make the following orders:

1. grant the application;
2. allow the appeal;
3. set aside the orders of the learned District Court judge and in lieu -

(a) record a conviction for the offence;

(b) impose a term of imprisonment of 12 months, to be served by way of an intensive correction order to contain the requirements set out in section 114 of the Penalties and Sentences Act 1992;

(c) disqualify the applicant from holding or obtaining a driver's licence for a period of three years.

WILLIAMS JA: I agree.

MULLINS J: I agree.

DAVIES JA: The orders are as I have indicated.
