SUPREME COURT OF QUEENSLAND

CITATION:	*R v Theuerkauf & Theuerkauf; ex parte A-G (Qld)* [2003] QCA 94
PARTIES:	**R** **v** **THEUERKAUF, Clint Miles** (respondent) **THEUERKAUF, Jason David** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 413 of 2002 CA No 414 of 2002 DC No 457 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeals by A-G (Qld)
ORIGINATING COURT:	District Court at Ipswich
DELIVERED EX TEMPORE ON:	11 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2003
JUDGES:	de Jersey CJ, McPherson JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. that each appeal be allowed, and the sentenced imposed in the District Court on 7 November 2002 set aside;** **2. in the case of the respondent Clint Miles Theuerkauf, that he be imprisoned, in respect of each of counts one and two, for two years six months, to be served concurrently, in each case suspended after 12 months for an operational period of three years;** **3. in the case of the respondent Jason David Theuerkauf, that he be imprisoned, in respect of count two, for two years, suspended after nine months for an operational period of three years;** **4. that in each case the order for licence disqualification imposed in the District Court remain undisturbed; and** **5. that warrants issue for apprehension of the respondents to lie in the registry for seven days pending execution if necessary**
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 – OTHER OFFENCES – where sentence consistent with counsel's submissions in lower court – where respondents carried out obligations pursuant to intensive correction orders

Criminal Code (Qld), s 328A(3)(b)

R v Broadbridge [1994] QCA 278; CA No 195 of 1994, 5 August 1994, distinguished
R v Dalmazio [2002] QCA 80; CA No 362 of 2001, 15 March 2002, distinguished
R v Gusa [1994] QCA 510; CA No 380 of 1994, 25 October 1994, considered
R v Bolton [2000] QCA 175; CA No 40 of 2000, 11 May 2000, distinguished

COUNSEL: M J Copley for the appellant
A J Rafter, with A Moynihan, for the respondents

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondents

THE CHIEF JUSTICE: The Honourable the Attorney-General appeals against sentences of 12 months' imprisonment to be served by way of intensive correction orders imposed on each of the respondents.

Clint Theuerkauf pleaded guilty to two counts of the dangerous operation of a motor vehicle. His brother Jason pleaded guilty to one count committed in conjunction with Clint, but in Jason's case with the circumstance of aggravation, that he, Jason, had two prior convictions for driving under the influence of alcohol. That meant that the learned sentencing Judge was obliged to sentence Jason to a term of imprisonment because of Section 328A (3)(b) of the Criminal Code.

For reasons I will shortly express, I consider the sentences imposed to have been extremely lenient.

Counsel for the respondents, Mr Rafter, relied on two circumstances in particular in opposing any increase. First the circumstance that counsel for the Crown submitted to the learned Judge that in the case of either respondent "a term of imprisonment of the order of 12 months wouldn't be unwarranted" leaving for the Judge whether "that be suspended in whole or in part." and second, the circumstance that the respondents had been at large in the community and had carried out obligations pursuant to the intensive correction orders.

They were sentenced on 7 November 2002 and material put before us upon the hearing of the appeal indicates that they had completed about three months of the 12 month term of the intensive correction orders.

There is much authority for the proposition that the approach to sentence taken by counsel for the Crown in the sentencing Court may assume considerable significance at the hearing of an Attorney's appeal. But in my view if the range advanced by the Prosecutor was completely inappropriate and the Court of Appeal is satisfied that the sentence imposed calls out for correction because clearly erroneous, the Court of Appeal should not be controlled by the approach taken below. Otherwise a clearly erroneous position may not subsequently be identified as such, the error may be compounded or perpetuated. Furthermore in the particular case an inappropriately lenient sentence would have remained undisturbed.

As to the significance of the respondents' having been at large, of course that is a relevant consideration. But again it cannot control a Court otherwise convinced of error and the need to impose an actual custodial penalty. It would nevertheless fall for consideration in the fashioning of any substitute penalty.

We were referred by Mr Rafter in particular to a great deal of authority on both those aspects. There is no need to canvass it here, because the propositions just stated are to my mind plain.

At the time of these offences, Clint was 20 years old and Jason was 24. Each had prior criminal and traffic histories. Neither had previously been imprisoned. These instant offences were committed on 19 May 2002. On 29 October 2001, Clint had been convicted and fined for the possession of dangerous drugs, utensils and tainted property. On the traffic side, his licence had been suspended twice for the accumulation of demerit points, on 17 August 1999, and after the commission of these offences, on 10 October 2002.

He had five previous speeding convictions, most recently to these offences on 4 August 2000. On three occasions he had driven unlawfully while the holder of a learner's permit, and he had committed various other offences over time, including offences related to the condition of his vehicle.

Jason had been convicted and fined for minor drug offending in 1997 and in 2002. He had driven under the influence of alcohol in the year 2000 with a reading of .139 per cent; and in the year 1997, with a prescribed concentration of alcohol, a reading of .141 per cent. His other convictions included disobeying a red traffic light.

The circumstances of the first instance of dangerous driving where Clint was the driver were particularly serious because Clint used his vehicle effectively as a weapon against an elderly man who had rightly admonished him for his driving. Clint deliberately drove twice at the complainant and in fact injured him. His dangerous driving was eventually terminated through the fortunate intervention of a bystander. It was this combination of circumstances which led counsel for the Attorney on the hearing of the appeal to submit that the maximum penalty of three years' imprisonment should be the starting point, suspended, in recognition of the plea of guilty especially, after 12 months or more.

In my view, approaching the matter in the way discussed in Veen (no. 2) (1988) 164 CLR 464 at 478, the circumstances of this offence did indeed put it into the worst category.

The complainant was a 70 year old retired police officer. He was attending to duties on his cattle property, part of which enjoyed a frontage on to England Creek Road at Fernvale. That was a dirt road in poor condition with numerous blind corners

and pot holes and channelled. It was crossed by three cattle grids leading up to the complainant's property.

During the afternoon of the day in question, the complainant had seen two vehicles travelling over one of the grids at high speed. Clint was the driver of one of them. The complainant approached Clint's vehicle and told Clint that he was the owner of the property and wanted to remind Clint of his obligations relating to speed.

Clint responded that he could do as he liked, as it was a public road. He called the complainant a "smart arse" and opened the door of his vehicle. The complainant pushed it closed and told Clint to stay in his car and slow down a bit. Clint replied that the complainant was a "real fucking smart arse" and said that he would "smash his fucking head in". Clint reversed and accelerated quickly towards the complainant. The complainant threw a steel pin at the windscreen of Clint's vehicle. As he did that, the bull bar of the vehicle hit him and he fell on to the bonnet of the vehicle. He then fell to the ground.

Clint reversed again and again drove at the complainant. The complainant rolled to avoid being run over, but Clint swerved in the complainant's direction and the front tyre hit the complainant's left shoulder. The complainant ended up under the vehicle. A friend of the complainant entered upon Clint's vehicle and knocked it out of gear. Clint then drove off with a shattered windscreen.

Now the complainant suffered injuries to his left shoulder and elbow, chest and the lower parts of his body. He consulted a doctor. The learned Judge was informed on the basis of medical opinion that the complainant would have suffered pain, stiffness and irritation for seven to 10 days after the incident. The complainant's victim impact statement shows that the incident has affected his general state of health, ability to work his property, level of confidence and emotional stability, including his capacity to look after his disabled wife.

The police were called, arriving at the complainant's property at 6.30 p.m. The vehicle Clint had been driving earlier drove by the police in the direction of the State Forest. They unsuccessfully tried to stop the vehicle by activating the lights and sirens of the police car. It seems three people were in the vehicle, Jason was driving with Clint and another person as passengers.

The police waited for the vehicle to return. When it did, its speed was excessive. The police vehicle was then positioned on the cattle grid with its lights on. Jason slowed his vehicle and turned off the road and drove through a barbed wire fence, continuing through a paddock and returning to the road past where the police vehicle was located.

The police gave chase. When they neared Jason's vehicle, Clint shone a spotlight into the police vehicle, blinding the

driver, necessitating his stopping. Before stopping, the police vehicle had been travelling at 80 kilometres per hour. The spotlight was extinguished and the vehicle continued on at high speed turning on to Banks Creek Road. The police pursued it, reaching 80 kilometres per hour when closing in.

Clint then again shone the spotlight into the police vehicle and with similar results. The police later resumed the chase and Clint yet again shone the spotlight with the same consequence. A second police vehicle had been positioned on a bridge ahead of Jason's vehicle. However when approaching the bridge, Jason showed no sign of stopping, and the police vehicle was therefore moved out of the way. Jason drove his vehicle over the bridge and then into a gully near a river. The roughness of the terrain prevented the police from pursuing further. They did however later that night locate the respondents. The other passenger told them that the respondents had returned to the complainant's property for the purpose of discussing who would be called upon to pay for Clint's damaged windscreen. When they saw the police, the spotlight was connected to assist their escape. An inspection of the respondent's vehicle revealed that it had no operable brakes.

The worst aspect of Jason's driving was that he deliberately drove dangerously to avoid apprehension. He deliberately drove the vehicle with no operable brakes at a parked police vehicle. The potential for harm to others was high. It may be inferred he drove over an appreciable distance. He did not

desist until he had outrun the police. He drove knowing Clint was endeavouring to impede the police officer's vision.

The learned Judge said that he was inclined to imprison each respondent for 12 months suspended after four months, but went on to impose the intensive correction orders because of their age and work histories. At the time of sentencing, Clint was a leading hand at a beverage factory and Jason worked on a turf farm. They lived with their father.

In my view, these were particularly serious examples of dangerous driving, for in Clint's case, his use of the vehicle as a weapon against an elderly man including deliberately driving at him twice and in fact injuring him, and in Jason's case, his deliberately driving dangerously to avoid apprehension by the police.

Looking at some of the cases to which we were referred, Broadbridge, Court of Appeal 195 of 1994 was only 18 years old with a relatively slight criminal history. He was sentenced to 18 months' imprisonment with parole after six following a plea of guilty to driving his vehicle "slightly" towards a police officer in order to frighten the officer.

There was much greater deliberation and more prolonged offending here, which in Clint's case actually harmed his victim. On an Attorney's appeal, Dalmazio, Court of Appeal 362 of 2001, was sentenced to two years' imprisonment for dangerous operation of a motor vehicle involving accelerating

towards and colliding with a police officer injuring his knee and causing a back injury.

Mc Pherson, Judge of Appeal, said that he would have considered three years in prison warranted but reduced it to two years because of the plea of guilty. I again observe that the course of the driving in the instant case was more prolonged.

Gusa, Court of Appeal 380 of 1994, was sentenced to three years' imprisonment wholly suspended for driving at speed towards a complainant, stopping just before making contact. That occurred in the context of matrimonial problems.

Bolton, Court of Appeal 40 of 2000, was sentenced to 12 months' imprisonment suspended after four months in respect of a course of dangerous driving on Bribie Island. No-one was hurt, however, and the driver apologised. His plea of guilty came late.

What distinguishes the instant case, of course, is the deliberative character of the driving or better put, use of the vehicle.

In my view, subjecting the respondents to an intensive correction order involved unsustainable leniency. In Clint's case, his offending fell into the worst category. Jason's offending was to an extent less serious, but on the other hand, Jason was four years older. He was apparently motivated

to assist his brother and he bore the burden of the previous drink driving convictions which are legislatively significant.

In each case, allowance should be made for the pleas of guilty and in disposing of the appeal, for the circumstance that the respondents have for approximately three months been carrying out their obligations under the intensive correction orders. Otherwise in Clint's case the maximum of three years' imprisonment should in my view have been imposed.

Clint should in these circumstances be imprisoned for two and a half years suspended after 12 months. Jason should be imprisoned for two years suspended after nine months.

I would order:

(1) That each appeal be allowed and the sentences imposed in the District Court on 7 November 2002 set aside;

(2) In the case of the respondent Clint Miles Theuerkauf, that he be imprisoned in respect of each of counts 1 and 2 for two years six months to be served concurrently, in each case suspended after 12 months for an operational period of three years;

(3) In the case of the respondent Jason David Theuerkauf, that he be imprisoned in respect of count 2 for two years suspended after nine months for an operational period of three years;

(4) That in each case the order for licence disqualification imposed in the District Court remain undisturbed; and

(5) That warrants issue for the apprehension of the respondents.

McPHERSON JA: I agree. A vehicle is properly regarded as a form of conveyance for people and goods. When it is transformed into a weapon against unprotected human flesh, as it was here, an offence in the use of it takes on a particularly serious dimension. There is then a very compelling reason for stressing the deterrent aspect of punishment in a case like that.

The sentence here does not in my respectful opinion sufficiently reflect this factor. I agree with the orders proposed by the Chief Justice and with his reasons.

ATKINSON J: I agree with the orders proposed by the Chief Justice for the reasons given by the Chief Justice and Mr Justice McPherson.

THE CHIEF JUSTICE: The order of the Court is as I have indicated.

MR RAFTER: Would your Honours order that the warrants lie in the Registry for seven days?

THE CHIEF JUSTICE: The warrants will lie in the Registry for seven days pending execution if necessary.
