SUPREME COURT OF QUEENSLAND

CITATION:	*R v Murphy* [2003] QCA 128
PARTIES:	**R** **v** **MURPHY, Christopher Francis** (applicant)
FILE NO/S:	CA No 21 of 2003 SC No 16 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED EX TEMPORE ON:	20 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2003
JUDGES:	McMurdo P, McPherson JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – CIRCUMSTANCES OF OFFENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE CRIMINAL LAW – PARTICULAR OFFENCES – DRIVING OFFENCES – CULPABLE OR DANGEROUS DRIVING CAUSING DEATH OR BODILY HARM – GENERALLY – where applicant convicted of dangerous driving causing death – where applicant's wife was a passenger in the car – where applicant's wife was killed – where applicant sentenced to four years imprisonment with recommendation for release after 12 months and licence disqualification for two years – whether sentence manifestly excessive
COUNSEL:	The applicant appeared on his own behalf, and with leave by S McCallum S G Bain for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Qld) for the respondent

WHITE J: Mr Murphy, I doubt that you are going to be able to hear everything that I say. I am not going to shout too loudly but a transcript of what I have to say and what the other Judges have to say can be obtained so that you can read what it is that's said.

The applicant seeks leave to appeal against a sentence which was imposed on him in the District Court at Maroochydore on the 16th of January 2003. He pleaded guilty to dangerous driving causing death on 1st September 2001, with a blood alcohol level in excess of .15 per cent. A blood specimen obtained from the applicant approximately two hours after the motor vehicle accident revealed a blood alcohol content of .155 per cent. The Government Medical Officer estimated that his blood alcohol concentration at the time of driving was approximately .185 per cent to .195 per cent.

The person who died was the applicant's wife, a passenger unrestrained by a seat belt in the back seat of the motor vehicle.

The applicant was sentenced to four years' imprisonment with a recommendation for post prison community based release after 12 months and licence disqualification for two years.

The applicant was 51 at the time of the offence. He and his deceased wife of 25 years had attended his wife's son's wedding that evening. The motor vehicle accident occurred on the way home from the wedding reception in Tewantin to Cooran.

The deceased was seated in the back seat because the front passenger seat was occupied by a friend who was heavily intoxicated and who had fallen asleep in the vehicle prior to the applicant and his wife getting into the car to go home. The road was wet and it was raining.

The submissions made below were that the car was travelling at about 95 to 100 kilometres per hour. The road was a two lane bitumen highway in a 100 kilometre per hour zone. The vehicle travelling north veered off the left-hand side of the road, down an embankment and onto a flat section of ground parallel with the road. It travelled along that path for approximately 50 metres veering back up the embankment and along the dirt shoulder of the road for approximately five metres. The car then veered back onto the bitumen road and the passenger side of the vehicle collided with a guide post at the side of the road. The car continued back onto the roadway, spun round to face South, and then skidded across the road and down an embankment. The passenger side of the vehicle collided with trees and the applicant's wife was killed.

The passenger said that he woke up, spoke to the deceased and noted the vehicle swerving to the left, and then noticed a kangaroo on the road. The applicant had no recollection of the presence of a kangaroo.

The applicant fractured his spine in the accident and spent some 11 days in hospital. The condition stabilised and the

medical report before the Court does not suggest any serious future disability.

The learned sentencing Judge received a number of victim impact statements the most poignant of which was from the deceased's son from whose wedding the applicant and his wife and their passenger had been travelling. Bitterness was expressed that the applicant had not contacted close family members since the accident but the learned sentencing Judge accepted the applicant's remorse.

The applicant had previous offences for driving whilst under the influence of liquor. It is true that two of them were quite old being in 1970 and in 1975, however there was a more recent offence in 1990. After this accident the subject matter of the application for leave to appeal, the applicant was charged with speeding past a school zone, although the explanation does suggest that it was but a minor infraction.

Before us, Mr Stephen McCallum, a long time friend of the applicant's, who has made submissions on his behalf since the applicant is very hard of hearing, seeks to put before the Court further material. This relates to the applicant's daughter who suffers from Guilliam Barré Syndrome, which prior to the sentence had been life threatening for her. This material in the form of an affidavit from the daughter demonstrates that she is in need of the support and assistance of her father in providing accommodation and financial assistance. She is an adult person who because of her

condition is unable to work. This was not before the Court below. His Honour was told that the daughter had been ill with a mental condition. This was not correct. The daughter was present in the Court at the time of sentence as was Mr Murphy, but because of his hearing difficulties it cannot be suggested that he allowed this wrong information to be put before the Court. But the true state of affairs could have been given to his Honour below.

Even had this material been in place before his Honour, as a matter of principle, the Court is still required to impose an appropriate sentence, as to which see the case of Anne Maree Tilley 1991 53 Australian Criminal Reports page 1 particularly the observations of Justice Thomas at pages 3 and 4. His Honour makes reference to the fact that often when a person is sentenced to a term of imprisonment it will result in equal hardship to persons other than the offender including, in that case, the children of the offender. In my view, it would be inappropriate to allow this fresh evidence to come before the Court on this application for leave to appeal.

The learned sentencing Judge below had been urged to impose the least possible term of custody actually to be served. Before us, Mr McCallum has submitted that the fact that neither the applicant nor the front seat passenger had been seriously injured in the motor vehicle accident was not sufficiently taken into account by his Honour below. But, of course, that overlooks the fact that what his Honour was most

concerned to take into account was that one passenger, the applicant's wife, had died in the accident.

His Honour did note the applicant's loss and his remorse and the affect that his wife's death had had on hers and their children as well as other close family members. He noted that there may be a perceived trend to increased sentences for offences involving the excessive consumption of alcohol and driving and he had regard to a number of comparable sentences of this Court. He rightly, in my view, regarded this as a serious case. He took into account the plea of guilty.

The maximum penalty for this offence is 14 years and when comparable sentences are considered, it is clear that the sentenced imposed below was not manifestly excessive. In Byrne CA number 3 of 1995 the 34 year old applicant was convicted after a trial of dangerous driving causing death and grievous bodily harm whilst adversely affected by alcohol. He was sentenced to five years imprisonment with eligibility for parole application after two years and disqualification from holding a drivers licence for seven years. He had no prior convictions for any traffic or other offences. He was the driver of a prime mover and trailer. He had consumed alcohol the night before the accident, slept and then travelled along the Gold Coast highway still significantly affected by alcohol.

He drove his prime mover and the heavily loaded trailer it was towing into a lane of traffic which was moving at a greater

speed and an accident occurred in which one man was killed and two others injured.

His prime mover had been observed by witnesses to engage in a number of previous unsafe manoeuvres. His blood alcohol content was 0.136 per cent. The incident had taken place some two hours before that test was administered. The maximum sentence then was 10 years' imprisonment and on appeal it was not regarded as excessive.

In Ekstrom, CA No. 229 of 1997, the applicant was a 30 year old woman who pleaded guilty to dangerous driving causing grievous bodily harm while affected by alcohol with a blood alcohol content of 0.215 per cent. She had previous convictions for offensives of drink driving some years prior to this offence.

She drove into the rear of a taxi cab on a major Brisbane street, drove away without stopping, then drove on the incorrect side of the roadway and had a head-on collision with a motor vehicle being driven towards her. She caused serious injury to the driver of that vehicle such that he almost died. The maximum penalty was 14 years.

Apart from her previous drink driving offences, the applicant had a good background. She was unlicensed at the time of the sentence. She was sentenced to three and a-half years with no recommendation for parole, which was not said to be manifestly excessive.

I'll briefly mention one or two other cases. Dingle, CA No. 267 of 2002, the applicant was convicted after a trial of dangerous driving causing death with a blood alcohol level of 0.19 per cent. The maximum penalty was 14 years. That applicant was sentenced to a term of imprisonment of 6 years.

The applicant had been drinking heavily at a hotel during the evening and drove some six or seven kilometres before colliding with a cyclist who was appropriately illuminated. That sentence was not regarded at manifestly excessive.

In McKinnon, CA No. 356 of 1998, the applicant pleaded guilty to dangerous driving causing death, with a blood alcohol content of 0.219 per cent. The maximum sentence was 14 years. A sentence of six years' imprisonment with a recommendation for parole after two and a-half years was held not to be manifestly excessive.

The applicant in that case was travelling at speeds of between 80 and 100 kilometres per hour. His car was seen to swerve into the incorrect lane and engage in other dangerous driving practices. Eventually he lost control of the vehicle and collided with a parked car on the side of the road, killing the occupant. He had been urged by a friend not to drive on this occasion. He was aged 29 years, had prior convictions for dishonesty and drug offences and had previously been convicted of driving under the influence of alcohol.

Ms Bain for the Crown has drawn the Court's attention to a recent decision of Simpson, CA No. 344 of 2002, delivered on the 14th of March this year.

The applicant had pleaded guilty to one count of dangerous operation of a vehicle causing grievous bodily harm whilst adversely affected by liquor. He was sentenced to five years' imprisonment with a recommendation that he be eligible for post prison community based release after 22 months and was disqualified from holding or obtaining a driver's licence for five years. He was also in breach of a suspended sentence imposed in the District Court and was ordered to serve the three months of that sentence concurrently.

The Court allowed the application for leave to appeal against sentence and allowed the appeal to the extent of substituting for the sentence imposed a sentence of four years' imprisonment, suspended after 18 months.

Here we have a case where previous convictions for drink driving had not operated as a personal deterrent to the applicant. He was a mature man and it was no answer to say, as his counsel submitted below, that everyone was on a high at the wedding. On such occasions particular care must be taken to make other arrangements. There was no suggestion that there was not available alternative means of transport.

When the further fact that it was a wet evening is taken into account, it must be seen that this was a serious disregard for

the safety, not only of his passengers, but for all other users of the road.

In my view, his Honour was correct to point both to personal deterrence and general deterrence in imposing the sentence that he did. In my view, in light of the previous authorities and the facts of this case, this sentence was not manifestly excessive and I would refuse the application.

THE PRESIDENT: I agree.

McPHERSON JA: I also agree.

THE PRESIDENT: The order is, the application for leave to appeal is refused.
