SUPREME COURT OF QUEENSLAND

CITATION:	*R v Harvey-Sutton* [2003] QCA 229
PARTIES:	**R** v **HARVEY-SUTTON, Paul William** (applicant)
FILE NO/S:	CA No 83 of 2003 DC No 495 of 2002
DIVISION:	Court of Appeal - Cairns Circuit
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED EX TEMPORE ON:	27 May 2003
DELIVERED AT:	Cairns
HEARING DATE:	27 May 2003
JUDGES:	Davies JA and Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENCE - where applicant pleaded guilty to dangerous operation of a motor vehicle with circumstances of aggravation - where applicant sentenced to two years imprisonment wholly suspended, fined $7,500 and had his licence suspended for five years - where applicant's blood alcohol level was five times the legal limit - where applicant had two prior convictions for driving whilst under the influence of alcohol - whether sentence manifestly excessive *R v Simpson* [2001] QCA 109; CA No 309 of 2000, 21 March 2001, distinguished
COUNSEL:	J D Henry (Cairns) for applicant D R MacKenzie (Cairns) for respondent
SOLICITORS:	Legal Aid Queensland for applicant Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: I will ask Justice Jones to deliver his reasons first.

JONES J: On 28 February 2003 in the District Court at Townsville the applicant was convicted on his own confession of dangerous operation of a motor vehicle with circumstances of aggravation. Those circumstances were that he had a blood alcohol concentration of .247 per cent and had two prior convictions in 1999 for driving whilst under the influence of alcohol.

He was sentenced to two years' imprisonment wholly suspended for a four year operational period, ordered to pay a fine of $7,500 within 12 months, and his driver's licence was suspended for five years.

The offence occurred on 8 July 2002 while the applicant was driving a vehicle southbound along the Bruce Highway between Alligator Creek and Green Acre Service Station, a distance of some 25 kilometres. His vehicle was observed from time to time to swerve onto the incorrect side of the carriageway and to force oncoming vehicles off the road.

The police were informed and the applicant was found at the service station asleep in his vehicle with the seat belt fastened and keys in the ignition. When awoken, he showed physical indicia of alcohol consumption. On testing, his blood alcohol level was .247, five times the permissible limit.

The maximum penalty for this offence is five years' imprisonment and a fine of $30,000.

The applicant could offer no justification for driving in the manner described. The explanation lies in the fact that the applicant is addicted to alcohol and suffered periodically from bouts of depression. The day of the event was his 40th birthday which resulted in his engaging in binge drinking before setting off to drive the vehicle.

Soon after this incident the applicant made a determined attempt to rehabilitate himself by being admitted to a program at the Loganholme Rehabilitation Centre. His success in that course was referred to in various certificates and reports from the centre which were tendered to the learned sentencing judge.

The applicant is a highly regarded psychologist who has worked in the area of health education both in Queensland and New South Wales. He has been especially involved in sexual health, counselling those at risk of contracting HIV and hepatitis. Various references tendered on his behalf attest to his favourable public and professional standing.

These matters were all considered by the learned sentencing judge, as well as the fact that the suspension of his driving licence would impact on his employability. His Honour was required to impose a sentence of imprisonment by reason of the earlier convictions for drink driving.

In the end result, it is the total impact of the penalty which is to be considered on this appeal, though the focus is on the quantum of the fine and the period of disqualification.

In respect of the latter, the applicant has outlined that the effective period of disqualification would have a profound impact on the applicant's employability and certainly to a greater extent than was taken into account by the learned sentencing judge.

The fine, it is submitted, was excessive in so far as it was some $2,500 more than that imposed in the case of R v Simpson [2001] QCA 109,CA No 309 of 2000, which both the applicant and the respondent regard as a comparable case.

In Simpson's case the offender was observed to drive erratically along Kingsford Smith Drive in Brisbane in mid afternoon. Finally the vehicle collided with another vehicle causing injury to the driver. When tested, her blood alcohol level was .169 per cent. She had two years previously been convicted of a drink driving offence with a blood alcohol concentration of .111 per cent. At the time of this incident she was 27 years old.

As has been adverted to by Mr Henry, the penalty in that case was virtually the same as for the applicant here, save for the fact that the fine imposed there was for $5,000.

In that case Ms Simpson had also suffered some financial loss through the damage to her vehicle and other expenses of some $25,000. That does not appear to be a feature in the present case.

Thus, the only difference in penalty being the quantum of the fine, one must yet look at the totality of the sentence. The applicant here is older and he had two prior convictions for driving under the influence of liquor. He is engaged in a professional career which might indicate, despite the immediate impact on employability, that he has nonetheless a higher capacity to earn. Also, he was driving on a highway where at greater speeds there is an increased potential for harm.

The differential in the quantum of the fine can be well justified, in my view, by these factors.

The other cases referred to by the Crown involve sentences where some term of actual custody was ordered. The applicant here, in my view, must be seen to be fortunate to have his sentence wholly suspended.

For these reasons I can see no basis for disturbing that component, but looking at the whole of the sentence, it is in my view well within the exercise of a sound sentencing discretion.

I would therefore refuse the application.

DAVIES JA: I agree.

CULLINANE J: I also agree.

DAVIES JA: The application is dismissed.
