SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2004] QCA 126
PARTIES:	**R** **v** **SMITH, Geoffrey William** (applicant)
FILE NO/S:	CA No 88 of 2004 DC No 48 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED EX TEMPORE ON:	22 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	22 April 2004
JUDGES:	de Jersey CJ, Jerrard JA and Holmes J Separate reasons for judgment of each member of the Court, Jerrard JA and Holmes J concurring as to the orders made, de Jersey CJ dissenting
ORDER:	**The sentence imposed in the District Court on 1 April 2004 be varied to provide that the sentence of 15 months' imprisonment be suspended forthwith for an operational period of three years, the operational period to date from 1 April 2004**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – OTHER OFFENCES – where applicant pleaded guilty to the dangerous operation of a motor vehicle while adversely affected by alcohol – where sentenced to 15 months' imprisonment suspended after four months for a period of two years – where applicant appeals on the ground that the sentence was manifestly excessive – whether the sentence is excessive having regard to comparable cases *R v Coake* [1999] QCA 12, CA No 403 of 1998, 5 February 1999, considered

R v Collier [2003] QCA 314, CA No 236 of 2003, 24 July 2003, considered
R v Gehrman [2002] QCA 261, CA No 192 of 2002, 25 July 2002, considered
R v Harch [2003] QCA 315, CA No 237 of 2003, 24 July 2003, considered
R v Harvey-Sutton [2003] QCA 229, CA No 83 of 2003, 27 May 2003, considered
R v Parker [2003] QCA 316, CA No 139 of 2003, 24 July 2003, considered
R v Simpson [2001] QCA 109, CA NO 309 of 2000, 21 March 2001, considered

COUNSEL: I A Entriken for the applicant
B G Campbell for the respondent

SOLICITORS: Clewett Corser & Drummond for the applicant
Director of Public Prosecutions (Queensland)

THE CHIEF JUSTICE: The applicant pleaded guilty on an ex officio indictment in the District Court to the dangerous operation of a motor vehicle while adversely affected by alcohol.

An hour after ceasing driving his blood alcohol concentration was .182. In the context of a maximum penalty of five years' imprisonment he was sentenced to 15 months' imprisonment suspended after four months for a period of two years and he was disqualified from holding or obtaining a driver's licence for two and a half years. He seeks leave to appeal on the ground the penalty is manifestly excessive.

At the time of the offence, which was committed on the 22nd of August 2003, the applicant was 54 years of age. He is an avionics technician with a good employment and service history

and a good record of voluntary community work. His counsel emphasised those features in relation to this application.

He had no prior criminal history but he did have a relevant traffic history. Approximately 18 months before committing this offence he drove while his blood alcohol concentration was .098 for which, on 23rd February 2003 he was fined $400 and disqualified for three months. He subsequently had a provisional licence until the 23rd of May 2003 and then three months later this incident occurred.

The driving took place over about 20 minutes while the applicant was driving east between Oakey and Toowoomba on a Friday afternoon at about 5.30 p.m. He was driving on the Warrego Highway and in O'Mara's Road, Charlton. Another driver observed erratic driving on the part of the applicant with the vehicle wandering across lanes onto the shoulder of the road necessitating evasive action by other vehicles including by a prime mover and semi-trailer. It was not a case of excessive speed and there was no collision or injury. It may be thought that the applicant was doing his inebriated best.

So the full flavour of the driving may be appreciated I propose reading from the prosecutor's submissions to the sentencing judge:

> "The subject driving occurs … between the town of Oakey and Toowoomba. That road is generally a single carriageway in each direction, although there are a

number of overtaking lanes along that road. The speed limit on that road there is between 80 and 100 kilometres an hour, although speed is not alleged to be a factor in the dangerous driving.

The offence occurs in the afternoon and continues from approximately 5.20 p.m. until about 5.40 p.m., a period of about 20 minutes. The offence was disclosed by a member of the public … He himself was driving a vehicle between Oakey and Toowoomba and he observed the driving a Mitsubishi utility in the same direction, that is towards Toowoomba.

He initially observed the vehicle about eight kilometres out of Oakey heading towards Toowoomba and shortly thereafter as a result of what he observed he, in fact, contacted the police on his mobile phone and then gave police a running commentary on the present [applicant's] driving.

He observed the [applicant] driving along the highway and on numerous occasions he initially saw the [applicant's] vehicle swerving around the marked lane and onto the dirt shoulder of the road. He also observed the [applicant's] vehicle swerving and crossing over the centre line of the highway as oncoming traffic was approaching.

He observed the vehicle only contained the [applicant]. As they continued along towards Toowoomba they approached an overtaking lane where there were two carriageways heading in an easterly direction. Mr Stark, on that occasion, as a result of conversations he had with the police, took the opportunity to overtake the [applicant's] vehicle.

Prior to that he observed the [applicant's] vehicle swerving over both those lanes and he overtook the vehicle. As he overtook it, the [applicant's] vehicle wandered across both lanes and, in fact, nearly cut him off. His observations were such that he doesn't believe that that was a deliberate act, but just a simple result of inattention and intoxication …

When he proceeded in front of the vehicle, he then commenced to slow his vehicle down in order to get the [applicant] to slow down and hopefully stop his driving. He did that and continued to watch the [applicant's] vehicle in his rear vision mirror and again observed it wandering over the road and crossing out of the laneway.

Ultimately the [applicant's] vehicle then overtook Mr Stark's vehicle. Mr Stark continued to observe the [applicant's] vehicle following that. He observed again it swerving all over the road. On occasions he was travelling with the driver's side wheels on the centre line. On one occasion he crossed the centre line and a

> semitrailer had to move off out of its lane onto the shoulder to prevent an accident.
>
> Mr Stark also observed on a number of occasions that other vehicles had to take evasive action. Mr Stark followed the [applicant] all the way till he pulled into his home in Toowoomba and police subsequently attended. They located the prisoner … within the house."

Counsel for the applicant sought a penalty which would involve no actual incarceration. The learned sentencing judge, notwithstanding the plea of guilty and other mitigating features, considered however that general deterrence warranted some actual imprisonment in this case.

A review of similar cases confirms to my mind that actual imprisonment is accepted as justified in generally comparable circumstances. Whether or not actual imprisonment is imposed, of course, depends on all the circumstances of the case and as I will mention a little later on it is the previous conviction here which, to my mind, is the applicant's burden in promoting this application.

That imprisonment may be imposed is, of course, consistent with the substantial potential danger to other road users and pedestrians inevitably associated with driving motor vehicles while substantially intoxicated.

General deterrence is a primarily important sentencing criterion in this area where offending persists, notwithstanding saturation media coverage of the dangers.

Quite recently the Court of Appeal, on 24th of July 2003, dealt with three cases in which actual incarceration was upheld, cases where no personal injury had resulted.

R v Parker [2003] QCA 316, CA No 139 of 2003, 24 July 2003, was sentenced to 18 months' imprisonment suspended after six. His blood alcohol concentration was .219. He was dealt with on the basis he had no relevant prior traffic history. That driving involved a police chase over about a kilometre. He was 27 years old and had taken steps towards rehabilitation.

R v Harch [2003] QCA 315, CA No 237 of 2003, 24 July 2003, was a 20-year old who drove with a blood alcohol concentration of .191. He was sentenced to 18 months' imprisonment suspended after four months. He had previously been convicted of driving while under the influence of liquor with a concentration then of .056. That case involved more dangerous driving than occurred here. But then again he was a much younger driver.

R v Collier [2003] QCA 314, CA No 236 of 2003, 24 July 2003, was 18 years old and his blood alcohol concentration was .163. He had no prior traffic history. He drove dangerously over about two kilometres with police following and voluntarily pulled over. His penalty, three months' imprisonment followed by 12 months' probation, was sustained.

By contrast this applicant was substantially older and had the prior traffic history and drove dangerously for a much more substantial period.

Especially bearing in mind this applicant's more mature age and that prior conviction 18 months before, those recent cases would, in my view, support the penalty imposed here notwithstanding the lack of police intervention or chase.

Were it not for the prior conviction and his offending again relatively soon after working through the consequences of that earlier offending he should not have been imprisoned.

It is those features which, in this Appeal Court, render the penalty, while stern, not susceptible of challenge.

Other earlier non injury cases in which actual imprisonment was upheld include *R v Coake* [1999] QCA 12, CA No 403 of 1998, 5 February 1999, two years' imprisonment suspended after eight months, a police chase case where the 33 year old driver had a concentration of .201 and one prior conviction for driving under the influence of liquor 12 years previously. And *R v Gehrman* [2002] QCA 261, CA No 192 of 2002, 25 July 2002, 12 months' imprisonment suspended after six months, another chase case where the driver had one prior conviction for driving under the influence of liquor seven years previously.

The learned sentencing Judge was referred to two cases – *R v Simpson* [2001] QCA 109, CA NO 309 of 2000, 21 March 2001 and,

R v Harvey-Sutton [2003] QCA 229, CA No 83 of 2003, 27 May 2003, in which terms of imprisonment were wholly suspended. The appeals were concerned, not surprisingly, with the quantum of associated fines and periods of disqualification and, that being so, it is opportune to mention the observation of Justice Jones in the Court of Appeal in *Harvey-Sutton* that that applicant was "fortunate to have his sentence wholly suspended".

At this appellate stage, it is not generally helpful to dwell on too close a comparison and contrasting from case to case. It is, to my mind, sufficient for the disposition of this application to note that there are a number of cases generally and sufficiently comparable with this one in which the requirement that the driver serve a term of imprisonment has been upheld. It could not, in my view, be concluded that in requiring the applicant to serve four months' imprisonment the learned Judge erred in principle or imposed a penalty which is manifestly excessive.

His counsel has submitted that the applicant should be released now having served almost a month's imprisonment but it follows from what I have said that I would, on appeal, consider that an unwarranted interference with the sentence imposed. I would refuse the application.

JERRARD JA: In this matter, I respectfully agree with what the Chief Justice has said regarding the need for general

deterrence. However, I consider that the sentence imposed in this matter was manifestly excessive.

I regard it as a serious or significant feature in each of the matters of *Coake, Parker, Gehrman, Harch* and *Collier* to which the Crown has referred the Court that at least a portion of the relevant dangerous driving in those matters occurred when those applicants were attempting to evade arrest during a police pursuit of their vehicle. I consider that there is a specific danger inherent in the circumstances when a driver is attempting to outrun a pursuing police car. That danger derives from the predetermination of the fleeing driver not to stop or slow down when that might otherwise be expected in the intervening circumstances such as the presence of other cars or pedestrians on the road.

If one puts those cases aside for that reason then the sentence imposed here is harsher than that imposed in the two matters to which the Crown referred the learned sentencing Judge below, those being the matters of *Simpson* and *Harvey-Sutton* referred to by the Chief Justice. In both of those, the relevant driver had a blood alcohol concentration of over .15 and at least one prior conviction for having driven with a blood alcohol concentration in excess of the legal limit. Arguably, the driving in each of those cases was worse than that in this case although that could be a matter of debate.

In this particular matter, this applicant is a person in his mid 50s with a good background and, as we were reminded, who

is in employment and whose employment will be endangered by any further imprisonment. I acknowledge that his driving constituted a significant risk to other road users but, in the circumstances, it happened that there was no collision and no harm was actually done to any other citizen.

In those circumstances, I think the sentence imposed was harsh considering his background and in comparison to those imposed in the matters of *Simpson* and *Harvey-Sutton* and excessive, given his plea of guilty.

I would order that the remainder of the sentence be suspended entirely for an operational period of three years and would vary the sentence imposed to that extent.

HOLMES J: I agree with the reasons of Justice Jerrard. The decisions in *Simpson* and *Harvey-Sutton* are certainly of limited assistance, because they were not concerned with a period of imprisonment, given that in each case it was a fully suspended term; but I do observe that, although Justice Jones commented in *Harvey-Sutton* that that applicant was lucky to escape actual imprisonment, there are some distinct differences between that case and this. Harvey-Sutton had a blood alcohol concentration of .247 per cent and had two prior convictions for driving under the influence of alcohol.

The other cases referred to by the Crown, unlike *Simpson* and *Harvey-Sutton*, do not, I think bear any real comparison. In *Coake*, there was a police chase at 120 kilometres per hour in

a 60 kilometre per hour area. The applicant there had driven through a red light. This all took place in a suburban area. In *Parker*, again, a police chase. This occurred on a busy road on the Gold Coast. The pursuit entailed going through a stop sign, driving with a passenger in the vehicle at speed.

Harch - yet another police chase - involved an applicant who had a significant criminal history including a previous conviction for driving under the influence. In that case, he drove at 80 to 90 kilometres per hour through the city. He drove through a roundabout without braking, his vehicle fishtailed, he skidded across the road, mounted the footpath, collided with a give-way sign. Again, on that occasion, he had a passenger. In *Collier*, again the applicant tried to outrun the police. He drove at up to 90 kilometres per hour in a 50 kilometre zone in Warwick, turning corners without braking, causing the vehicle to fishtail, going through a red light.

All of those circumstances seem to me vastly different in that they involved the attempt to outrun the police and the complete abandonment of caution which is not present in this case. There is no allegation of excessive speed in this case, although the driving clearly was reprehensible. But the applicant was of excellent character. He had a history of 20 years' military service. He was employed, with the consequences for his employment that Justice Jerrard has already referred to. He was active in charity work. On the day in question, he had actually done his drinking at a hotel

while selling tickets for a charity. It was a plea of guilty on an ex officio indictment.

Everything, I think, points to the fact that although general deterrence was required in the form of a sentence of imprisonment, it ought to have been fully suspended. Like Justice Jerrard, I think that the requirement of personal deterrence is appropriately met by an extension of the operational period, but that the appropriate order is one of 15 months' imprisonment fully suspended for an operational period of three years.

THE CHIEF JUSTICE: The application and the appeal are allowed. The order of the Court is that the sentence imposed in the District Court on 1 April 2004 be varied to provide that the sentence of 15 months' imprisonment be suspended forthwith for an operational period of three years, the operational period to date from 1 April 2004.
