SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gallaher* [2004] QCA 240
PARTIES:	**R** **v** **GALLAHER, Kenneth Samuel** (applicant)
FILE NO/S:	CA No 5 of 2004 DC No 50 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gympie
DELIVERED ON:	23 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2004
JUDGES:	de Jersey CJ, Williams JA and Mackenzie J 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 OFFENDER – where applicant convicted of dangerous operation of a motor vehicle causing death – where sentenced to three and a half years imprisonment – where bad traffic history – whether learned sentencing judge placed too much weight on the impact of the offence on victim's family – whether learned sentencing judge did not put enough weight on applicant's significant intellectual defects – whether sentence imposed manifestly excessive *R v Gardiner* [1996] QCA 8; CA No 452 of 1995, 13 February 1996, cited *R v Hardes* [2003] QCA 47; CA No 393 of 2002, 18 February 2003, cited *R v Newman* [1997] QCA 143; CA No 88 of 1997, 8 May 1997, cited *R v Wilde; ex parte A-G (Qld)* [2002] QCA 501; CA No 283 of 2002, 19 November 2002, cited
COUNSEL:	L J Powell (sol) for the applicant

R G Martin for the respondent

SOLICITORS: QEC Aboriginal and Torres Strait Islanders Corporation for Legal Services for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Williams JA. I agree that the application for leave to appeal against sentence should be refused, and with His Honour's reasons.

[2] **WILLIAMS JA:** The applicant was convicted on 20 November 2003 after a trial of dangerous operation of a motor vehicle causing death. The incident in question occurred on 24 May 2002 on a rural road outside of Gympie. In broad terms the vehicle being driven by the applicant came over what was described as a "blind crest" then travelled onto its incorrect side of the road where it collided head-on with a motor vehicle in which the deceased was a passenger. In summarising the facts the learned sentencing judge observed that the evidence did not establish that the applicant was driving in excess of the 80 kilometres per hour speed limit, but said that "to come over that crest at perhaps 80 kilometres an hour was in itself extremely dangerous". During the trial the applicant challenged the truthfulness of the version given by the deceased's husband who was driving and two other eye witnesses. That challenge was obviously rejected by the jury.

[3] The applicant had a bad traffic history for unlicensed driving and driving unaccompanied on a learner's permit. He also had a criminal history which included a conviction in October 1998 for assault occasioning bodily harm whilst in company; he was imprisoned with respect to that offence for 12 months.

[4] In the course of sentencing remarks the learned District Court judge said that the conviction was "based on absolutely overwhelming evidence." He went on to say: "The challenge to Mr Fisher's reliability and truthfulness is a particularly unfortunate consequence of you having chosen to plead not guilty. Of course, no person can be punished for having their trial. . . . But this was an overwhelming case." The learned sentencing judge also recorded that the applicant suffered from "quite significant intellectual defects", but went on to observe that in the interview with police after the accident the applicant showed he was "capable of being quite cunning." Then followed a passage which was challenged on the hearing of this application for leave to appeal against sentence:

> "Whether or not you believe what you told the police is impossible for me to know, but if you had pleaded guilty in this case and relieved this family of the further suffering of having to hear about all this again in a courtroom, and particularly relieving Mr Fisher of the terrible trauma of having to go through giving evidence, then that would have been a factor very much in your favour. Ultimately that's the course you have chosen.
>
> One of Mr Fisher's daughters in her victim impact statement mentions the fact that there's been no apology. I think in our system of justice there's a great underestimation of the importance of acknowledging wrongdoing, apologising and trying to restore the harm that's been done. Sadly, none of that is available for you here,

> and I will be dealing with you on the basis that you have shown no remorse whatsoever.
>
> That has to be tempered ... by the fact that those medical reports, the psychological assessments suggest to me you have limited intellect. You have limited or practically no understanding of the tragedy that you have brought upon this family and you have no empathy, and whether or not that will change with time remains to be seen."

[5] Later on the learned sentencing judge referred to the obligation on a court to take into account a wide variety of factors on sentencing which included the applicant's age, the possibility of his rehabilitation, and the effects upon the victims.

[6] Against all that background the applicant was sentenced to three and a half years imprisonment. He seeks leave to appeal against that sentence on the basis that it was manifestly excessive. Specifically it was submitted either that a sentence of two to three years should have been imposed, or the sentence of three and a half years suspended after serving approximately nine months.

[7] In the course of oral submissions it was contended that the sentence imposed was manifestly excessive because no alcohol was involved and because of the applicant's significant intellectual defects. Further, it was submitted that the learned sentencing judge placed too much weight on the impact of the offence on the victim's family. It was submitted that the learned sentencing judge expressed personal feelings which indicated undue sympathy for the family and resulted in the imposition of too harsh a penalty.

[8] In my view a reading of the record does not support those submissions. The victim impact statements from the deceased's husband and children clearly established the understandable impact the death had on a close knit family. It is also correct to say that up to the stage of sentencing no remorse had been shown by the applicant and the challenge to the credibility of the deceased's husband in the light of overwhelming evidence against the applicant aggravated that situation.

[9] Though reference was made to the effect on the deceased's family there is nothing to indicate that the experienced sentencing judge was overwhelmed by sympathy, or empathy, for the victim's family. The passage quoted above indicates that a balanced approach was taken in the particular circumstances of this case.

[10] It is true that the applicant has significant intellectual defects but that does not excuse, or explain, his driving on the occasion in question. Photographic evidence clearly confirms that he drove onto the incorrect side of the road for no apparent reason.

[11] The court was referred to a number of comparable decisions. Reference in particular can be made to *Gardiner* [1996] QCA 8, *Newman* [1997] QCA 143, *Wilde* [2002] QCA 501 and *Hardes* [2003] QCA 47. A perusal of those cases does not indicate that a sentence of three and a half years imprisonment in all the circumstances of this case was manifestly excessive. The sentence was clearly within range, even for a situation where no alcohol was involved.

[12] Despite the careful argument of Ms Powell for the applicant I am not persuaded that the sentence imposed was manifestly excessive.

[13] In the circumstances the application for leave to appeal should be refused.

[14] **MACKENZIE J:** I agree with the order proposed by Williams JA. Despite the comprehensive submissions on the applicant's behalf, I particularly endorse Williams JA's reasons for concluding that the experienced sentencing judge did not overemphasise the effect of the event on the victim's family and that he did not err in assessing the weight to be given to the applicant's personal circumstances. I agree in other respects with the reasons he gives for refusing the application.