SUPREME COURT OF QUEENSLAND

CITATION:	*R v Markusic* [2004] QCA 249
PARTIES:	**R** **v** **MARKUSIC, Emil** (applicant)
FILE NO/S:	CA No 173 of 2004 DC No 85 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED EX TEMPORE ON:	26 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2004
JUDGES:	McPherson and Williams JJA 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 dismissed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where leave sought to appeal against sentence – where applicant sentenced to five years imprisonment – where sentence suspended after 18 months – where applicant convicted of dangerous operation of a motor vehicle with circumstances of aggravation – where applicant adversely affected by alcohol – where applicant drove through red light - where applicant caused grievous bodily harm – where applicant 72 – whether insufficient account taken of age *R v Antoney* [2000] QCA 180; CA No 402 of 1999, 16 May 2000, distinguished *R v McGuire; ex parte A-G (Qld)* [2002] QCA 439; CA No 197 of 2002, 18 October 2002, distinguished *R v Purcell* [1999] QCA 316; CA No 192 of 1999, 17 August 1999, distinguished *The Queen v Schloss* (1998) 100 A Crim R 80, cited
COUNSEL:	A F Maher for the applicant

R G Martin for the respondent

SOLICITORS: Lake Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

MACKENZIE J: The applicant seeks leave to appeal against a sentence of five years' imprisonment to be suspended after 18 months with an operational period of five years for an offence of dangerous operation of a motor vehicle with circumstances of aggravation that he was adversely affected by alcohol and caused grievous bodily harm.

The concentration of alcohol in his blood about one-and-a-half hours after the incident was 0.262 per cent and would have been in the vicinity of 0.29 per cent at the time of the incident.

The applicant was 72 years of age at the time of the offence. He had no criminal convictions but had incurred two fines for exceeding the speed limit by at least 15 kilometres an hour in 1998 and 2002 and one for failing to provide a breath specimen in 1989. The learned sentencing Judge was told that, apart from a back problem, he had no major medical problems and was not on any significant medication.

The offence occurred at about 10 p.m. on the 22nd of December 2002 at the intersection of Bermuda Street and Reedy Creek Road, West Burleigh. Bermuda Street is one of the major north south arterial roads on the Gold Coast and Reedy Creek Road is

a major road which runs in a generally westerly direction from Burleigh to the Pacific Motorway. Road and atmospheric conditions were good at the time.

The occupants of the vehicle with which the applicant's Kombi van collided were a mother and daughter. They were travelling from the Gold Coast Airport where the mother had picked up the daughter with a view to spending Christmas together. The daughter suffered a fractured and dislocated upper left humerus and two fractures of her pelvis which constituted the grievous bodily harm. She was on the passenger side of the vehicle which bore the force of the impact. She had to be cut from the vehicle.

Her mother suffered a broken wrist and abrasions to the cornea of her left eye from small specks of glass. Her injuries did not amount to grievous bodily harm. An eye witness, Mr Grant, first saw the applicant's vehicle when it entered Reedy Creek Road from a side street and travelled east. Mr Grant was in the second lane from the left and moved left into the next lane as he approached the intersection at which the collision occurred.

When he was alongside the applicant's vehicle, it suddenly moved to the left without indicating causing Mr Grant to brake and swerve to avoid a collision. The applicant's vehicle then swerved back into its original lane. As the applicant's vehicle reached the intersection, the lights were red against it. Mr Grant saw the applicant accelerate and proceed through

the intersection without braking. The Kombi van collided with the passenger side of the car containing the victims as they were crossing the intersection with the green light in their favour.

The Kombi tipped on its side and came to rest on the traffic island. The other vehicle was pushed into the centre island of Bermuda Street. People who attempted to speak to the applicant found him to be incomprehensible and smelt a strong odour of liquor.

The case is therefore one where the applicant was grossly intoxicated and driving erratically before going through a red light at a major intersection at a time when the light must have been red for some time since the other vehicle had, by the time of the collision, traversed the width of the west-bound traffic lanes.

The learned sentencing Judge referred to the physical, psychological and financial consequences of the applicant for the victims and the fact that the applicant was very intoxicated at the time. She noted his age and lack of criminal convictions and any significant traffic history. She accepted that the driving was not intentionally aggressive and that the applicant did not commence drinking knowing that he would have to drive.

The explanation given for the fact that he drove was that a friend visiting from overseas who had been taken to Burleigh

beach earlier in the day by his wife had phoned him to ask if he could be picked up. In the absence of his wife, he decided to drive to collect him. Nevertheless, he must have known that he was grossly intoxicated and in no condition to drive when he set out. His driving observed by Mr Grant and his failure, for whatever reason, to heed the red light amply demonstrate this.

The learned trial Judge said that deterrence of drivers who are highly intoxicated was important and significant punishment was called for. It was conceded by the applicant's counsel at sentencing that deterrence was an important factor. He accepted that a combination of high speed and excessive alcohol consumption and potentially serious injuries merit substantial punishment including a period of actual imprisonment but sought to persuade the learned sentencing Judge that the absence of evidence of excessive speed was a factor in the applicant's favour.

However, statements of the kind relied on, as in McGuire [2002] QCA 439, are not intended, in my view, to be exclusive of other circumstances. Driving across a major intersection against a red light even at a normal speed is highly dangerous and more so when the light must have been red against the offender's vehicle for long enough to allow the victims' vehicle to progress substantially across the intersection.

It was submitted, on the applicant's behalf that a sentence of five years' imprisonment with a suspension after 18 months was

manifestly excessive. Particular reference was made to section 9 of the Penalties and Sentences Act with a view to suggesting that there were significant aspects in the applicant's favour including the fact that he was no risk to the community, the offence was not one of violence, that the applicant's past record was relatively minor, and that he was otherwise of good character. Further, his early plea of guilty was said to be indicative of remorse.

It was submitted that the learned sentencing Judge did not give sufficient weight to the applicant's age and good character. Reliance was placed upon The Queen v. Schloss (1998) 100 A Crim R 80 at 84. It was submitted that, while the learned sentencing Judge noted that the applicant suffered from no particular illness that would make a custodial sentence more onerous, the sentence of 18 months actual custody in respect of a person of 73 years of age was a very significant amount of time when compared with such a sentence for a younger person. It was submitted that it was an exceptional circumstance which displaced, to some extent, the need for general deterrence.

Schloss and the cases referred to in it are authority for the proposition that old age is a relevant circumstance in relation to sentence. Those cases were ones where the offences merited lengthy terms of imprisonment and time in actual custody. The concern that emerged was that the offender may have little or no prospect of useful life after

prison if a penalty that would ordinarily be appropriate in the particular circumstances was imposed.

In the present case, there is an order for suspension after 18 months which represents a 40 per cent reduction from the half point of the sentence at which an entitlement to apply for post-prison community-based release would come into effect in the absence of an earlier recommendation or suspension. Such a reduction is also more than would ordinarily be allowed for the early plea and other conventional factors in the applicant's favour. In my view, mitigation for age was appropriately allowed for by a discount of that order.

Overall, it was submitted that the sentence was too harsh compared with cases in which a shorter sentence had been imposed, although it was said that the head sentence was within range, although, high by counsel before us. All of the cases referred to by the applicant's counsel involved lesser periods of imprisonment. Two which involved the same circumstances of aggravation as the present case are Attorney-General's appeals, (McGuire; Purcell [1999] QCA 316). Each is, in my view, factually less serious than the present case. Also, the level of alcohol, while sufficient to be a circumstance of aggravation, was significantly lower than in this case. That was also the case in Antoney [2000] QCA 180.

The other cases, which did not have the circumstance of aggravation causing death or grievous bodily harm, carried a lower maximum penalty and are not a helpful comparison. On

behalf of the respondent, particular reliance was placed on Lennon which was a significantly worse case because of the protracted course of driving and the fact that the applicant had ignored warnings from other drivers that he was driving on the wrong carriageway of a freeway.

Nevertheless, a term of imprisonment of six years without any recommendation for early release reflects the fact that the case is worse. Reliance was also placed on Haydon who unsuccessfully appealed against a sentence of five years' imprisonment for driving with 0.213 per cent alcohol in his blood, at speed, and colliding with the structure of a bridge which resulted in his vehicle colliding with another vehicle and injuring the occupants. It does not appear that any provision for early release was made in that instance.

This process of analysis does not suggest that a sentence of five years with an appropriate discount for mitigating circumstances and certainty of release after 18 months is manifestly excessive.

In my view, it has not been demonstrated that the sentencing discretion has miscarried. I would therefore refuse the application for leave to appeal.

McPHERSON JA: I agree.

WILLIAMS JA: I agree.

McPHERSON JA: The application is dismissed.