SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bawden* [2004] QCA 285
PARTIES:	**R** **v** **BAWDEN, Benjamin Charles** (appellant/applicant)
FILE NO/S:	CA No 59 of 2004 DC No 2847 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	6 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2004
JUDGES:	McMurdo P, McPherson JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application to adduce further evidence refused** **2. Appeal against conviction refused** **3. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant convicted of dangerous operation of a motor vehicle whilst adversely affected by an intoxicating substance – where appellant claimed inconsistencies in evidence of police against him – whether the jury's verdict was unreasonable and could not be supported having regard to the whole of the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – FRESH EVIDENCE – GENERAL PRINCIPLES – where appellant sought to introduce material available to his legal representatives at trial – whether such material should be admitted on appeal CRIMINAL LAW – APPEAL AND NEW TRIAL AND

INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEALS AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – OTHER OFFENCES – where applicant fined $1000 and disqualified from holding a driver's licence for 18 months – where applicant lived several hundred kilometres from home town – whether sentence was manifestly excessive

Gallagher v The Queen (1986) 160 CLR 392, cited
Mickelberg v The Queen (1989) 167 CLR 259, cited
TKWJ v The Queen (2002) 212 CLR 124, cited

COUNSEL: The appellant/applicant appeared on his own behalf
B G Campbell for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** Benjamin Charles Bawden was convicted of dangerously operating a vehicle whilst adversely affected by an intoxicating substance in the District Court at Brisbane on 13 February 2004. A conviction was recorded; he was fined $1,000 to be paid within nine months and disqualified from holding a driver's licence for 18 months. He represents himself on this appeal against conviction and application for leave to appeal against sentence.

[2] He contends that the verdict of guilty is unreasonable and cannot be supported having regard to the whole of the evidence and seeks leave to adduce evidence not called at the trial.

The evidence

[3] The prosecution case turned on the evidence of two police officers, Smedley and Collins, who were patrolling the Caboolture area in a marked police car, driven by police officer Smedley, in the early hours of the morning of 19 October 2002. At 2.00 am they observed Mr Bawden's white Holden Commodore in Matthew Terrace turn right onto Beerburrum Road through a red light at the intersection. They heard the Commodore's wheels spin as it accelerated north on Beerburrum Road and followed it. Police officer Smedley had to accelerate heavily to maintain a constant distance. He estimated that the car was travelling at about 140 kph in a 60 kph zone. In the area where Henzell Road meets Beerburrum Road, the car moved sideways across the centre line markings. It veered onto the incorrect side of the road whilst travelling at about 140 kph through a blind bend just after the intersection with Pumicestone Road. The police activated their siren and flashing lights and the car stopped after turning left into Porter Road. Mr Bawden was driving and had a blood alcohol reading of 0.149. The distance from Matthew Terrace where police first saw the car to Porter Road where it stopped was 3.1 kilometres.

[4] Police officer Smedley could smell alcohol on Mr Bawden's breath but did not observe his eyes. He did not notice any other physical signs of the effect of alcohol. Police officer Collins noted that Mr Bawden was unsteady on his feet, his eyes were quite bloodshot and he smelled of alcohol.

[5] Mr Bawden's experienced counsel at trial extensively cross-examined the police officers about minor inconsistencies between their evidence at trial and that at committal and about minor inconsistencies between each officer's evidence. He also suggested that their accounts as to Mr Bawden's driving were exaggerated and implausible, especially in the light of their evidence as to the alleged speed of his car.

[6] Dr Robert Hoskins, the Acting Director of the Government Medical Office, gave evidence of the effect of a blood alcohol level of .149 on the body of an average 20 year old male, namely the slowing of reflexes, responses and coordination.

[7] Mr Bawden gave evidence that he had consumed between five and ten XXXX Gold stubbies and about three Sambucca shots between 8.30 or 9.00 pm and midnight or 1.00 am with friends, including Darren Barnes and Russell Hartley. Darren, Russell and he left Darren's home at about 1.45 am in his car. He drove along Matthew Terrace and into Beerburrum Road, Caboolture. He was playing loud music in the car. He did not see any other vehicles. He did not drive onto the wrong side of the road at any time. He may have exceeded the speed limit but by no more than 15 kph. He noticed a vehicle with its lights on high beam approaching him from behind very quickly. He initially thought it was an inconsiderate driver and sped away to avoid the glare of the headlights. His speed would not have exceeded 110 kph. When he realised he was being followed by a police car, he was angry but looked for an appropriate spot to pull over. He did so after turning left into Porter Road.

[8] Darren Barnes gave evidence that he had a couple of VB stubbies during the evening (three at the most). Towards the end of the night (11.00 pm or midnight) Ben Bawden drove Russell and him along Matthew Terrace where he stopped at a red traffic light. Mr Barnes had been driving cars for about four years. Mr Bawden was driving "perfectly fine and stable". He "had no need to talk to Ben about his driving, look at the speedometer or to feel nervous within [his] own personal self". He did not notice the car cross onto the incorrect side of the roadway. It was ridiculous to suggest that Mr Bawden was driving at 145 kph. He noticed a car with its lights on high beam following close behind them for some distance. When this car activated its siren, Ben slowed down to find a suitable place to pull over and did so shortly afterwards by turning left into Porter Road. The police took Ben to the police station and he and Russell were left with their dog to make their own way to a friend's place.

The application to adduce further evidence

[9] Mr Bawden seeks leave to call evidence in this appeal of a QP9 form which, he says, is inconsistent with the evidence of the police officers as to where they were parked when they first saw his vehicle. Mr Bawden concedes the QP9 form was available at his trial and was in the possession of his lawyers, who obviously decided not to further investigate this alleged inconsistency. There may have been a very good reason for this tactical decision, for example, someone other than police officers Smedley and Collins may have prepared the QP9 form and made a mistake, or the inconsistency, if established, may have been explicable in many other ways. In any case, it was of little consequence. Mr Bawden has not demonstrated any proper reason why this Court should now receive that evidence in accordance with

the well established principles set out in *Gallagher v The Queen*[1] and *Mickelberg v The Queen*.[2]

[10] Mr Bawden next seeks leave to call evidence from senior police officers to the effect that Redcliffe District Police and Communications Centre operators comply with service procedures which ensure contact is maintained with all individual patrol units, even when a second patrol unit makes a radio call to the Redcliffe District Communications Centre. This evidence was capable of being ascertained at the time of the trial although it was not then in the possession of Mr Bawden or his lawyers. He contends the evidence is inconsistent with the evidence of police officer Smedley at trial about his radio communication whilst he followed Mr Bawden's car. A reading of the relevant portion of the transcript of police officer Smedley's evidence does not support that contention. Mr Bawden has not established that this evidence is relevant to the essential issue at trial, whether he drove dangerously. He has not established under the principles discussed above any basis for this Court to receive that evidence.

[11] He also seeks leave to tender at this appeal photographs taken by his father on 20 October 2002. These, too, were available at trial and were in the possession of his lawyers but they were not tendered in the defence case. Mr Bawden contends that the photographs demonstrate that the aerial photograph of the area where the driving occurred (ex 6) was inaccurate and that the police officer's evidence that he took such a steep bend at high speed was implausible. The photographs which he wishes this Court to receive are not helpful to his case in that they show, much more clearly than the aerial photograph, the blind bend around which the police officer said he drove at speed and partially on the wrong side of the road. No doubt his lawyers did not tender the photographs at trial because they thought they would not advance his case. Again, Mr Bawden has not shown any reason for this Court to receive that evidence.

Appeal against conviction

[12] Mr Bawden raises many points which he contends show that the verdict of guilty was unreasonable. His primary contention is that the evidence of the two police officers was conflicting with each other, with other accounts given by them at committal and was implausible so that the jury should have preferred his evidence and that of Mr Barnes. I will not deal with every other one but they include matters such as police officer Collins giving evidence that her enquiries showed that his vehicle was registered to him at Murgon when in fact at that time it was registered to an address in Cairns. This and other inconsistencies he raises relate to peripheral matters. He also emphasises that the police version as to the high speeds they claimed he was travelling was implausible; he could not have taken the steep bend at 140 kph and the police could not have seen what they claimed to have seen had he been travelling at that speed. These and other matters were canvassed fully at his trial before the jury and were extensively discussed by his counsel in addressing the jury. They did not, either alone or in combination, require the jury to reject the evidence of the police officers.

[13] He next contends that the aerial photograph (ex 6) does not represent a true indication of the road at the time of the offence and he was not examined or cross-

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1 (1986) 160 CLR 392, 397, 399, 407.

2 (1989) 167 CLR 259, 273, 275, 292.

examined in respect of it. For reasons already given on the unsuccessful application for fresh evidence, it is difficult to see how an attack on the aerial photograph could have assisted Mr Bawden in his trial. He was, of course, able to give evidence of any matters he considered relevant, at least until an objection was taken.

[14] Mr Bawden next emphasises that the tape recording and the transcript of his record of interview with police was indistinct so that the jury may have formed the impression that he did not want to answer questions and inferred that he had something to hide. The difficulty for Mr Bawden is that that was the state of the evidence and his tape recorded conversation with police was admissible even though portions of it may have been indistinct. His Honour told the jury the transcript was only an aid and the tape recording was the evidence. When Mr Bawden gave evidence he had the opportunity to clarify what he said to police if the tape and transcript did not accurately record it.

[15] Mr Bawden has referred us to the evidence of Dr Hoskins as to the effects of an alcohol reading of .149 on a 20 year old male and claims that this was inconsistent with the evidence of the police officers. The evidence set out earlier does not support that contention. The evidence of Dr Hoskins, combined with the evidence of the police officers, was sufficient to enable the jury to conclude beyond reasonable doubt that Mr Bawden was adversely affected by an intoxicating substance when he dangerously operated his vehicle that evening.

[16] Mr Bawden now contends for the first time, and not on oath, that when the court had a view of the scene, police officer Smedley mingled with the jurors and at Porter Road directed traffic around and in the presence of the jury in a way that was detrimental to the defence case. He also contends that because the jury travelled in a bus which was higher and bigger than a police vehicle they had an unrealistic perspective of the scene which they inspected in the middle of a sunny day instead of at 2 am on a dark night. In addition, he points out that the scene had changed markedly from the time of the offence. The learned primary judge directed the jury that the view of the scene was not evidence and it was only to assist them in understanding the evidence and that the present scene was different from its condition at the time of the offence. There is no material before this Court to establish that police officer Smedley behaved inappropriately during the view. These contentions are without substance.

[17] Mr Bawden alleges that the learned primary judge:

> "confused the jury by misnaming one of the prosecution witnesses, and failed to fully explain or clarify to the jury what was required of them when deliberating [sic] the evidence and/or failed to adequately explain the proper and/or legal meaning and legal effect of certain words or phrases and the implications thereof, including:
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> a) beyond reasonable doubt
> b) inferences
> c) credibility of witnesses
> d) consistency of evidence
> e) being objective
> f) benefit of doubt
> g) three times over the limit".

[18] A perusal of the learned primary judge's careful and fair summing-up shows that the learned primary judge gave the customary balanced directions as to the onus and standard of proof. It was of no significance that his Honour mistakenly referred to police officer Collins as police officer Cassidy; he later corrected this. His Honour was not required to explain to the jury how to apply their common sense or to say any more than he did on the drawing of inferences or on the other matters raised. These and the other nit picking complaints in Mr Bawden's written submissions as to the learned primary judge's directions to the jury are baseless.

[19] Mr Bawden next contends that the prosecution case did not exclude the possibility that the police saw another vehicle, not his, being driven in a dangerous manner that evening. There is no evidence to support that contention, even though police officer Smedley agreed that they may have been looking for a VS Commodore earlier that evening in respect of another matter. No witnesses recalled seeing any other vehicles in the area at the time Mr Bawden was driving there and the police officers said that they sighted Mr Bawden's vehicle and followed it until it stopped and Mr Bawden was apprehended.

[20] Mr Bawden has not forgotten the increasingly popular claim in appeals against conviction: "My defence did not present all my case and/or evidence in their possession to the jury or present my defence in such a manner as to be understood and absorbed by the jury". Mr Bawden was represented by an experienced counsel who cross-examined the prosecution witnesses thoroughly and effectively and gave an equally effective and thorough address to the jury. He has certainly not established that any miscarriage of justice has resulted from defence counsel's conduct of the case: *TKWJ v The Queen*.[3] Unfortunately for Mr Bawden, the jury preferred the evidence of the police officers to the defence witnesses. They were entitled to reach that conclusion on the evidence before them.

[21] The many points raised by Mr Bawden, alone or collectively, do not show that on the whole of the evidence it was not open to the jury to conclude beyond reasonable doubt that Mr Bawden drove dangerously at Caboolture on 19 October 2002. The appeal against conviction must be dismissed.

The application for leave to appeal against sentence

[22] Mr Bawden contends the sentence was excessive because of the 18 month disqualification from driving. He argues that a 12 month disqualification was appropriate because he lives at Murgon, 230 kilometres from his home town, Caboolture and the absence of a licence makes it difficult for him to easily visit his family and friends.

[23] As the primary judge noted, Mr Bawden tendered excellent references and is still a young man; he was only 20 when he committed this foolish offence. He has no criminal history, is in good employment and has a promising future. On the other hand, his conduct was potentially dangerous to himself, his passengers and others who might be on or near the road, he has a concerning traffic history, has shown no remorse and does not have the mitigating benefit of an early plea of guilty. A 12 month disqualification period could have been imposed but disqualification from driving for 18 months cannot be said to have been excessive. The sentence imposed

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3 (2002) 212 CLR 124; (2002) 76 ALJR 1579, [13]-[17], [101]-[112].

was plainly within a sound exercise of discretion. The application for leave to appeal against sentence must also be dismissed.

ORDERS:

1. Application to adduce further evidence refused.

2. Appeal against conviction refused.

3. Application for leave to appeal against sentence dismissed.

[24] **McPHERSON JA:** I agree with the reasons of the President, which deal in detail with, and effectively dispose of, the complaints made by the appellant on his appeal before us. Most of those complaints are directed to challenging the accuracy of minor points of fact in the prosecution evidence which, even if established, would go only and in oblique fashion to the credibility of the police witnesses at trial. Some of them were the subject of address to the jury by the appellant's counsel. As to others, prudence no doubt dictated that any effort to make something of them would be unproductive, and possibly even counter-productive, in the minds of 12 persons using their good sense to decide the case before them. They were all matters which fell essentially within the province of that area of skill and judgment that counsel is expected to bring to the defence of his client at the trial of a criminal charge.

[25] Nothing has been said on appeal to persuade me that the experienced counsel who appeared for the appellant at his trial failed in any respect to draw the attention of the jury to such inconsistencies as there were in the prosecution case, or that the jury would have been influenced in their verdict by other matters now relied on here. This court does not sit to revise jury verdicts based on findings of credibility or fact except in those cases where it can be seen that no reasonable jury properly instructed could have formed the view of the evidence that they did. This is far from being an example of that kind.

[26] Some of those as well as other matters relied on by the appellant could have been, but were not, raised on the material available to the appellant at his trial. Having considered them, I am left with the firm impression that none of them satisfy the requirements for introducing new evidence on appeal, and that none would have had, or if a new trial were to take place, would have, a material influence on the outcome.

[27] The appeal against conviction should be dismissed and, also for the reasons given by the President, the application for leave to appeal against sentence.

[28] **MACKENZIE J:** I agree with the orders proposed by the President for the reasons given by her.