SUPREME COURT OF QUEENSLAND

CITATION:	*R v Frost; ex parte A-G* [2004] QCA 309
PARTIES:	**R** **v** **FROST, Robert Alistair** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 142 of 2004 DC No 91 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	27 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2004
JUDGES:	McPherson and Jerrard JJA and Helman J Separate reasons for judgment of each member of the Court, McPherson and Jerrard JJA concurring as to the order made, Helman J dissenting
ORDER:	**Allow the appeal to the extent of removing the recommendation for early consideration for post prison community based release**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – where respondent convicted on own plea of guilty to dangerous driving causing death while adversely affected by alcohol – where prolonged period of dangerous driving causing the deaths of three people – where respondent severely intoxicated – where no remorse shown at time of incident – where respondent sentenced to nine years imprisonment with a recommendation that he be eligible for PPCBR after three and a half years – whether sentence manifestly inadequate CRIMINAL LAW – PARTICULAR OFFENCES – DRIVING OFFENCES – CULPABLE OR DANGEROUS DRIVING CAUSING DEATH OR BODILY HARM –

GENERALLY – where a charge is brought against a person arising out of death following a road accident - whether appropriate charge is dangerous driving causing death or manslaughter – charge of manslaughter appropriate in the most serious of cases

Corrective Services Act 2000 (Qld), s 135(2)(c)
Penalties and Sentences Act 1992 (Qld), s 157(7)

R v Sanderson [1998] QCA 237; CA No 134 of 1998, 15 July 1998, considered
R v Vessey; ex parte A-G [1996] QCA 011; CA No 453 of 1995, 16 February 1996, considered
R v Wilde; ex parte A-G [2002] QCA 501; (2002) 135 A Crim R 538, considered
R v Wooler [1971] QWN 10, considered

COUNSEL: M J Copley for the appellant
M J Byrne QC for the respondent

SOLICITORS: Director Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Jerrard JA. The Attorney-General's appeal against sentence should be allowed by removing the recommendation for parole after three and a half years.

[2] **JERRARD JA:** This is an appeal by the Attorney-General arguing that a sentence of nine years imprisonment imposed on Robert Frost, together with a recommendation that he be eligible for post prison community based release after three and a half years, was manifestly inadequate. Mr Frost received that sentence of imprisonment after he pleaded guilty to an offence of dangerous operation of a motor vehicle causing death, while adversely affected by alcohol.

[3] The offence was committed on 24 April 2003 at Mackay, when Mr Frost killed two sisters, Casey Louise Owens and Daina Vee Owens, and their friend Alan Douglas Bates. It occurred at around 3.00 a.m. in the morning, when the three friends were walking from a house in North Mackay, in a northerly direction along the sealed shoulder of a well lit road, towards a BP Service Station with the intent of buying cigarettes. They were struck from behind by the respondent's Toyota Landcruiser, and the two sisters were killed instantly. Alan Bates died later that day. The road shoulder on which the pedestrians were walking was separated from the two north bound lanes of the carriageway by a painted white line.

[4] The respondent was 24 years old at that time, and 25 when sentenced. He was a self employed and successful businessman, who had dined that night at a restaurant in Mackay and had consumed alcohol, including beer, red, and white wine. He continued to drink alcoholic beverages throughout the rest of the night at a number of licensed premises around the city area of Mackay and at about 1.00 a.m. that morning was observed to be visibly adversely affected. His eyes were glassy, he looked tired, and his mannerisms were slow.

[5] At about 3.00 a.m. that morning he met an acquaintance named Michael Hodgetts, and the two men hailed a taxi. Mr Frost directed it around several streets in the city, while apparently looking for a friend whose name he was yelling out of the car window; and he then directed the taxi driver to his own vehicle. He offered Mr Hodgetts a lift home, assuring Mr Hodgetts that he was all right to drive.

[6] Almost immediately after the vehicle set off on its journey Mr Hodgetts saw that Mr Frost had difficulty maintaining control of the vehicle, and was weaving within the north bound lane when crossing a bridge to the northern side of Mackay. As they crossed it Mr Hodgetts again asked if Mr Frost was all right to drive and Mr Hodgetts added that he could not afford to lose his licence. Mr Frost said he was "alright" to drive, remarking that he had "not got a licence to lose". Mr Hodgetts asked to be let out of the vehicle, but Mr Frost insisted that he drive Mr Hodgetts to his home. Mr Hodgetts saw that the vehicle was swerving between the two north bound lanes and asked Mr Frost to slow down and take it easy, and again asked to be let out. Mr Frost refused to stop, and the request was then repeated and refused on a number of occasions.

[7] Mr Hodgetts then saw the three pedestrians walking ahead some 50 metres away, in the same direction as the respondent's vehicle was travelling, and he warned Mr Frost to be careful. Despite the warning, the vehicle continued to swerve back and forth across its two lanes and then moved onto the road shoulder, hitting the three victims. Hodgetts yelled to be let out of the vehicle, and Mr Frost asked "what was that, was that a person"? He was told in no uncertain terms that "it" was, and to let Mr Hodgetts out, but he drove on. He hit a guide barrier as his vehicle entered a roundabout, then travelled over a bridge during which journey he entered onto the incorrect side of the road for a portion of the distance and into the path of an oncoming vehicle. He ultimately stopped and let Mr Hodgetts out not far from the suburb in which Hodgetts lived. Mr Hodgetts then ran four blocks to a friend's home and telephoned the police.

[8] The respondent's vehicle was next seen driving back towards Mackay, and seen to move to its incorrect side of the roadway on at least six occasions during that journey. There was no oncoming traffic but the danger created was obvious. His car was later found abandoned in North Mackay, quite close to the scene of the tragedy. He had not returned there however, but had telephoned a friend for assistance for him – not the police or ambulance for assistance for the people he had hit – and he and the friend searched for Mr Frost's abandoned vehicle. That took them past the scene and they drove to a police station, which was apparently unattended at that time. Eventually Mr Frost was returned to his dwelling where police arrived at about 5.30 a.m.

[9] Mr Frost's blood alcohol concentration was measured at .198% at 6.17 a.m., and it was unchallenged that at the time of the incident it would have been at least .237%. When interviewed Mr Frost admitted that he "felt" that he was "over the limit".

[10] He actually did have a driver's licence at that time, although he also had a poor record of committing traffic offences in this State and in Tasmania. That record included the commission of offences of speeding on 2 October 1996 and 9 June 1997, driving without due care and attention on 1 November 1998, failing to keep left within a lane on 4 May 1999, failing to comply with a licence condition on 2

May 2000, and using a hand held mobile telephone while driving on 6 December 2002.

[11] He also committed the offences of speeding on 6 December 2002, on 9 January 2003, on 15 February 2003, and on 9 March 2003. On each of those occasions in the four months leading up to the commission of the offence which killed three other people on 24 April 2003 he had been travelling between 15 and 30 km above the speed limit; and on 5 June 2003 his license was suspended for three months due to the accumulation of demerit points.

[12] After committing the very serious offence of dangerous driving causing death while adversely affected by alcohol, he was released on bail, and he then committed an offence of speeding on 6 September 2003, travelling then at between 30 and 40 km above the speed limit; and on 23 December 2003 and while still on bail drove a vehicle with a blood alcohol concentration of .072%. He was dealt with for that offence on 11 February 2004, and disqualified from driving for four months. He pleaded guilty to the charge the subject of this appeal on 12 May 2004.

[13] It was plainly a very bad case of dangerous driving, which had foreseeable and tragic consequences. There was a prolonged period in which he drove dangerously, which the appellant calculated to be over a distance of some 14 km. Throughout the entire journey he must have known he was incapable of safely operating a motor vehicle. At the beginning of the journey he was asked if he was all right to drive, and the passenger making that inquiry very soon thereafter kept asking to be let out of the vehicle. Then he hit three pedestrians and was told what he had done, but continued to drive. He left the scene of the accident and sought personal help for himself only. He had a very high blood alcohol concentration. The only feature of dangerous operation of a motor vehicle commonly present but absent is that he was not speeding; he told the investigating police that that was because he realised he was "over the limit" of the permissible blood alcohol concentration.

[14] Matters further aggravating the appropriate penalty were that he had a poor driving record and exhibited no remorse when he committed the offence, and instead callously continued on. By the time he came to be sentenced over a year later the nature of what he had done had sunk in, and a psychologist's report prepared in May 2004 described him as experiencing an immense sense of guilt at the fact of causing the death of three people and the psychologist's opinion was that he did experience remorse. His plea of guilty was accepted as a timely one, it being offered promptly after a committal hearing was completed. The submissions made by his counsel was that he had finally recognised and acknowledged he had a problem with alcohol when he offended in December 2003. It seems he had not realised that in April.

[15] Counsel for the Attorney referred this court to the decisions in *R v Vessey; ex parte A-G* [1996] QCA 011, and *R v Wilde; Ex parte Attorney-General (Qld)* (2002) 135 A Crim R 538. In *Vessey* this court increased the sentence imposed on that respondent, from one of six and a half years imprisonment with parole recommended after 26 months, to a sentence of nine years imprisonment with consideration for release on parole recommended after four years had been served. That offender had been seen to travel on the wrong side of the road for about 150 metres, causing another vehicle to take evasive action, and he then drove around a

corner and to an intersection in which he drove through a Give Way sign and collided with another vehicle, killing the driver.

[16] That offender was seen to drive dangerously for a very much shorter distance than Mr Frost was. On the other hand, Mr Vessey was described in the judgment of this court as having a bad history of driving under the influence of liquor and with high blood alcohol concentration. This court recorded that "On each occasion he was disqualified from driving (including 2 absolute disqualifications). He was disqualified for a period of 15 months as a result of the last of these offences at the time of the offence. On two of the occasions he was convicted in the Magistrate's Court of dangerous driving".

[17] Mr Vessey had a concentration of at least .2% alcohol in his blood at the time he collided with his victim's vehicle, and he was unlicensed at that time. He was described as having "manifestly co-operated" with the investigating authorities, and as a mature aged man.

[18] When settling upon the appropriate head sentence this court remarked that for that respondent (because of his manifest co-operation as described) an early recommendation for parole was appropriate, albeit qualified by the circumstance that his conviction was all but inevitable. In the light of that remark it appears that this court determined upon the head sentence of nine years imprisonment, imposed on appeal on that offender, as the appropriate head sentence before making any allowance for the mitigating effect of the plea of guilty and co-operation. A limited allowance was made.

[19] Mr Vessey was only shown to have driven dangerously for a distance probably less than .5 of a kilometre, whereas Mr Frost drove dangerously for 14. Mr Vessey's prior history of driving offences was far worse than Mr Frost's, and this court described Mr Vessey as having a persistent history of driving under the influence of liquor and of dangerous driving. While Mr Vessey's far worse history but far shorter distance over which he drove so very dangerously means that both he and Mr Frost were guilty of committing very bad examples of dangerous driving while severely intoxicated and causing death, the difference between them is that Mr Frost's actual offence was significantly worse and would have justified a 10 year sentence, even though his prior record was far better. That means the head sentence imposed was at the lower end of the appropriate range. One consequence of a 10 year sentence would have been that because of the provisions of s 157(7) and Part 9A of the *Penalties and Sentences Act* 1992, and s 135(2)(c) of the *Corrective Services Act* 2000, Mr Frost would not be eligible for parole till he had served eight years. That means it would have been impossible to reflect the guilty plea by any recommendation for early release, and the only way credit for a plea could be given was by a reduction in the head sentence.

[20] The conclusion that the head sentence was a quite moderate one is strengthened by reference to the decision in *R v Wilde*. That offender had pleaded guilty to charges in three indictments, of which the first charged aggravated unlawful use of a motor vehicle, receiving, and burglary and stealing; the second an offence of receiving; and the third dangerous operation of a motor vehicle causing death. That offender had been found on 20 June 2001 in a vehicle unlawfully taken from a shopping centre car park on 19 June 2001, and which, when the offender was found in it, contained property previously stolen from premises earlier burgled on 20 June 2001

and at which that car had been seen. Other stolen property was located at her residence. After being released on bail she committed the offence of dangerous driving causing death, when then driving a stolen car and after her licence was cancelled two days earlier.

[21] That offence was committed on 12 January 2002, when that respondent was the sole occupant of the vehicle. She had been observed to drive dangerously for a period of about 1.35 km in which she was apparently attending to something on the passenger side of her vehicle. This resulted in her cutting in front of another vehicle without indicating, swerving in and out of her lane, then overcorrecting and striking two cyclists riding on a marked 1.9 metre wide lane adjacent to the carriageway and separated from it by a single unbroken line. One cyclist was killed and the other severely injured.

[22] That respondent stopped her vehicle briefly following the collision but then drove off. She evaded attempts to have her stop, travelled through a red light, and eventually abandoned her vehicle on foot. She was finally apprehended three days later. Examination of her mobile telephone indicated that she had been on the telephone almost constantly between 10.05 a.m. on 11 January until the time of the collision, save for a period from 10.43 p.m. on 11 January to 12.14 a.m. on the 12th. The prosecution contended, and it was unchallenged, that assuming that offender had slept for that one and a half hours, she could not have been sufficiently alert to manage a vehicle responsibly in the early morning of the 12th.

[23] This court increased her sentence on appeal to one of six years imprisonment, reduced to five years because of five months pre-sentence custody and because the sentence was cumulative to one of one and a half years imposed in respect of her other offences. That made an effective sentence of six years, six months; this court then specifically and only then made allowance for the plea of guilty, by a recommendation that she be considered eligible for post prison community based release after three years.

[24] The maximum available penalty for that offence of dangerous driving causing death, where alcohol was not shown to be a factor, was seven years imprisonment, and that offender accordingly received an effective sentence, when made cumulative, very near the maximum. Indeed, this court held that in that case the sentencing judge should have worked from a level approaching that maximum penalty; and described the case as approaching the category of the worst example of the offence. Features included her reckless inattention over a substantial distance, reduced alertness through fatigue, callous flight from the scene, lengthy criminal and traffic history, being on bail, and the fact that her car was stolen and that she was unlicensed at the time. Some of those features are present in this case, in addition to the aggravating circumstances of adverse effects of alcohol being proven to be present; but again the prior criminal and traffic history of Mr Frost is much less serious than Ms Wilde's.

[25] The maximum penalty applicable to Mr Frost was 14 years, similarly to Mr Vessey. Another instance of an offender who faced a maximum of 14 years was the applicant in *R v Sanderson* [1998] QCA 237. That applicant was a 28 year old woman who pleaded guilty to dangerous driving causing death with the circumstance of aggravation that her blood alcohol concentration exceeded .15. She had killed the two passengers in her vehicle when she lost control of it and collided

with a power pole, she having previously been driving it at a considerable speed. Her blood alcohol concentration measured nearly two hours later was .245. She was unlicensed, having never held a Queensland Driver's licence, and her car had been seen with its wheels screeching and the car fishtailing just before the collision. She had been drinking until late the night before and then again during the day of the accident. That offender was on probation at the time, and had been convicted in December 1995 of unlicensed driving and driving under the influence of liquor when her blood alcohol concentration then was .224. Her application for leave to appeal against her sentence of six and a half years was refused.

[26] That applicant's demonstrated period of dangerous driving was again far less than Mr Frost's, her blood alcohol concentration was similar, and her prior offending history as a driver was significantly worse. The judgment of this court makes it clear that the sentence she received, with parole recommended after two years and nine months, was a head sentence imposed without reference to the mitigating effect of the plea of guilty, for which matter – and her remorse – she received the benefit of a recommendation for release on parole six months earlier than would otherwise have applied. It follows that the decisions of this court in *Vessey*, *Wilde*, and *Sanderson*, all show that the head sentences imposed in those cases were made without reference to the mitigating effect of the pleas of guilty therein, which were reflected in recommendations for parole consideration. A comparison of those sentences and this one establishes that while the head sentence imposed here was not manifestly below the appropriate level, and that while the sentencing judge was obliged to make some allowance for the plea of guilty and the late manifestation of remorse, the result in each of those three cases implies the appropriate allowance was less than that made in this case. Mr Frost showed no semblance of remorse at the time, and his subsequent behaviour on bail could not encourage leniency. Since he got the significant benefit of a head sentence at the lower end of the range, I would simply remove the recommendation entirely.

[27] DM Campbell J remarked in *R v Wooler* [1971] QWN 10 that where a charge is brought against a person arising out of death following a road accident, the more appropriate charge in most instances is the charge of dangerous driving causing death rather than manslaughter, which should be reserved for the most serious cases. Those observations should not inhibit the Director from charging manslaughter in such cases, and s 328B of the *Code* would have the effect that on a charge of manslaughter an alternative verdict of dangerous driving causing death, with or without a circumstance of aggravation, would be automatically available for consideration by the jury. A conviction for manslaughter would carry a maximum penalty of life imprisonment, and in the appropriately serious cases such a conviction would in all likelihood result in a more onerous penalty being imposed than would be the case if the conviction were for dangerous driving causing death, even with the aggravating circumstances of alcohol.

[28] I would allow the appeal to the extent of removing the recommendation for early consideration for post prison community based release.

[29] **HELMAN J:** There is no doubt that this is a very serious case of dangerous driving which called for a severe penalty, and the sentence imposed on the respondent could fairly be described as severe. I agree with the other members of the court in concluding that the head sentence of imprisonment for nine years should not be disturbed. The question then must arise whether the recommendation of eligibility

for post-prison community-based release renders the overall penalty manifestly inadequate.

[30] There are I think important differences between this case and the cases referred to by Jerrard J.A. The most striking difference lies in the pre-sentence histories of the offenders. Vessey had a bad history of driving under the influence of liquor with high blood-alcohol concentrations. On each occasion he was disqualified from driving, twice absolutely. He had been convicted twice of dangerous driving, and was disqualified from driving at the time of his committing the offence of dangerous driving causing death. Sanderson, whose driving caused two deaths, was on probation for offences of dishonesty when she drove dangerously, and had been convicted of unlicensed driving and driving under the influence of liquor with a high blood-alcohol concentration. Wilde had a substantial criminal history, had been convicted of driving under the influence of liquor, and was on bail when she committed the offence driving a stolen car. Her driver's licence had been cancelled only two days before she offended. The respondent's traffic history was, as Jerrard J.A. has demonstrated, poor, but it is in no way comparable with the histories of Vessey, Sanderson, and Wilde. While the respondent's history of offending shows him to have driven irresponsibly on occasions, it is altogether different from the criminal and other anti-social behaviour of which Vessey, Sanderson and Wilde had been guilty.

[31] Furthermore, the sentences imposed on Sanderson and Wilde hardly support the Attorney's case, even if one allows for the lower maximum sentence applicable to Wilde's case. That imposed on Vessey was of the same order as that under review and it should be noted that for the Attorney Mr Copley – quite correctly in my view – conceded that should the appeal be thought otherwise without merit, as I think it is, an adjustment of the recommendation from three and a half years to four could not be supported.

[32] Without minimizing in any way the gravity of the respondent's offence and his subsequent history of offending, I am not persuaded that when the sentence imposed by his Honour is considered as a whole one can say it is manifestly inadequate. His Honour made no error in principle in sentencing the respondent and his sentence was in my view within the range applicable to a case like this.

[33] I should dismiss the appeal, but should like to record my agreement with Jerrard J.A.'s remarks concerning charging manslaughter in appropriate cases.