SUPREME COURT OF QUEENSLAND

CITATION:	*R v McGuigan* [2004] QCA 381
PARTIES:	**R** **v** **McGUIGAN, John Joseph** (applicant/appellant)
FILE NO/S:	CA No 285 of 2004 DC No 547 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence) Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2004
JUDGES:	McPherson and Jerrard JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for an extension of time within which to apply for leave to appeal granted** **2. Application for leave to appeal granted** **3. Allow the appeal** **4. Set aside the sentence imposed below and in lieu thereof impose a sentence of three and a half years imprisonment with a recommendation for eligibility for post-prison community based release after serving 18 months with an absolute disqualification from obtaining a drivers' licence** **5. The order of the court below on 19 March 2004 activating the suspended sentences to be served concurrently with the sentence imposed for dangerous driving is affirmed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – MISCELLANEOUS MATTERS – QUEENSLAND – PROCEDURE – EXTENSION OF TIME - application for extension of time within which to appeal - exercise of discretion - whether good reason shown to account for the delay - whether interests of justice served by

granting extension

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPLICATION TO REDUCE SENTENCE – WHEN GRANTED – OTHER OFFENCES – where applicant pleaded guilty to a charge of dangerous operation of a motor vehicle causing grievous bodily harm with the circumstance of aggravation – where applicant sentenced to a five year term of imprisonment with a recommendation for post-prison community based release after serving 20 months – whether sentence imposed was manifestly excessive

Criminal Code 1899 (Qld), s 328A(4)

R v Balfe [1998] QCA 14; CA No 444 of 1997, 20 February 1998, considered
R v Conquest; ex parte A-G (Qld) [1995] QCA 567; CA No 395 of 1995, considered
R v Fripp [2003] QCA 4; CA No 345 of 2002, 29 January 2003, considered
R v Tait [1999] 2 Qd R 667, applied
R v Wilde; ex parte Attorney-General (Qld) (2002) 135 A Crim R 538, distinguished

COUNSEL: The applicant/appellant appeared on his own behalf
S G Bain for the respondent

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

[1] **McPHERSON JA:** I agree with the reasons and orders proposed by White J. The orders should be those stated by her Honour in her reasons.

[2] **JERRARD JA:** In this matter I have had the advantage of reading the reasons for judgment and orders proposed by White J and I respectfully agree with those. What is important in this applicant's favour is that the evidence established no more than a very short period of dangerous driving that was perhaps for 30 metres at most, and for a very short time. It may have been explicable as momentary inattention, during which the applicant failed to keep a proper lookout. It was not established that alcohol played any part in that dangerous driving, or that he was driving at a speed which would have been excessive had he not failed to keep that proper lookout.

[3] His driving record was a very bad one, and he left the scene, although he claimed to have thought only that he had clipped another vehicle with his mirror. Despite those circumstances aggravating even dangerous driving constituted by momentary inattention, and despite his subsequent offending by his later being in charge of a motor vehicle while under the influence of liquor, his dangerous driving

was not as serious as that of the applicant in *Fripp*, a decision given after the judgment of this court in *R v Wilde*. Mr Fripp drove dangerously for a far longer period and a much greater distance than Mr McGuigan did, and grossly exceeded the permissible speed limit. On one of the two occasions on which Mr Fripp was driving dangerously, he was driving a stolen vehicle.

[4] In comparison with *Wilde*, this applicant was not on bail (although still under the currency of a suspended sentence), was not shown to have left the scene of an accident which he knew had resulted in his injuring another person, was not shown to be recklessly inattentive over any substantial distance, and was not shown to have any reduced alertness or capacity to drive. He did say he was not supposed to be using that vehicle after hours. It also appears by necessary inference that he must have regained a license to drive before 5 July 2003, so that comparable circumstance of aggravation was absent too.

[5] **WHITE J:** The applicant seeks an extension of time in which to appeal against the sentence imposed on him in the District Court on 12 and 19 March 2004 after to he had pleaded guilty to a charge of dangerous operation of a motor vehicle causing grievous bodily harm with the circumstance of aggravation of having twice previously been convicted of offences of driving under the influence of liquor. He was sentenced to a five year term of imprisonment with a recommendation for post-prison community based release after serving 20 months of the sentence to take account of the plea of guilty and other factors personal to him. The maximum sentence for this offence is seven years, s 328A(4) of the *Criminal Code*.

[6] On 19 March 2004 the sentence was reopened to deal with the breach of suspended sentences which the applicant was serving at the time of this offence. He was ordered to serve the whole period of those sentences, the maximum of which was six months, concurrently with the sentence imposed on 12 March.

[7] The notice of application for leave to appeal against sentence was filed on 17 August 2004 – four months out of time. The explanation offered is that the applicant instructed his counsel and solicitor immediately following sentence that he wished to appeal. This oral notification is acknowledged in his solicitors' letter of 5 April 2004. In that letter he was asked to contact his solicitor prior to 8 April as a matter of urgency so that he could be informed of the risks associated with bringing an appeal. According to their letter of 7 July 2004 to the applicant the solicitors had previously written to him by a letter dated 16 March 2004 outlining the appeal process. Nothing was received by the solicitors, according to them, until the applicant's letter of 11 June 2004 raising the issue of the appeal and mentioning a faxed letter of 18 May 2004.

[8] In their letter of 7 July 2004 the solicitors denied that they had received the letter dated 18 May 2004 or, indeed, any other instructions. It may be noted that the letter in question bears a "FAXED" stamp with the date 18/5/04 followed by initials and some numbers which the applicant told the court were the initials of the Corrective Services officer who sent the letter on his behalf as prisoners are not permitted to do so. In that letter the applicant sought information about his appeal. It is clear from the tenor of the letter that he believed that he had already given instructions to lodge an appeal.

[9] The applicant decided to take up his own appeal. In his application for an extension of time he states that upon receiving his sentence he was "in a state of shock at the severity of the sentence and the trauma of entering prison for the first time" in his life. This led, according to his application, to a long period of depression and isolation from other inmates.

[10] In his oral submissions the applicant said that both the failure of his previous solicitors to act on his instructions and his own mental state were explanations for the delay.

[11] The approach of the court to an application to extend time is to look at the reasons for delay, the length of the delay, the overall interests of justice and to make some assessment of the strength of the appeal, *R v Tait* [1999] 2 Qd R 667.

[12] The applicant is now 50 years old. He was 49 at the time of the offence. He has a serious traffic history. The two offences which were relied upon as the circumstance of aggravation occurred on following days, 4 and 5 May 1996. He was dealt with for both on 3 September 1996. In respect of the first he pleaded guilty to driving under the influence with a blood alcohol content of 0.203 per cent for which he was fined $1,000. In respect of the offence on 5 May, he was found to be driving under the influence with a blood alcohol content of 0.251 per cent for which he was fined $2,000 and disqualified absolutely from driving.

[13] On 3 June 1997 he was charged with disqualified driving for which he was fined $1200 and disqualified absolutely. On 10 August 1999 he was charged that on 29 May 1999 he failed to provide a breath test, gave a false name and address, was driving whilst disqualified and for obstructing police. For those offences he was sentenced to various terms of imprisonment to be served concurrently, wholly suspended with an operational period of 5 years and disqualified absolutely from driving. The greatest of those sentences was for six months. On 25 August 2003 he was fined for failing to stop at a red light on the same day as the previous offences.

[14] The circumstances of the present offence were that at about 5pm on Saturday 5 July 2003 the complainant, a Mr Chislett, a 75 year old man, was crossing Shore St, Cleveland on a pedestrian crossing. The street is in the middle of a busy retail precinct. The speed limit is 40km per hour. A number of round-abouts slow the traffic flow and a large gardened median strip divides the inbound and the outbound lanes of which there were two on each side. The pedestrian crossing was well lit, clearly marked with signs and drivers had reasonable visibility of people waiting to use the crossing. The complainant approached the crossing and waited for an opportunity to cross the road. A vehicle in the outside lane closest to him stopped to allow him to cross. The prosecution alleged that other vehicles came to a halt behind that vehicle. The applicant did not accept that there was more than one vehicle stopped at the crossing as he approached it in his van. The learned sentencing judge proceeded on the basis advanced by counsel for the applicant that there was only one vehicle stopped in the outside lane at the pedestrian crossing.

[15] The complainant walked in front of the stopped vehicle and moved toward the middle of the road. The driver of that vehicle noticed the van driven by the applicant in his rear vision mirror approaching the crossing, on his assessment, "at a fair speed". The vehicle driven by the applicant was on the inside lane. It struck the complainant as he moved from the front of the stopped vehicle knocking him to the

ground. The impact broke the side mirror on the applicant's vehicle. Other drivers said the applicant's van accelerated past them on the inside lane. The van continued after colliding with the complainant, seemed to slow down for a moment, then accelerated and drove through a round-about and out of sight. The van was noted by witnesses to be marked with the logo of a well-known pest control business.

[16] The complainant was immediately assisted by other drivers. He was initially unconscious and bleeding from the mouth. He regained consciousness and people remained with him until the ambulance arrived. The matter was reported to police. The complainant's injuries were serious. He was transferred by ambulance to the Royal Brisbane Hospital suffering from neck and facial injuries. He was admitted to the intensive care unit and underwent a tracheostomy and fixation of his nasal and numerous facial fractures. He developed pneumonia and returned to intensive care after developing respiratory distress. He was not discharged from intensive care until 30 July 2003.

[17] Whilst in hospital it was noted that the complainant's cognitive functions were impaired. He remained dependent on nursing staff requiring regular treatment by physiotherapists, occupational therapists, a speech therapist and dietician. The report tendered to the court below concluded that the complainant would require long-term rehabilitation over the following two years and might never be able to live independently again. He would most likely have died had he not received treatment. A victim impact statement from the complainant's niece was tendered. She spoke of the significant setback that his injuries had caused him and that he now depended on someone to do his housework, cooking and shopping and pay his bills. The learned sentencing judge noted

> "He was a man [who] appeared to enjoy his life. A bachelor who enjoyed going down to the TAB to meet his mates and have a bet on the horses; down to the shopping mall; and loved to just go and sit down by the water. He was independent. Now the prospect is that he'd have to be admitted to a nursing home as that is inevitable."

[18] Meanwhile a description of the van was circulated. An attendant at a hotel nearby notified police that the van driven by the applicant had been through the drive-through bottle shop at about 3pm when the driver had purchased a six-pack of VB beer and again at 4:40pm when more beer was purchased. The applicant had been recognised as a regular customer. His attendance at the bottle shop on that day was confirmed by video surveillance. The applicant's counsel on sentence admitted that his client had consumed alcohol that afternoon but did not believe that he was over the prescribed limit when he was driving the van.

[19] At 4:20am the following morning, 6 July, police located the applicant in a parked car in front of what they afterwards learnt was his house at Fairfield. Police could smell alcohol on him, his speech was slurred, he appeared confused and there were empty and full cans of VB beer in the vehicle. The pest control van with a missing wing mirror was parked nearby.

[20] The applicant was arrested for being in charge of a motor vehicle whilst adversely affected by alcohol. His blood alcohol content reading was 0.2 per cent. The applicant told police he had been drinking since about 7:30pm the evening before and had consumed his last drink at about 2am. He claimed to have been

drinking in the local hotel and that he had caught a taxi home. He explained to police that he was only in the vehicle to turn the battery over because it had not been driven for some time. After his arrest he was returned home.

[21] Detectives from Cleveland contacted the applicant that day and asked to speak to him about the incident involving Mr Chislett. The applicant did not keep the appointment and police then attended his house on 7 July. When first asked about the incident he denied any involvement in it. He told police that he had loaned the vehicle to someone else and gave details of that person. He said that he had not checked his work vehicle for damage. He also said that there were a number of contractors with the pest control business with similarly marked vehicles and suggested that one of them may have been responsible for the incident. He gave a false alibi saying that he had been at a hotel at Annerley at the relevant time and denied visiting the bottle shop at Cleveland that afternoon. The applicant was placed in the cells.

[22] He asked to be reinterviewed. He admitted that he was the driver and claimed that he had not consumed any alcohol. He said that he was driving towards Brisbane in the lane closest to the centre of the road and it was getting dark. He said he thought his mirror had clipped a passing car just after the pedestrian crossing. He told police that he failed to stop and panicked because he was not supposed to be using his work vehicle after hours. He told police that he was aware it was a 40km per hour zone and that he was not exceeding the speed limit. He denied, as other witnesses had claimed, that he was travelling in excess of 70km per hour. He said he did not see other vehicles at the crossing and did not see the complainant. He told police that he felt guilty and considered himself, somewhat surprisingly in light of his traffic history, to be a responsible driver. He denied leaving the scene and claimed that he was simply unaware of what had occurred.

[23] At sentence both the prosecutor and defence counsel erroneously conveyed to the learned sentencing judge that the applicant had actually served the six month term of imprisonment which was wholly suspended. When this was realised the sentence was reopened on 19 March and his Honour asked to deal with the breach of the suspended sentence. His Honour did so, found the breach proved, and activated the whole of the suspended sentence ordering that it be served concurrently with the sentence which he had imposed on 12 March. His Honour did not consider that this new information altered the approach which he had taken on 12 March to the sentence.

[24] The applicant, who appeared on his own behalf, has a number of complaints about the sentencing process. He submits, by implication, that the learned sentencing judge took a harsher view of him because of the error mentioned in the previous paragraph. The prosecutor used the word "again" when referring to the suspended sentence imposed on 29 May 1999

> "Your Honour would see that he again was gaoled for a period of six months, then smaller terms of imprisonment and disqualified absolutely." T 4.

His own counsel shared in the mistaken belief that the term of imprisonment was actually served. This was corrected when the sentence was reopened. It is clear

from his Honour's sentencing remarks that he did not regard the word "again" used by the prosecutor as referring to any other term of imprisonment.

[25] The applicant then refers to confusion about how many vehicles were actually stopped at the crossing at the time of the accident. However his Honour proceeded on the version of the facts advanced on behalf of the applicant.

[26] The concern that the respondent's summary on appeal of the applicant's traffic history erroneously referred to the offence of driving under the influence on 6 July 2003 rather than being in charge of a vehicle in a similar state has clearly had no effect on the sentence (the same error was made by the prosecutor below).

[27] The applicant contends that he was not speeding at the time of the impact with the complainant. His Honour's principal condemnation of the applicant was that he failed to keep a proper lookout but also concluded that he drove at "an excessive speed in the circumstances". Irrespective of whether or not the applicant was within the designated speed limit, he approached a pedestrian crossing at a speed which made it difficult to react appropriately at the pedestrian crossing. The applicant contends that it was momentary inattention which caused him to fail to observe the stationary vehicle.

[28] None of these matters suggest any doubt about the basis upon which the learned sentencing judge entered upon the sentencing process and it was not infected with an erroneous understanding of the facts.

[29] At sentence and before this court the applicant was concerned not to diminish in any way his responsibility for the injuries sustained by Mr Chislett.

[30] The applicant referred the court to a number of comparative sentences and submitted that by reference to them he was sentenced to a term of imprisonment which was manifestly excessive. He submitted that a sentence of three years suspended after serving 12 months would more appropriately reflect the trend of sentences for an offence for which he had pleaded guilty.

[31] The applicant contended that the learned sentencing judge had given too much weight to his problem with alcohol when it was not any part of the charge. When making the post prison release recommendation the learned sentencing judge did not suspend the sentence but recognised that the parole board would need to be satisfied about his rehabilitation from excessive alcohol consumption and his responsibilities as a driver. As mentioned, his counsel was specifically instructed to admit that the applicant had been drinking alcohol prior to his car striking the complainant. Further the condition in which he was found by police the following day and his traffic history would suggest that his earlier attempt at rehabilitation had not been successful. His Honour correctly identified the need for rehabilitation as something which would concern any parole board considering his application for post-prison community based release.

[32] However a consideration of the cases does suggest that the sentence of five years with a recommendation for eligibility for post-prison community based release after 20 months was outside the range for this offence. The prosecution had contended for a sentence in the range of three to four years. The applicant referred to a number of comparable cases. In *R v Conquest* [1995] QCA 567; CA No 395 of 1995, an

Attorney-General's appeal, a 17 year old youth driving a stolen motor vehicle, unlicensed and on a good behaviour bond, swerved across a major road at night onto the wrong side and collided with a group of five young people walking along the side of the road not on the carriage way. One was killed and two received serious injury. The offender had a previous criminal history although not for driving offences. It was expressly found that he was not driving at excessive speed and his bad driving had not been prolonged. A sentence of two years after a trial imposed below was increased to three years. McPherson JA and Thomas J in a joint judgment noted the increase in 1989 in the maximum sentence under s 328A of the Code for dangerous driving causing death or grievous bodily harm from five to seven years imprisonment. Their Honours said at p 5,

> "The factors that would take a sentence further towards the maximum level would include the seriousness of the driving, callousness or attitude that falls in the murky area between recklessness and deliberate harm, the period for which the dangerous driving was sustained, the seriousness of the consequences to the victims, the seriousness of the offender's criminal record (with particular emphasis upon his driving history and his attitude to fellow citizens), and whether the offender has little prospect of rehabilitation."

They concluded that the increase in sentence should be conservative keeping in mind that it was an Attorney's appeal and the submissions made by the prosecutor below that a sentence of two to two and a half years would be appropriate.

[33] In *R v Balfe* [1998] QCA 14; CA No 444 of 1997, a 54 year old man with little relevant criminal or traffic history drove his heavily laden prime-mover and semi-trailer into the back of a utility stationary at an intersection waiting to turn right on a busy country road in daytime with good visibility. Both young men in the utility who were brothers were killed. The speed limit was 80km per hour and there was no suggestion that the applicant drove in excess of it. The cause of the collision was found to be inattention. About 15 seconds had elapsed between the moment when the applicant should first have appreciated the presence of the stationary car and the fatal impact. The court accepted that this was prolonged, not momentary, inattentiveness. The sentence of three years imprisonment was described as "heavy" but not beyond the range of a sound sentencing discretion.

[34] In *R v Wilde; ex parte Attorney-General (Qld)* (2002) 135 A Crim R 538 the sentence for breach of s 328A was complicated by the need to fashion an overall sentence dealing with three disparate groups of offences. The respondent had driven into a group of cyclists riding in a cyclists' lane on the highway killing one and inflicting injury on another. The court said at 542-3

> "This was a case where the sentencing judge should have worked from a level approaching the maximum penalty of seven years. The case approaches the category of the worst examples of the offence, when one fully acknowledges the aggregation of the respondent's reckless inattention over a substantial distance, her reduced alertness through fatigue, her callous flight from the scene, her lengthy criminal and traffic history, her being unlicensed at the time, her then being on bail for other charges ... and her driving a stolen vehicle.

> While other cases have involved more sustained dangerous driving as such, it is the aggregation of all those many adverse features which put this case into a particularly serious category."

The court increased the sentence on the dangerous driving charge from two years and four months cumulative on other terms for an effective three years and 10 months to five years on the dangerous driving charge cumulative on a term of 18 months.

[35] Finally, in *R v Fripp* [2003] QCA 4; CA No 345 of 2002 the applicant was charged with 10 indictable offences and seven summary charges. Of those 10 offences, six were for unlawful use of various motor vehicles and two were for dangerous driving. In one of the latter police engaged the applicant in chases after ordering him to stop. Speeds of 130-140km per hour were attained in 60km per hour zones in traffic conditions that involved a considerable risk of death or serious injury to the driving public. The second count of dangerous driving occurred when the applicant in a stolen vehicle collided with the rear of the complainant's vehicle as she was driving out of a suburban supermarket in the morning. As a result of the collision the stolen vehicle was a write-off and the complainant's car suffered extensive damage. The complainant sustained personal injury which caused her grievous bodily harm. She required a number of operative procedures leaving her unable to walk except with the aid of a walking frame. As a 66 year old her quality of life was significantly impaired. Fripp was a 24 year old young man who had a traffic record involving 41 offences arising out of 26 separate incidents including 16 occasions of driving while disqualified as well as careless driving and speeding. He had some drug offences and had committed other offences whilst on bail or in breach of a suspended sentence. The court held that even with a plea of guilty the effective head sentence of 4 years was not excessive. The court concluded that the dangerous driving was not the result of momentary inattention.

[36] Although this applicant has a serious traffic history and is fortunate not to have killed or seriously injured anyone in the past when driving seriously affected by alcohol, this matter proceeded on the basis that neither alcohol nor excessive speed were aggravating aspects of the case. It must be observed, as did the learned sentencing judge, that leaving the scene of the incident meant he could not be tested for the consumption of alcohol. The applicant failed to observe due care at a pedestrian crossing when he ought to have been alert to the stationary vehicle already there. He lied to police in an attempt to conceal his involvement and tried to shift the blame to others. Whilst he eventually cooperated with police by pleading guilty he caused resources to be used unnecessarily by his denials and lies. The consequences for Mr Chislett have been ongoing and will affect the quality of the rest of his life. Nonetheless when the comparable cases are considered a sentence of five years imprisonment is manifestly excessive. The sentence which I would impose is one of three and a half years imprisonment with a recommendation for post-prison community based release after serving 18 months. The absolute disqualification from driving should stand and the activation of the suspended sentences to be served concurrently with the present sentence should also remain.

[37] The orders which I propose are application for an extension of time within which to apply for leave to appeal granted; application for leave to appeal granted; allow the appeal; set aside the sentence imposed below and in lieu thereof impose a sentence of three and a half years imprisonment with a recommendation for eligibility for

post-prison community based release after serving 18 months with an absolute disqualification from obtaining a drivers' licence. The order of the court below on 19 March 2004 activating the suspended sentences to be served concurrently with the sentence imposed for dangerous driving is affirmed.