SUPREME COURT OF QUEENSLAND

CITATION:	*R v D'Arrigo; ex parte A-G (Qld)* [2004] QCA 399
PARTIES:	**R** **v** **D'ARRIGO, Paul Joseph Thomas** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 315 of 2004 DC No 3125 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	26 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2004
JUDGES:	de Jersey CJ, McMurdo P and McPherson JA Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. The sentence imposed on 8 September 2004 be set aside** **3. The respondent be imprisoned for three and a half years** **4. Declare the respondent has served one day of that term in custody, from 7 to 8 September 2004** **5. The five year licence suspension and disqualification remains in place** **6. A warrant should issue for the arrest of the respondent, to lie in the Registry for 7 days pending execution**
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 – APPLICATIONS TO INCREASE SENTENCE – OTHER OFFENCES – where the respondent was convicted by a jury of the offence of dangerously operating a motor

	vehicle causing death – where the respondent was sentenced to three years imprisonment, suspended for an operational period of five years – where the Attorney-General appeals on the ground that the penalty is manifestly inadequate
	Arnold v Trenerry (1997) 118 NTR 1, cited *Le & Le v R* [1996] 2 Qd R 516, cited *R v Boyle* (1987) 34 A Crim R 202, cited *R v Conquest; ex parte Attorney-General* [1995] QCA 567; CA No 395 of 1995, 19 December 1995, cited *R v Edwards* (1996) 90 A Crim R 510, cited *R v Hardes* [2003] QCA 47; CA No 393 of 2002, 18 February 2004, cited *R v McGuigan* [2004] QCA 381; CA No 285 of 2004, 15 October 2004, cited *R v MP* [2004] QCA 170; CA No 42 of 2004, 20 May 2004, cited
COUNSEL:	L J Clare for the appellant B G Devereaux for the respondent
SOLICITORS:	Office of the Director of Public Prosecutions (Qld) for the appellant Legal Aid Queensland for the respondent

THE CHIEF JUSTICE: The respondent was sentenced to three years' imprisonment suspended after the one day he had spent in custody for an operational period of five years. He was disqualified for five years from holding a driver's licence. The sentence followed his being convicted by a jury of the offence, committed on 8 January 2002, of dangerously operating a motor vehicle causing death. The Attorney-General has appealed on the ground that the penalty is manifestly inadequate.

Some time after 4 o'clock on a Tuesday afternoon the respondent was driving along Wickham Street in Fortitude Valley when he collided with the vehicle of his victim which was crossing the road in front of him. On the evidence of

calculation, which was accepted by the learned sentencing Judge, the respondent's vehicle was travelling at at least 86 kilometres per hour. It was a 60 kilometre per hour zone. That calculation depended on skid marks and some other circumstances but it cannot be definitive of the actual speed of the respondent's vehicle because the vehicles were artificially stopped as will emerge from what I am about to say.

The respondent had been stationary two blocks back from the point of collision and had accelerated heavily over those two blocks then appreciating far too late the presence of the other driver. Other witnesses put the respondent's speed much higher than 86 kilometres per hour, up to 130 kilometres per hour for example. The attention of those observers was attracted by the loud noise made by the vehicle as it was accelerating. The force of the impact pushed the other vehicle onto the footpath and the vehicles were stopped only by coming into contact with a power pole. It was a built-up commercial area so that there was potential danger to other persons including pedestrians.

Alcohol was not involved but it was nevertheless a serious case of the dangerous operation of a motor vehicle causing death. The circumstance that the driving occurred over only two city blocks must be seen in the context of their being within a busy commercial precinct and the respondent’s deliberately driving and unnecessarily at grossly excessive

speed. The prosecutor submitted that the penalty should be three and a half to four years' imprisonment with an absolute licence disqualification. The maximum penalty was seven years' imprisonment.

The respondent had a significant prior criminal history. At the time of the offence he was 30 years old. On 27 October 1989 he had been sentenced to 12 months' imprisonment following his plea of guilty to a charge of dangerous driving. On that occasion he drove a stolen vehicle dangerously during a high speed police chase, reaching speeds of up to 150 kilometres per hour in a built-up area. He was also then sentenced for numerous property offences arising from a car stealing racket which the sentencing Judge styled as an orgy of criminal activity.

The respondent's traffic history also was significant. Since the end of 1999 he has accumulated five speeding tickets, his licence has been cancelled once and it has been suspended once. Two of the speeding violations occurred subsequently to this offence. Also, about two months after this offence, he was breached for creating unnecessary noise and smoke through the operation of his vehicle. He has, in short, demonstrated a lack of interest in responsible behaviour on the road.

The sole reason why the learned Judge suspended the term, virtually completely, was to allow the respondent to continue to discharge his role as sole carer of his then 16 month old

daughter. The whereabouts of the child's mother were unknown. The Judge acknowledged that the child attended a child care facility while the respondent was at work. The Judge was also influenced, generally, by the circumstances that the respondent had given up, as his Honour put it, the serious crime for which he was sentenced in 1989 and that he was following secure employment. But the Judge made it clear that the only reason he suspended the imprisonment was the consideration of the care of the child.

Mrs Clare, the Director of Public Prosecutions, appearing for the appellant, has submitted that the sentence should be varied from three and a half years to four and a half years' imprisonment with no suspension. Mr Devereaux, the Public Defender, appearing for the respondent, has submitted that the Judge was entitled in his discretion fully to suspend the term. The case was, he submitted, sufficiently exceptional to warrant departure from the general rule that a sentencing Court has little or no regard to the effect of imprisonment on third parties.

In my view, the learned Judge erred in suspending the term because of the respondent's position as sole carer of his daughter. The balance of authority supports the view that while hardship to third parties because of the imprisonment of a family member may, if rarely, be a relevant consideration, it must not overwhelm others such as the need for deterrence,

denunciation and punishment. See *Le & Le v R* [1996] 2 Qd R 516.

Indeed, the preponderance of authority is to the effect that this consideration may be brought to account only in exceptional or extreme circumstances. See *R v MP* [2004] QCA 170; *R v Boyle* (1987) 34 A Crim R 202; *Arnold v Trenerry* (1997) 118 NTR 1; and *R v Edwards* (1996) 90 A Crim R 510.

In the present case it is not as if the child would be left without care. Care will be provided in the usual way through the Department of Family Services. It is of some relevance to note also that the child is in the care of others during the day while the respondent is at work. Three cases support the range of three and a half years to four and a half years' imprisonment for which Mrs Clare contends. They are *R v Conquest; ex parte Attorney-General* [1995] QCA 567; *R v Hardes* [2003] QCA 47; and *R v McGuigan* [2004] QCA 381.

In *Conquest*, a 17 year old driver who was skylarking in a stolen motor vehicle drove onto the wrong side of the road, killed a pedestrian and caused grievous bodily harm to her two companions. On appeal, the Court increased the sentence from two to three years' imprisonment but was at pains to point out that the three year term imposed should not be considered as the upper limit of the appropriate range of sentence.

In *Hardes*, the respondent had pleaded guilty to dangerous operation causing death, failing to remain at the scene and disqualified driving. Because he pleaded guilty eligibility for parole was set at one third of the sentence. The driving in that case was less serious than in the present case. It involved the cutting of a corner. The offender's appeal was dismissed, Williams JA remarking that a term of three years' imprisonment was at the very bottom of the appropriate range.

McGuigan was a 49 year old with a past record comparable with this respondent's. He pleaded guilty to the dangerous operation of a motor vehicle causing grievous bodily harm. On appeal, he was sentenced to three and a half years' imprisonment with a recommendation for consideration of post-prison community based release after 18 months.
Points of distinction are the plea of guilty by McGuigan and the fact that his fault was momentary, a very short period of dangerous driving over only about 30 metres. In this case, where the respondent went to trial, caused a death, drove dangerously much more substantially, I cannot see, even allowing for its being an Attorney's appeal, that we can sentence this respondent for less than the three and a half year term imposed so very recently by the Court of Appeal on McGuigan.

In saying that, I acknowledge that McGuigan left the scene with a suspicion that he did so to avoid being tested for the presence of alcohol. He was not charged, however, with

driving while under the influence of alcohol, and the Court of Appeal dealt with the case on the assumption that alcohol was not involved. He was, furthermore, sentenced on the basis that when he left the scene he was unaware that he had caused personal injury.

This present case involved wilfully reckless driving which destroyed a life. The offence was committed by a person who had previously been imprisoned for dangerous driving and who had an otherwise significant traffic history. I consider that the respondent should have been sentenced within the range for which Mrs Clare contends.

Respecting the moderation which traditionally attends the disposition of Attorney appeals, I would now order that the respondent be imprisoned for three and a half years.
It must be said that the suspension imposed by the learned Judge involved a remarkable and unacceptable indulgence. Those who offend in this serious way cannot avoid incarceration by invoking family considerations especially where, as here, arrangements can be made for the responsible care of the child during the respondent's period in custody.

The circumstances of the child do not, in short, put the case into the extraordinary category where the interests of third parties may prevail. What was extraordinary here was that a driver with this past history, who took a life by his grossly irresponsible driving, should have avoided substantial

incarceration. The learned Judge's sentencing discretion plainly and starkly miscarried.

In the case of *Edwards*, to which I earlier referred, Chief Justice Gleeson, sitting in the New South Wales Court of Appeal, made the important point that:

> "Justice will not be seen to be administered evenhandedly if exceptions are made in cases which are not truly exceptional."

I would order that the appeal be allowed, that the sentence imposed on 8 September 2004 be set aside, that the respondent be imprisoned for three and a half years and that it be declared the respondent has served one day of that term in custody, that is, from 7 to 8 September 2004. The five year licence suspension and disqualification would remain in place. A warrant should issue for the arrest of the respondent to lie in the Registry for 48 hours pending execution.

McPHERSON JA: I agree with the reasons given by the Chief Justice and with the order he has proposed.

THE PRESIDENT: I too am persuaded the sentence was manifestly inadequate. The respondent was driving, at the very least, at 86 kilometres per hour in the 60 kilometre zone in Wickham Street, Fortitude Valley shortly before 4.30 p.m. on a weekday evening in January 2002. That speed was clearly a dangerous speed in the circumstances in a busy shopping and restaurant

area, frequented by pedestrians and slow-moving vehicles like that of the deceased.

His vehicle struck the deceased's vehicle as she was moving from his left to his right across Wickham Street from Alden Street towards Ballow Street. The impact forced her vehicle to move about 26 metres and to hit a steel post. To his credit he immediately went to her assistance. Tragically, she died shortly after admission to hospital. Her loss has been felt keenly and deeply by her close family members.

The maximum penalty was seven years imprisonment. The respondent did not have the mitigating factors of an early plea of guilty or extreme youth. He had a prior conviction in 1989 for dangerous driving. He was then only 17 years old but the learned sentencing Judge at the time regarded the dangerous driving as very serious because it involved a high speed chase with a police vehicle over a considerable distance in a built-up area at very high speeds between 100 and 150 kilometres per hour driving through several red lights and causing grave danger to citizens on the road. He was sentenced for this and for offences of dishonesty to 12 months imprisonment but the sentencing Judge observed that the offence of dangerous driving was the most serious of the offences.

It is true that the respondent has not committed serious criminal offences since that time. However, he has in recent

years a concerning traffic history for speeding offences in 1989 and again in 2000 and 2001. Of particular concern is that he committed further speeding offences after killing the deceased. On 26 July 2002 he exceeded the speed limit by between 15 and 30 kilometres per hour and he committed a similar offence on 15 June 2003.

The learned and experienced sentencing Judge considered that since his last episode of criminal offending in 1989 he had matured and given up serious crime and become responsible for his family, gaining secure permanent employment and taking on the sole responsibility for his 16 month old daughter whose mother's whereabouts were unknown. The respondent's counsel told the sentencing Judge that imprisonment would mean the child would, at least initially, have to be cared for by the State.

I note that the sentence was imposed from 8 September 2004 so that the child was conceived and born well after the commission of this offence. I note also that he has other children living in Victoria with their mother and that he does not contribute to the maintenance of these children.

I mention these matters not to detract from his commendable efforts in gaining employment and raising his 16 month old child but to set a full picture of his personal circumstances. The innocent 16 month old child is likely to suffer emotionally with the respondent's incarceration. In a case

where imprisonment may, but will not necessarily, be imposed a factor like this may well persuade a judicial officer not to impose a sentence of actual imprisonment. But it cannot save a sole care giver being sentenced for a serious offence warranting a substantial period of imprisonment from an appropriately salient penalty.

The matters which impressed the learned sentencing Judge were to the respondent's credit but could not overcome the important sentencing principles requiring general and personal deterrence in this serious example of dangerous driving causing death. A significant period of actual custody has to be imposed despite any resulting hardship likely to be rendered to his young child. I agree with the orders proposed by the Chief Justice.

MR DEVEREAUX: Did your Honour the Chief Justice order that a warrant lie for 48 hours?

THE CHIEF JUSTICE: Yes.

MR DEVEREAUX: I wonder would the Court-----

THE CHIEF JUSTICE: I said 48 hours, I should explain, because I assumed that your client would have appreciated the significant risk of his being incarcerated and would responsibly have taken steps already against that contingency.

MR DEVEREAUX: I am instructed that he does indeed appreciate the position and was given certain advice. The advice that he was given was that it is commonly the case that the Court will order a warrant to lie for seven days. That is his expectation. I wonder whether the Court would consider that indulgence.

THE CHIEF JUSTICE: Mrs Clare.

MRS CLARE: That is the usual practice, your Honour. Whilst I recognise the force of what your Honour says in the circumstances with that expectation I think there's little I can say against it.

THE CHIEF JUSTICE: Seven days. The orders are as I have indicated.
