SUPREME COURT OF QUEENSLAND

CITATION:	*R v Robinson* [2004] QCA 467
PARTIES:	**R** **v** **ROBINSON, David Nial** (applicant)
FILE NO/S:	CA No 330 of 2004 DC No 3205 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	3 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2004
JUDGES:	McPherson and Jerrard JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to amend the notice of appeal and to appeal the conviction dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON PLEA OF GUILTY – PARTICULAR CASES – where applicant sought to withdraw plea of guilty on appeal – where applicant pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm while adversely affected by alcohol – where applicant's BAC reading after incident was 0.06 per cent – whether that circumstance of aggravation made out on the evidence – whether failure to set aside plea would result in miscarriage of justice CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where applicant convicted of dangerous operation of a motor vehicle causing grievous bodily harm while adversely affected by alcohol – where applicant sentenced to two and a half years imprisonment suspended after nine months – whether

sentence manifestly excessive

Meissner v The Queen (1995) 184 CLR 132, cited
R v McGuire; ex parte A-G (Qld) [2002] QCA 439; CA No 197 of 2002, 18 October 2002, considered
R v Wickett [2003] QCA 57; CA No 359 of 2002, 20 February 2003, considered

COUNSEL: K A Mellifont for the applicant
B G Campbell for the respondent

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

[1] **McPHERSON JA:** I agree with Jerrard JA that this application for leave to appeal against sentence should be dismissed.

[2] Matters that lend weight to the conclusion that this is a serious example of dangerous driving meriting the punishment imposed is that it took place right outside the entrance to a suburban State school at or shortly after 3 pm when the children and their parents were, as everyone knows and can see on such occasions, milling around in readiness for going home. It therefore behoved the applicant to take extra care for the safety of those persons and particularly the young children, who are prone to act impulsively and unpredictably in conditions like those.

[3] Instead, the applicant drove his vehicle at an excessive speed estimated at some 20 kph above the prescribed limit of 40 kph in such an area. To avoid a car ahead of him, which was waiting to turn right and indicating an intention of doing so, he crossed on to his incorrect side of the road and predictably collided with a vehicle coming in the opposite direction. The impact drove his vehicle on to the fence near the entrance to the school. In doing so, it snatched the 7 year old complainant from his father's grasp and forced him against the fence.

[4] Happily the boy was not severely injured although it took him a year or more to recover from the broken fibia and tibula he sustained. Not unexpectedly he has been greatly affected by the experience, and his school work and sporting commitments have suffered. According to his parents' victim impact statement, he is visiting a psychiatrist for advice on his mental condition and to determine if any injury may have been caused by the accident. His parents and the family arrangements have suffered a good deal of dislocation and expense, and other children at the school have also had to receive counselling.

[5] This has all happened because the applicant was travelling too fast in an area where extreme caution in driving was plainly dictated by prevailing conditions. Why he was doing so has not been explained, nor do we know how much he had to drink before driving while holding a restricted licence. His parents have provided their statement of the effects of the experience on him which they have observed, saying that he was genuinely very sorry for having hit the complainant with his car; but his attempted suicide, to which they refer, is said to have followed a break-up with his long-standing girlfriend.

[6] His parents' conclusion of remorse on his part is not borne out by this behaviour since the accident on 2 September 2002. His previous bad traffic record has persisted since that date. It includes breaches for failing to stop at a red light (8 November 2002); exceeding the speed limit by more than 40 kph in Brisbane (12 July 2003); failing to stop at a red traffic light (25 July 2003); exceeding the speed limit by less than 13 kph (2 & 6 November 2003), all resulting in the suspension of his licence on 8 January 2004 and for demerit points on 15 January 2004. Added to this are traffic breaches earned by driving a defective vehicle (2 August 2003) and one that made unnecessary noise or smoke (12 July 2003). Before the accident he had criminal convictions for breaking and entering on at least three separate occasions and for breaching his probation order. Since the accident he has been convicted and fined for possession of a knife.

[7] This is not the behaviour to be expected from someone who has learned a sobering lesson from colliding with a small child outside a busy school at 3 o'clock on a weekday afternoon. On the contrary, it suggests that he is someone who, even after the accident, still does not care much at all about the safety or interests of others.

[8] For these reasons and those given by Jerrard JA, the sentence imposed on the applicant was merited and should not be interfered with.

[9] **JERRARD JA:** On 19 August 2004 David Robinson pleaded guilty in the District Court to a charge of dangerous operation of a motor vehicle causing grievous bodily harm and when adversely affected by an intoxicating substance. On 16 September 2003 he was sentenced to two and a half years imprisonment, to be suspended after he had served nine months, with the remainder suspended for an operational period of three years. He has applied for leave to appeal against that sentence, on the ground that it is manifestly excessive.

The offence

[10] The offence was committed in Ogg road at Murrumba Downs in Queensland on 2 September 2002. Mr Robinson was then 23 years old and the holder of a provisional drivers' licence. Shortly after 3.00 pm that day he was driving along a two lane road which passes in front of the Undurba Primary School, where there is a 500 metre stretch of that roadway designated as a school zone in which the speed limit is restricted to 40 kph between 2.30 pm and 4.30 pm in the afternoon. At the time of Mr Robinson's offending, the school students had just been released from class and many of them were being picked up by their parents. The weather was fine and there was moderate to heavy pedestrian and vehicular traffic.

[11] As Mr Robinson approached the front entrance to the school at a speed estimated to be in excess of 40 kph and in the vicinity of 60 kph, another driver (a parent) stopped in the lane ahead of his, indicating an intention to turn right, and intending to perform a U-turn. Mr Robinson did not brake his vehicle, or slow down and pass that other vehicle on its left or passenger side. Instead, he swerved around it to its right and onto the incorrect side of the roadway. His vehicle collided with an oncoming one, with the front left hand or passenger side of those two vehicles coming into collision, and Mr Robinson's car continued across that incorrect side of the roadway and onto the footpath directly outside the school, where it hit a seven year old boy and the boy's father. The child suffered a fractured tibia and fibular

above the ankle, with a minor displacement of those bones, and bruising and tenderness to other parts of his body. The injuries if untreated were likely to cause permanent injury to health, although no permanent injury has resulted.

[12] Mr Robinson was subsequently breath tested and found to have a blood alcohol concentration of 0.06 per cent. Immediately after the accident he stepped out of his vehicle and repeatedly asked the boy's father if the child was "all right"; the father, who could smell alcohol on Mr Robinson's breath, told him to "get lost".

Prior criminal and driving record

[13] Mr Robinson has some prior criminal convictions, which show that he is a petty or minor previous offender, but still a repeat one. Referring only to the date of his offending behaviour, and not of the date of the convictions, in December 1997 he committed the offence of entering a dwelling with intent, when he would have been aged 18, and in April 2001 broke and entered a vehicle in the night time, and also stole. In August 2001 he was guilty of unauthorised dealing with shop goods.

[14] In November 2000 he offended against the *Drugs Misuse Act* 1986 by being in possession of utensils or pipes used in connection with the administration of a dangerous drug, and on 23 July 2000 was in unlawful possession of a dangerous drug. On 4 June 2003, when on bail in respect of this offence, he was unlawfully in possession of a knife in a public place.

[15] He had been placed on probation on 19 March 1999 for the offence involving entry to a dwelling house committed in December 1997, and had twice been dealt with for breach of that order, once on 22 March 2000 and again on 22 August 2001. That history of offences shows that he did not stop offending after being placed on probation.

[16] He has a poor driving record both before and after September 2002. His provisional licence was cancelled on 23 February 2000, after he had accumulated 8 points in the period November 1999 to January 2000. His drivers' licence was next cancelled on 16 July 2001, after he had accumulated 7 points and a conviction for unlicensed driving in the period from November 2000 to July 2001. He was punished twice for speeding in that period. As at September 2002 he held only a provisional license. A person aged under 25 who is the holder of a provisional licence commits an offence by having any concentration of alcohol in the blood when driving a motor vehicle, by reason of s 79(2A)(a) of the *Transport Operations (Road Use Management) Act* 1995.

[17] Next he received a warning letter on 23 August 2003, having accumulated a total of 18 demerit points in the period from February 2002 to August 2003. On two occasions he got demerit points for speeding and on another two for failing to stop at a red light. That period last described covers the one in which his offence of dangerous driving was committed; one of those speeding offences and both failures to stop at a red light were committed after his dangerous driving the subject of this application.

[18] Despite the warning given in August 2003 he then committed two offences of speeding in November 2003, and his license was subsequently suspended for both an accumulation of demerit points, and for "high speed". That driving record is of a driver who does not comply with the road rules, and the record is as bad or worse

after September 2002 than it was before. His driving behaviour was not altered by his knowledge that his driving had caused a child to be injured.

Personal matters

[19] Information placed before the learned sentencing judge did demonstrate that Mr Robinson had otherwise shown by his behaviour that he was genuinely troubled by what he had done, as well as showing that by repeatedly asking the child's father if the boy was "all right". Mr Robinson's parents informed the court by a hand written statement that Mr Robinson had become progressively more withdrawn after the collision, at first leaving his job and then needing to move back home with his parents. He had attempted suicide, been resuscitated, and had then spent three days in intensive care in the Royal Brisbane Hospital. He had continued thereafter to be withdrawn and no longer socialised with his friends. His depression had caused his parents a great deal of anguish and stress.

[20] He had a reasonable work record prior to the collision, having completed an apprenticeship as a boilermaker, and had worked for 15 months in that trade for Webforge. The foreman from it provided a reference, describing Mr Robinson as a good worker whose quality of work was exceptional.

Change of plea application

[21] When Mr Robinson was originally called on to plead by the associate to the learned judge, he pleaded guilty as charged. The learned judge, when subsequently informed that Mr Robinson's blood alcohol concentration was .06 per cent, became concerned as to the propriety of accepting a plea to the offence with the circumstance of aggravation that Mr Robinson was adversely affected by alcohol. His counsel informed the judge that Mr Robinson accepted that he was affected to some degree; following some prompting from the judge, evidence was called on that issue, and in the result the learned judge accepted that at the worst for Mr Robinson the adverse effect of the blood alcohol concentration of .06 per cent was that Mr Robinson's capacity to properly control a motor vehicle was affected to a minor degree.[1] It had taken some days to make the necessary arrangements and hear medical evidence on the issue of whether Mr Robinson's capacity would or might have been affected by the consumption of sufficient alcohol to return that reading, and after the evidence was given Mr Robinson's counsel sought leave to have the plea of guilty to the indictment with that aggravating circumstance set aside.

[22] The oral evidence on the issue of the effect of a .06 per cent concentration was confined to the opinion of two Government Medical Officers, neither of whom had examined Mr Robinson that day, or at any time when he was .06 per cent. A Dr Buchanan said that a small proportion of the population would not be adversely affected at all by that concentration of alcohol in their ability to safely control a motor vehicle. A Dr Osborne added that because of individual tolerance for alcohol, he could not predict whether a particular individual with that concentration would be adversely affected in properly controlling a motor vehicle. Those opinions were to the same effect as the one the prosecution had obtained for the committal hearing, and on which Mr Robinson's counsel at the sentence had relied

---

1 At AR 90

in advising Mr Robinson to plead guilty as charged. It relevantly advised that "…depending on tolerance, the ability to control a motor vehicle may be affected."

[23] After hearing the evidence and cross-examination on the issue of the effect of that concentration of alcohol in the blood, the learned judge declined to allow Mr Robinson to change his plea. Mr Robinson now asks this court for leave to amend his Notice of Appeal to include an appeal against conviction, by which appeal he again seeks to set aside that plea to the offence with that circumstance of aggravation. He seeks either a trial, or a sentence hearing, in which the existence of the circumstances of aggravation will be contested by him all over again. He had contested it in September 2004, when asking for leave to change the plea.

[24] The course the learned judge followed reflected the judge's original unease at acting on the plea, when informed of the relatively low reading. The thrust of the evidence led was that if Mr Robinson was like the majority of the population, he was adversely affected by alcohol when .06 per cent, including in his capacity to control a vehicle; there was always the possibility his tolerance for alcohol meant he was not. The learned judge was correct in not allowing Mr Robinson to change his plea after that evidence was given, since it did not reveal that any miscarriage of justice would occur from the court acting on his plea admitting the aggravation that he was adversely affected by alcohol.

[25] The judgment of the High Court in *Meissner v The Queen* (1995) 184 CLR 132 establishes that the critical issue on an application of this sort is whether a miscarriage of justice has resulted from a plea of guilty. That is not established when a plea of guilty has been voluntarily and freely entered, in the interests of the person making the plea, even if that person is actually innocent. Here Mr Robinson made the choice to admit at least some degree of adverse affection by alcohol, based on the available evidence. The alternative was to argue to the jury that despite the fact his breath smelt of alcohol, and despite his dangerous driving, they would not accept that he was adversely affected by alcohol that day when .06 per cent. That would be a risky course. It might have required the jury to accept it was possible he had a high tolerance for alcohol, presumably from his experience in drinking it. On the evidence the sentencing judge heard, Mr Robinson would have a challenging task in winning on that issue. Further, on the evidence the judge heard, Mr Robinson could be sentenced only on the basis of being affected to a minor degree, and his consumption of alcohol seems to have played no part in the sentence imposed. The sentencing judge was accordingly correct in refusing to set aside the plea. The degree of adverse affection was not established by the plea, which conceded no more than the existence of some, perhaps minor, effect. No miscarriage of justice could result from Mr Robinson making an informed choice, as he did, to admit that inexact and minor degree of adverse affect.

[26] The concession originally made by his counsel to the learned sentencing judge before any oral evidence was heard seems a common sense one, as was the finding the judge made after hearing evidence. That finding was not challenged on this application. If the issue of that circumstance of aggravation was litigated all over again before a different judge, or judge and jury, and it was established adverse to Mr Robinson, that different judge would be entitled and in all likelihood would come to both the conclusion announced by Mr Robinson's counsel at the sentence, and the same conclusion on the evidence as did the learned sentencing judge,

whether or not the issue was settled by a jury's finding against Mr Robinson, or on a contested sentence pursuant to s 132 of the *Evidence Act* 1977.

The sentence

[27] Regarding the severity of the punishment, Mr Robinson's driving exhibited a failure to responded adequately to the circumstances in the surrounding environment, including the behaviour of other road users and the nature of the area past which he was driving. The parliament has required drivers to slow down when passing schools around the times when children are arriving and departing. Mr Robinson's inattention was not just momentary, and not just to the fact that the vehicle ahead of his had stopped in front of him; he had not responded to the fact that he was approaching a school as children were leaving it and their parents were collecting them.

[28] His sentence was heavier than that imposed in *R v McGuire; ex-parte A-G (Qld)* [2002] QCA 439. That respondent had been convicted of dangerous driving causing grievous bodily harm. His blood alcohol concentration was 0.16 per cent, and that respondent was driving at 129 kph in what was normally an 80 kph zone, reduced to 60 kph because of road works whose existence was known to Mr McGuire. Police officers attempted to wave his vehicle down, but the vehicle preceding his responded to that signal, slowing and then stopping. The police officers conducting the random breath testing duties in the area of those road works were unable to wave that vehicle on, and Mr McGuire did not slow down until he was some 50 metres from it, when he braked heavily and his vehicle skidded, colliding with the rear of that car and then spinning across the road and into a parked police car. In the fracas which had occurred a police officer had injured his knee when leaping out of the way.

[29] Mr McGuire had a very bad traffic history but was originally sentenced to two years imprisonment fully suspended for an operational period of four years, as well as being fined $7,000.00; he had also pleaded guilty to a charge of driving a motor vehicle while under the influence of liquor. On appeal this court noted that he had a previous conviction for drink driving with a blood alcohol content of .091 per cent, another for driving with a blood alcohol level of .133 per cent, and nine for offences of speeding. He had a good work history and a large number of references were tendered on his behalf, and he had repaid $568.32 to the Main Roads Department for damage to its barriers. Nevertheless this court held that the penalty necessary to reflect his driving with a BAC of 0.16 per cent on the Pacific Motorway at high speeds in an area where road works were being undertaken, in a grossly irresponsible manner, and which resulted in injuries to a number of people and a great deal of property damage, required that he serve a term of actual imprisonment. He had entered an early plea of guilty and demonstrated genuine remorse, but was sentenced to two years imprisonment suspended after six months.

[30] That sentence was more than Mr Robinson's, whose BAC and speed was considerably less. As against that, Mr Robinson continued to breach important driving rules in the period before sentence when on bail, and had carried a weapon in a public place in that period. Further, Mr McGuire was the respondent to an Attorney's appeal, in which this court usually observes a self imposed rule of moderation.

[31] Mr Robinson's sentence was only a little less than that imposed on the applicant in *R v Wickett* [2003] QCA 57, where that applicant was convicted of dangerous driving causing grievous bodily harm, after deliberately driving too fast when leaving an underground car park at Southbank Parklands. After going up a ramp at what was described as an excessive speed, he stopped his vehicle, revved the engine in three or four sharp and short bursts, and then took off very quickly with squealing tyres. His car then fish tailed and crashed into a pylon. He had a BAC of 0.15 per cent, a significant criminal history, and a relevant traffic history, of which some had occurred after he committed the dangerous driving offence. While on remand he had driven while disqualified, and prior to his dangerous driving had driven under the influence of liquor.

[32] He had suffered for some time from chronic post traumatic stress disorder, resulting from sexual abuse by a parent, and on the day he drove dangerously had had a fight with his long term girlfriend resulting in his becoming distressed and consuming too much alcohol. That girlfriend subsequently died of a heroin overdose. Mr Wickett feared sexual abuse in prison, but this court upheld the sentence imposed on him of two and a half years imprisonment suspended after he had served 12 months.

[33] Mr Wickett's dangerous driving was deliberately done, after consuming much more liquor than Mr Robinson had taken. His criminal history seems comparable and his traffic history worse, in the sense that he had previously driven above the prescribed limit. It was otherwise comparable.

[34] It was appropriate that Mr Robinson receive a lesser sentence than Mr Wickett, as he did. Were it not for Mr Robinson's conduct after September 2000, his sentence should have been no worse than that imposed on Mr McGuire. Mr McGuire drove above the speed limit and fast, after drinking much more, and his dangerous driving was for at least as long a period as Mr Robinson's was shown to be. But Mr Robinson's driving behaviour while on bail is a significant point telling against a lesser sentence than Mr McGuire's, and against leniency, as it shows both that he has not responded positively at any stage during a relatively long opportunity to show a maturing judgment, and that he is a persistently bad driver not deterred by facing a very serious charge.

[35] Mr Robinson drove inattentively and therefore dangerously when approaching and adjacent to a school, and above the speed limit. While he was not driving fast, has otherwise suffered in his own life as a consequence of what he did to the complainant, and was shown to be affected by alcohol to only a minor degree, he was approaching the school at precisely the time children could be expected to emerge from it and parents attend to collect them, who would be concentrating on the children. In those circumstances the penalty imposed on him is not manifestly excessive and was a proper exercise of discretion.

[36] I would order that the application for leave to amend the notice of appeal and to appeal the conviction be dismissed, and that the application for leave to appeal against sentence be dismissed.

[37] **PHILIPPIDES J:** I agree with the reasons for judgment of Jerrard JA and with the orders proposed.