SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tabakovic* [2005] QCA 90
PARTIES:	**R** **v** **TABAKOVIC, Senad** (applicant/appellant)
FILE NO/S:	CA No 3 of 2005 DC No 2892 of 2004 DC No 2858 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2005
JUDGES:	McMurdo P, Jerrard JA and Fryberg J Separate reasons for judgment of each member of the Court, McMurdo P and Jerrard JA concurring as to the orders made, Fryberg J dissenting
ORDER:	**1. Grant leave to appeal against sentence** **2. Allow appeal** **3. That the appellant be sentenced instead to three years imprisonment to be suspended after he has served 10 months**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – applicant convicted of dangerous operation of a vehicle causing grievous bodily harm while adversely affected by alcohol – applicant's blood alcohol concentration was .152 per cent – applicant had no prior convictions but bad traffic history – whether the head sentence of three and a half years exceeded the appropriate range – whether the non-suspended period of 16 months was excessive *R v Ekstrom* [1997] QCA 471; CA No 229 of 1997, 23 September 1997, considered *R v Hine* [2002] QCA 212; CA No 31 of 2002, 21 June 2002, distinguished *R v McGuire; ex parte A-G (Qld)* [2002] QCA 439; CA No

197 of 2002, 18 October 2002, considered
R v Quinn [2003] QCA 417; CA No 241 of 2003, 22 September 2003, considered
R v Rowley [1998] QCA 339; CA No 240 of 1998, 26 August 1998, considered
R v Russell [2002] QCA 285; CA No 91 of 2002, 6 August 2002, distinguished
R v Simpson [2003] QCA 100; CA No 344 of 2002, 14 March 2003, considered
R v Wickett [2003] QCA 57; CA No 359 of 2002, 20 February 2003, considered

COUNSEL: C M Muir for the applicant
M J Copley for the respondent

SOLICITORS: MacDonnells Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with the orders proposed by Jerrard JA and with his reasons.

[2] **JERRARD JA:** On 10 December 2004 Senad Tabakovic pleaded guilty to having dangerously operated a motor vehicle on 18 October 2003, and having thereby caused grievous bodily harm to John Robertson, at a time when Mr Tabakovic was adversely affected by alcohol and when the concentration of alcohol in his blood exceeded 150 mg of alcohol per 100 ml of blood. That plea of guilty made Mr Tabakovic liable to 14 years imprisonment, and he was in fact sentenced to three and a half years imprisonment, that sentence to be suspended after he served 16 months. The learned judge fixed an operational period of five years, and disqualified him from holding or obtaining a license for five years. Mr Tabakovic has applied for leave to appeal that sentence, arguing that it is manifestly excessive.

[3] The circumstances of the offence were that at about 5.30 am on 18 October 2003 Mr Tabakovic was driving a Ford Fairmont motor vehicle in which his three year old son was a passenger, and was stopped at a set of traffic lights in Princess Street at Kangaroo Point, near Woolloongabba. He intended to turn left into Main Street. Two witnesses in a vehicle in the lane adjoining his in Princess Street described him as revving his car engine very loudly while waiting at the lights, and it appeared to those witnesses that Mr Tabakovic must have had his foot on the brake whilst revving the engine. When the lights turned green he accelerated heavily during his left hand turn into Main Street, with his wheels screeching loudly; and then his vehicle began to fishtail and veered up onto the curb and then the footpath. There it collided with the complainant, then a bus shelter, a wooden boundary fence of a McDonald's premises, and finally came to rest with the front wheels of the car raised up against a flag pole. The complainant sustained serious injuries, including a laceration to the back of his head and a very large one to his chest. He would have bled to death without medical intervention at the Princess Alexandra Hospital emergency ward, and there were in the order of 200 stitches required for that wound. The injuries had a huge impact on the complainant's life, and he received intensive physiotherapy to ensure a broken collar bone functioned properly.

[4] Mr Tabakovic told the police that he had been out drinking the previous evening and had consumed a large quantity of alcohol, returning to his home at around 2.00 am. He had had at most three hours sleep. His wife, who had had part of her pancreas and part of her spleen removed because of a tumour, and who was suffering from both deep vein thrombosis and depression, had been off work for eight weeks at that stage and in hospital for two; she was by then back at work but still recovering from an operation. Mr Tabakovic had taken his three year old son to McDonalds to allow his wife to sleep. His blood alcohol concentration was .152 per cent. He lived in a nearby street.

[5] The prosecution described the complainant as having made a reasonable recovery from his injuries after 12 months of effort, and submitted that Mr Tabakovic's driving was not a case of momentary inattention, but rather deliberately driving in a reckless way. It was deliberately foolish driving, but over a very short distance. His reading slightly exceeded .15 per cent. He had no prior criminal history or any convictions for drink driving. His driving history included five offences of speeding on and after November 2000, and a failure to stop at a red traffic arrow. His license had been suspended in May 2003 because of an accumulation of demerit points.

[6] Mr Tabakovic pleaded guilty, by way of an ex-officio indictment. He had requested the complainant's address and details from the police officer who interviewed him, so that he could write a letter of apology to the complainant. He and his wife were paying off the cost of the repairs to the bus shelter, approximately $10,000 and at the time of sentence had reduced the debt to $5,942. He was 28 at the time of the offence and born and raised in the former Yugoslavia, where his family home was destroyed in one of the wars. He left his homeland aged 17 (his brother was killed when a child when playing with a bullet that exploded) and Mr Tabakovic obtained a residency visa for Australia in 1994. He spoke no English but soon learned it and has been in steady employment in this county, including self-employed when charged.

[7] The learned sentencing judge clearly enough took into account, when suspending Mr Tabakovic's sentence after he had served one third of it, the fact of his plea to the ex-officio indictment and the other described circumstances evidencing remorse for his conduct and preparedness to compensate the victims of it. However, his counsel urges the submission to this Court that the judge nevertheless erred in imposing a head sentence which was slightly above the top of the range for which counsel contended, and likewise in suspending the sentence at a time later than when counsel contended was appropriate. The argued for sentence was three years, suspended after Mr Tabakovic had served between eight to 12 months of that sentence.

[8] Ms Muir, counsel for the applicant, relied principally upon the decisions of this Court in *R v Hine* [2002] QCA 212, *R v McGuire; ex parte A-G* [2002] QCA 439, *R v Wickett* [2003] QCA 57, and *R v Quinn* [2003] QCA 417, in support of a lower head and non-suspended sentence. She also argued that in *R v Simpson* [2003] QCA 100 the offending behaviour and circumstances generally were worse, whereas that applicant had received a comparable sentence to Mr Tabakovic, demonstrating that the latter's was excessive. The DPP referred, in support of the sentence, to *R v Hine*, to *R v Russell* [2002] QCA 285, and to the older matters of *Ekstrom* [1997] QCA 471 and *Rowley* [1998] QCA 339.

Decisions on which the applicant relied

[9] In *R v Hine* that applicant had pleaded guilty to an offence of dangerous operation of a motor vehicle causing grievous bodily harm while adversely affected by an intoxicating substance. The BAC there was .139 per cent, and accordingly that applicant faced a maximum term of 10 years imprisonment, whereas Mr Tabakovic faced a 14 year head sentence. That applicant had driven his motor vehicle into the rear of another vehicle stationary at traffic lights, propelling it a distance of 70 metres into a telephone poll, and the impact resulted in the complainant driver of that vehicle suffering lasting physical and personal effects, including brain damage.

[10] Mr Hine, who was a 26 year old offender, was sentenced to four years imprisonment with a recommendation that he be considered for post-prison community based release after 18 months. He had driven through a red light at an intersection approximately 100 to 150 metres distant from the point of collision, travelling at a speed in excess of the 60 kph speed limit. He admitted a speed of 80 to 90 kph, and applied his brakes only eight metres away from the point of collision. The road surface was dry and there was a system of street lighting. Visibility was good. He had a good work history, no criminal convictions, and one traffic record for driving at a speed in excess of 30 kph over the speed limit. His application was dismissed by a majority of this Court. Ms Muir sought to distinguish that case and to rely on it by the submission that the victim there suffered far more serious grievous bodily harm. McPherson JA had observed in that case (at [5]) that the results of any accident may often be a matter of chance, but that in sentencing in such cases it was impossible to ignore the outcome of the offending conduct and its impact on the individual who was the victim of it. Those observations, in a case where the sentence upheld on appeal was more severe than Mr Tabakovic's, and where the maximum term that offender faced was less, do not demonstrate that Mr Tabakovic's sentence was manifestly excessive. What was more serious in Mr Hine's driving was that it was demonstrably dangerous for over a much longer period than Mr Tabakovic's was. That difference would justify the severer sentence imposed on Mr Hine.

[11] In *R v McGuire* the Attorney-General appealed against a sentence of two years imprisonment fully suspended, together with a $7,000 fine with two years to pay, imposed on the respondent who had pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm with the circumstance of aggravation that Mr McGuire was adversely affected by alcohol which exceeded 150 mg of alcohol per 100 ml of blood. Mr McGuire, who was 27 when offending, had been driving his car towards the Gold Coast at a speed recorded at 129 kph on the Pacific Motorway in an area where road works were being conducted and where the speed limit, 80 kph, was reduced to 60 kph because of those road works. Police officers were performing speed detecting and random breath test duties on that highway at that point, and unsuccessfully attempted to wave on another vehicle which had stopped in response to signals from an officer holding a torch, and who had intended to flag down Mr McGuire's vehicle. Mr McGuire did not slow down until he was about 50 metres from that other vehicle stopped in front of his, then braked heavily, and his vehicle skidded. It collided with the rear of the stationary vehicle, resulting in its spinning across the road and into a police vehicle nearby. A police officer injured his knee sufficiently badly to constitute grievous bodily harm when taking action to avoid the spinning vehicle.

[12] Mr McGuire's blood alcohol level was .16. He had no criminal history but a very significant traffic history, which included two prior convictions for drink driving and nine speeding offences. His licence had been cancelled on 2 January 2001 due to an accumulation of demerit points. He was driving on a provisional licence at the time of the offence. This Court allowed the Attorney-General's appeal and ordered the sentence of two years be suspended after Mr McGuire had served six months of it. His manifestly dangerous driving was considerably worse than Mr Tabakovic's, since he travelled at double the speed limit and while having a higher BAC than Mr Tabakovic did. He had obviously driven while significantly impaired by alcohol for a much longer distance than that over which Mr Tabakovic so drove. His driving history was far worse than Mr Tabakovic's. Mr McGuire's sentence was significantly less than Mr Tabakovic's, though the former's driving and driving history were worse. That decision supports Ms Muir's complaint that the head sentence was manifestly excessive.

[13] In *R v Wickett* that applicant had pleaded guilty by way of ex-officio indictment to one count of dangerous operation of a motor vehicle causing grievous bodily harm while adversely affected by alcohol. The maximum term he faced on that plea was a 10 year sentence, unlike each of Mr McGuire and Mr Tabakovic. He was sentenced to two and a half years imprisonment, suspended after 12 months. He had been driving his vehicle in an underground car park, taking corners too quickly and travelling at an excessive speed. He then stopped his car quickly, revved the engine in three or four short sharp bursts, then took off very quickly, with his tyres squealing. His car fishtailed and when he attempted to counter steer it, he crashed it into a concrete pylon. His passenger suffered grievous bodily harm from a knee injury, from which the passenger had recovered. Mr Wickett had a BAC of .15, and had previous convictions for disqualified driving in March 2001, careless driving, driving without due care and attention, and driving with a BAC of .045 while on a provisional licence. He also had a series of relatively petty convictions for offences of dishonesty, drugs, and malicious damage in New South Wales. He had pleaded guilty at an early stage by way of ex-officio indictment and expressed remorse. The Court, referring to *McGuire*, and other cases referred to in the judgment, held that the sentence imposed was not manifestly excessive.

[14] I observe that the demonstrably poor driving there was over a longer period than Mr Tabakovic's, albeit it was still over a short period. Mr Wickett's traffic history was worse. The sentence upheld on appeal was lighter than that imposed on Mr Tabakovic, although Mr Wickett was younger – only 21 – when he offended. Mr Tabakovic was a 28 year old married man when he offended; the personal circumstances of his wife's illness, and that being the reason for his being out and about at that time of the morning, are a comparable mitigating circumstance to Mr Wickett's relative youth. The result is that the sentence imposed on Mr Tabakovic seems high by comparison.

[15] In *R v Quinn* that applicant pleaded guilty to an ex-officio indictment charging one count of dangerous operation of a motor vehicle causing grievous bodily harm with a circumstance of aggravation, namely that the offender was adversely affected by alcohol with her BAC being in excess of 150 mg per 100 ml of blood. She was sentenced to three years imprisonment suspended after 12 months, and this Court dismissed her application for leave to appeal. She had consumed alcohol at the Cairns Casino, argued with her boyfriend, then picked him up in her car as he was walking home. He realised she was intoxicated and twice asked her to stop the car

so that he could get out. She did not do so, and then drove through a stop sign at an intersection at a speed in excess of 70 kph, resulting in a collision with another vehicle. Her boyfriend informed the prosecuting authorities that earlier that night she had driven through the same intersection, commenting at the time that she never stopped at the stop sign there because she considered it to be on the wrong road. Her BAC at the time of the collision was .188 per cent. She was 25, had no relevant criminal history, and a very limited traffic history which included one loss of point in 2002 for exceeding the speed limit. She was pregnant at the time she was sentenced.

[16] The judgment of this Court on the appeal records that her counsel agreed with the proposition that the range for the head sentence was between three to four years, and the Crown submitted to this Court on sentence that that "normal tariff" was often suspended after a period of between 18 months and two years. Those submissions by each counsel generally accord with the sentence imposed in this case. The sentence she received was described as "clearly not a lenient" one, but not outside the range of a proper exercise of the sentencing discretion. Her dangerous driving was a more aggravated variety than Mr Tabakovic's since she was twice warned to stop before deliberately ignoring a stop sign; and it appears she had driven for a longer period than he did when adversely affected by liquor. The sentence of three years imprisonment suspended after 12 months upheld in her case, and described as not lenient, supports Ms Muir's submission that this sentence fell outside the appropriate range, despite counsels' submissions repeated by the court.

[17] In *R v Simpson* that applicant pleaded to one count of dangerous operation of a vehicle causing grievous bodily harm while adversely affected by liquor. He was originally sentenced to five years imprisonment with a recommendation that he be eligible for post-prison community based release after 22 months; this Court reduced that to a sentence of four years imprisonment suspended after 18 months. He was 25 years old with a significant criminal history with a steady stream of appearances for relatively minor offences, but who had no relevant traffic history. He entered an early plea of guilty, and expressed remorse.

[18] The circumstances of his offending were that he had driven his partner's motor vehicle away from a bowls club with six passengers, some of whom were also intoxicated, and after first driving slowly sped up to about 80 kph. He had failed to brake or negotiate a roundabout, driving straight though it with the right hand side of the vehicle on the raised roundabout, and his passenger told him to slow down and stop. His partner also told him to slow down. He ignored those requests and continued to drive at that speed. He was again told to slow down, and a passenger punched him in the face. He took his hands off the steering wheel and punched that person back, and the car veered onto the wrong side of the street and onto a gutter. When he endeavoured to regain control he steered the vehicle into a light pole. It was extensively damaged and three passengers were injured. Two were injured very seriously, one of whom was his partner. He was found to have a BAC of .263 two hours after the accident. When sentenced he was in employment and financially supporting his significantly disabled partner and her children.

[19] On his appeal this Court regarded the sentences upon which the prosecution relied, the matters of *R v Breckenridge* [2001] QCA 448 and *R v Haydon* [1996] QCA 503, as distinguishable. In those cases five year sentences were imposed. Both those offenders had very bad driving records, which in each case included more than one

conviction for driving under the influence of liquor. Each had readings comparable to Mr Simpson. Apparently because of the difference in the previous driving history, this Court lowered Mr Simpson's sentence, relying also upon his genuine remorse in the circumstances in which he continued to assist his complainant partner in her rehabilitation. There was also the hardship that his imprisonment caused to her. That applicant's very high BAC and longer course of demonstrably dangerous driving makes his case worse than Mr Tabakovic's but does not demonstrate the latter's lower sentence to be excessive.

[20] In this application the respondent Director particularly relied upon *R v Ekstrom* [1997] QCA 471; *R v Rowley* [1998] QCA 339; *R v Russell* [2002] QCA 285; and also referred to *R v Hine*. In *R v Ekstrom* that applicant was refused leave to appeal from a sentence of three and a half years imprisonment, with no recommendation for consideration for early release on parole, or any suspension of part of the sentence. She had pleaded guilty to dangerous driving causing grievous bodily harm while adversely affected by alcohol and with a BAC in excess of .15 per cent, namely .215. She too faced a 14 year maximum sentence; she had two prior convictions for driving with a blood alcohol content above the prescribed limit, and was not licensed to drive at the time of the incident for which she had been sentenced to imprisonment.

[21] That incident resulted from her attending a family dinner which had focused upon her father's terminal illness, and she had consumed a good deal of alcohol. On the drive home she collided with the rear of a taxi, drove away without stopping, and shortly after drove onto the incorrect side of the roadway and had a head on collision. The driver of the other vehicle suffered fractures of both femurs. The sentencing judge in her matter was informed that after the second collision in which the grievous bodily harm was caused, she had asked that the police not be called. She was 30 years of age, with university degrees and with a good employment position. The sentencing judge was satisfied that she was remorseful, and the submission to this Court on her application was that the sentence had been rendered manifestly excessive by reason of the absence of any recommendation for early parole. This Court dismissed her application, remarking that it was not the function of the Court of Appeal to re-sentence by imposing the sort of sentence that perhaps one or more members of the Court would impose had each of them been the sentencing judge. Rather, this Court's function was to determine whether the order made by a sentencing judge was manifestly excessive to the extent that it required the Court to interfere. That applicant had a significantly higher BAC than Mr Tabakovic and her demonstrated bad driving was over a longer course. She had a worse driving record. The identical head sentence upheld in her case suggests that Mr Tabakovic's sentence exceeds the permissible range for a short course of demonstrated bad driving by an applicant right on .15, with no prior convictions for BAC offences, or other criminal history.

[22] In *R v Rowley*, upon which the respondent particularly relied as a comparable case, that applicant had pleaded guilty by way of an ex-officio indictment to a count of dangerous operation of a motor vehicle causing grievous bodily harm with a circumstance of aggravation. His BAC was .182, and that 55 year old applicant had over taken another vehicle at a speed of about 100 kph in a 60 kph zone, entered an s-curve without braking, failed to negotiate the curb and then travelled onto the incorrect side of the road, colliding head on with another vehicle and causing severe injuries to the driver. The applicant himself was severely injured.

[23] That applicant's case involved excessive speed, driving on the incorrect side of the road, devastating injuries to another, and a BAC well in excess of .15. Mr Rowley's traffic history included a prior conviction for driving a motor vehicle with a BAC of 0.71, and a prior criminal history of convictions for drug offences and for stealing. He was sentenced to four years imprisonment with a recommendation for release on parole after 16 months, and the President's judgment records that counsel for both the prosecution and for Mr Rowley had submitted to the learned sentencing judge that four years was an appropriate head sentence in that case, a submission repeated by Mr Rowley's counsel on his application to this Court. I disagree with the respondent's submission on this appeal that the sentence upheld there supports the head sentence imposed here, since Mr Rowley's matter involves a longer period of demonstrated bad driving, a higher blood alcohol concentration, and a worse driving record. It really shows only that the head sentence imposed here was necessarily lower than the four years accepted as appropriate there.

[24] The last matter is *R v Russell* [2002] QCA 285, where that applicant would have failed to overturn a sentence of four years imprisonment with parole recommended after 18 months, had she not been diagnosed as suffering from an aggressive cancer by the time of her application for leave. That matter apart, she had pleaded guilty to one count of dangerous operation of a vehicle causing grievous bodily harm with the circumstance of aggravation that she was adversely affected by an intoxicating substance; her BAC was .139 a little under two hours after she had driven her car onto the incorrect side of the road and collided head on with another vehicle. Although a calculation had been undertaken by a Government Medical Officer suggesting that her BAC at the time of the accident would have been very close to .159 per cent, she was not charged with the further aggravating circumstance that it was in fact in excess of .15. Her blood analysis had also revealed the presence of tetrahydrocannabinol, considered by the GMO as amplifying the impairment caused by alcohol, but again no further aggravating circumstance was charged. She accordingly faced a maximum 10 year sentence, rather than 14.

[25] The complainant in that matter had been very severely injured and the applicant had a prior conviction 18 years earlier for driving with a BAC of .14 per cent, and for failing to remain at the scene of an accident. She had convictions from 17 years earlier for two offences of possession of a prohibited plant, and one nine years earlier for permitting her premises to be used for the commission of a crime.

[26] Her course of dangerous driving was prolonged, and occurred after she had been warned by others she was incapable of driving. A person with whom she had been drinking at a hotel had offered to pay for a taxi home for her, but she declined the offer; a hitch hiker who travelled for some distance in her vehicle described how she reversed into a tree, and her vehicle had later wandered within its lane and then drifted onto the incorrect side of the road. The hitch hiker had warned her not to drive anymore or else because she would end up killing somebody, and other road users also described erratic driving shortly before the accident. That included four unsuccessful attempts to start the vehicle while it was in gear, crossing double white lines, and weaving over a road surface.

[27] Mrs Russell was a 56 year old woman who herself suffered injury in a motor vehicle accident in 1970 resulting in her needing a walking stick from 1990 until 1998, when she had a full hip replacement, and who suffered from a serious problem of alcohol abuse. Her appeal would have been rejected had it not been for

the factor of her recently diagnosed cancer, with this Court holding that it was otherwise comparable to *R v Hine.*

[28] That applicant's very bad driving had been demonstrated over a far longer course of travel than Mr Tabakovic's, and that applicant had been twice warned to stop driving. Those features make her case much more serious than his and do not demonstrate anything other than that the head sentence here was appropriately fixed below four years.

[29] The cases to which this Court was referred, quoted at length herein, show that relevant matters in imposing sentence in such cases include, but are not limited to:

- the BAC, with the specific statutory increase in the maximum penalty from 10 to 14 years if the intoxicating substance is alcohol and the offender was over .15;
- the duration of the unbroken journey in which the offender had driven while the offender's capacity was adversely affected by alcohol or another drug;
- the distance over which an offender had been observed to drive in a manifestly dangerous way;
- whether that manifestly dangerous driving was the result of deliberate choice by the offender, or of carelessness, or inattention and if so whether prolonged or momentary, or the result of some other cause, such as drowsiness or drugs;
- the offender's prior traffic history and criminal history;
- the offender's plea;
- the extent of cooperation or non-cooperation with investigating bodies;
- other conduct indicative of remorse or of its absence; and
- matters personal to the individual offender.

[30] Sentencing in these matters is always difficult, and particularly where a Court is sentencing a person who would otherwise be unlikely to be in a criminal court dock. In the present application two of the described matters tell against Mr Tabakovic, namely his blood alcohol concentration of .152, and the fact that his bad driving was deliberate. The other relevant factors tell in his favour, save for his blemished driving history which although concerning did not involve alcohol. That result means that his head sentence should have been towards the bottom of the suggested three to four year range supported by both counsel (who were experienced) in *R v Quinn* in these matters, and which range is often demonstrated in the cases cited; though in *R v Wickett* and in *R v McGuire* the head sentence was less. Mr Tabakovic had taken some positive steps to demonstrate remorse, including paying some compensation for the property he damaged, and as remarked by the sentencing judge he had suffered substantially in his earlier life before coming to this country in 1993 and thereafter achieving an impressive employment record and otherwise demonstrating that he was a worthwhile and good citizen. In those circumstances, while bearing in mind the reminder given in *R v Ekstrom* about this Court's role, I consider the general interest of the community demonstrably better served by a

sentence which releases him to support his wife and child as early as is consistent with general deterrence, and that the learned sentencing judge gave too little weight to the matters in mitigation. I would give leave to appeal, allow the appeal, and order instead that he be sentenced to three years imprisonment to be suspended after he has served 10 months.

[31] **FRYBERG J:** The relevant facts are set out in the reasons for judgment of Jerrard JA. His Honour has analysed the relevant cases and I agree generally in that analysis. With regret, I differ from his Honour as to the conclusion to be drawn from it. In my judgment the sentence imposed, though high in the circumstances, was not manifestly excessive. I would have sentenced the applicant to imprisonment for three years, suspended after 12 months for an operational period of five years; but that is not the point. This court can intervene only if the sentence was manifestly excessive:

> "[I]t is not the function of this Court to re-sentence; to impose the sort of sentence that perhaps one or more members of this Court would impose if they were imposing it. It is the function of this Court to determine whether the order made by the sentencing Judge is manifestly excessive to the extent that it requires this Court to interfere with it and make the order which [it] is persuaded is necessary to prevent it from being manifestly excessive."[1]

Otherwise the court is rightly exposed to the charge of tinkering.

[32] I would dismiss the application.

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1 *R v Ekstrom* [1997] QCA 471.