SUPREME COURT OF QUEENSLAND

CITATION:	*R v Balic* [2005] QCA 212
PARTIES:	**R** **v** **BALIC, Fikret Frank** (applicant/appellant)
FILE NO/S:	CA No 57 of 2005 DC No 2137 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2005
JUDGES:	McMurdo P, McPherson JA and Williams JA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed to the extent of setting aside the sentence of seven years imprisonment and substituting in lieu thereof imprisonment for a period of five and a half years**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – GENERALLY – where applicant convicted after trial of dangerous operation of a motor vehicle causing grievous bodily harm whilst adversely affected by an intoxicating substance – applicant sentenced to seven years imprisonment – passenger suffered severe and permanent brain damage – whether the sentence is manifestly excessive *R v Frost; ex parte A-G (Qld)* [2004] QCA 309; CA No 142 of 2004, 27 August 2004, cited *R v Hine* [2002] QCA 212; CA No 31 of 2002, 21 June 2002, cited *R v Hoad* [2005] QCA 92,;CA No 434 of 2004, 8 April 2005, cited *R v McCormick* [2000] QCA 522; CA No 89 of 2000, 22

December 2000, considered
R v Merrill; ex parte A-G (Qld) [2002] QCA 263; CA No 86 of 2002, 25 July 2002, cited
R v Rahn [1998] QCA 338; CA No 180 of 1998, 6 August 1998, distinguished
R v Simpson [2003] QCA 100, CA No 344 of 2002, 14 March 2003, cited
R v Thumm; ex parte A-G (Qld) [1999] QCA 355; CA No 186 of 1999, 27 August 1999, cited
R v Wilde; ex parte A-G (Qld) [2002] QCA 501; CA No 283 of 2002, 19 November 2002, cited

COUNSEL: S A Lynch for the applicant/appellant
D L Meredith for the respondent

SOLICITORS: A W Bale & Son for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The relevant facts, comparable cases and issues in this application for leave to appeal against sentence are fully set out in the reasons for judgment of Williams JA.

[2] The prosecutor at sentence contended that the appropriate sentencing range was a term of imprisonment of seven to eight years and that a sentence of eight years imprisonment should be imposed. The applicant's lawyer at sentence agreed with that range, conceded that the injuries to the victim were serious and stated that the use of drugs pushed the appropriate sentence towards the higher end of that range.

[3] The comparable sentences to which this Court was referred during the hearing of the application for leave to appeal do not support the submissions made at sentence as to the appropriate range. Those submissions seem to have led the learned and experienced sentencing judge into imposing a sentence which was manifestly excessive. The only case which could in any way support a seven year term of imprisonment was *R v Rahn*.[1] Rahn's dangerous driving whilst adversely affected by methylamphetamine resulted in the death of another, whereas here the applicant's driving whilst similarly adversely affected caused grievous bodily harm. In both cases the maximum penalty was ten years imprisonment. In my view, the dangerous driving in this case, which caused serious, permanent, life-affecting injuries to the victim, was almost as serious as had death resulted. In *Rahn*, however, the victim did not in any way contribute to or acquiesce in the conduct resulting in the motor vehicle collision leading to her death. In this case, the voluntarily intoxicated victim appears to have travelled in the vehicle driven by the applicant knowing that he had recently ingested a large quantity of methylamphetamine. The driving offence in *Rahn* was but one of many criminal offences for which he was being sentenced. *Rahn* is distinguishable on its facts from this case.

[4] The many serious aspects of this case referred to by the learned judge in his sentencing remarks nevertheless justified a salutary deterrent sentence. His Honour rightly noted that there was very little to be said in favour of the applicant. He was

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1 [1998] QCA 338; CA No 180 of 1998, 6 August 1998.

a mature man with a concerning criminal and traffic history who drove a motor vehicle dangerously; as a result his niece, who was 35 years old by the time of sentence, suffered devastating permanent head injuries and is unable to live independently; he did not have the mitigating benefit of an early plea of guilty or significant cooperation with the administration of justice.

[5] I agree with Williams JA that the application for leave to appeal should be granted, the appeal allowed and a sentence of five and a half years imprisonment substituted.

[6] **McPHERSON JA:** I agree with the reasons of Williams JA and with the order he proposes for disposing of the application and appeal.

[7] **WILLIAMS JA:** After a trial the applicant was convicted of the dangerous operation of a motor vehicle causing grievous bodily harm whilst adversely affected by an intoxicating substance. By his notice of appeal he sought to challenge the conviction but at the outset of the hearing that was abandoned by his counsel. The Court then dismissed the appeal against conviction.

[8] The applicant was sentenced to seven years imprisonment and he seeks leave to appeal against that sentence on the ground that it is manifestly excessive.

[9] At approximately 6.20am on 15 May 2003 the Mazda 626 sedan motor vehicle being driven by the applicant collided with a telegraph pole in Vulture Street, East Brisbane. The applicant had spent the night at various clubs in the Fortitude Valley area and at about 6.00am returned to where his vehicle was parked. His niece, Aida Gavranovic, then a woman aged about 34, had been with him throughout the evening and she got into the front passenger seat of the motor vehicle. Another woman, Yvonne Dresser, was in the back seat; it appears she was asleep during the time leading up to the incident.

[10] Ms Gavranovic suffered severe and permanent brain damage as a result of the accident. She has permanent amnesic disorder and marked frontal lobe damage. She will require care in a supervised environment for the rest of her life. At the time of the trial she was an inpatient at the Ipswich Mental Health Unit.

[11] The applicant drove from Fortitude Valley, across the Storey Bridge, down Main Street, and then turned left into Vulture Street. From that intersection, travelling in an easterly direction, Vulture Street is one way. From about that point a witness, Ms Lockhart, observed the applicant's vehicle and his manner of driving. It appears from her evidence that she first observed the applicant's vehicle as she moved off from the traffic lights at the intersection of Vulture Street and Wellington Road; that is the first significant intersection after Main Street. She said "there wasn't all that many cars on the road" at that time of the morning. Her attention focussed on the applicant's vehicle when it came from the right hand lane into the left hand lane in which she was travelling without warning. After that she noticed that the vehicle kept drifting over "the dotted line in the middle of the road into the right-hand lane". She referred to it moving "backwards and forwards several times . . . without indication". She then noticed "it drifted on a slight angle until it hit a telegraph pole and it never braked and there was at no time any indication." The evidence established that the distance from the Wellington Road intersection to where the incident occurred was a little less than a kilometre. According to Ms Lockhart her vehicle and that being driven by the applicant were both travelling at about 60

kilometres per hour, the speed limit. It was not raining, but the road surface was wet.

[12] Under further questioning Ms Lockhart maintained she did not see the brake lights of the applicant's vehicle illuminated at any time, and maintained there was no sudden change in direction but rather always a gradual drift.

[13] The applicant gave evidence at his trial. His evidence was that he met his niece unexpectedly on 14 May 2003. He had booked into an hotel at Spring Hill and there, at about 6.45pm on 14 May, he and his niece shared 0.5 grams of "speed" taken intravenously. They then decided to go to various clubs at Fortitude Valley before taking his parents to the airport the following morning. He maintained he did not drink but that his niece consumed a quantity of whisky. His evidence was that at about midnight they orally consumed a bit more than half a gram of “speed”. It was then early morning that he went to his vehicle and commenced the fateful drive. It would appear from his evidence that he was confused as to where he was going. He mentioned going to either Highgate Hill or Springwood, but travelling in an easterly direction along Vulture Street was away from either of those areas.

[14] It should also be mentioned that according to the applicant in his evidence his niece became aggressive and argumentative during the journey. He claimed that just before the accident he told her he would stop to allow her to hail a taxi but that made her more agitated. According to him she then "started going for the steering wheel as well". He said: ". . .she started grabbing the steering wheel after hitting me in the left shoulder. That's when I hit the kerb and last thing I know I was hitting the telegraph pole . . .". Of course, because of the mental condition of Ms Gavranovic she was not able to answer those allegations.

[15] At 7.55am a specimen of blood was provided for analysis by the applicant at the Princess Alexandra Hospital. The certificate of the analyst established that the specimen contained 0.04 milligrams of amphetamine per kilogram and 0.68 milligrams of methylamphetamine per kilogram. The medical evidence from Dr Hoskins was that methylamphetamine metabolises to amphetamine and in consequence when a person had taken methylamphetamine one would find a small amount of amphetamine in the body. Dr Hoskins also gave evidence that the level of methylamphetamine found in the applicant's body was "a little over 13 times higher than the upper limit of the therapeutic range". In the opinion of Dr Hoskins with that level of methylamphetamine in the body the "crash risk would be increased" by at least 2.3 times.

[16] Of significance on the issue of penalty is the fact that the applicant has a significant criminal and traffic history in a number of States. Over a number of years going back to the 1970s he has convictions in New South Wales for breaking, entering and stealing, burglary, assault, and unlawful use of a motor vehicle; in Western Australia for breaking, entering and stealing; in South Australia for false pretences; and in Victoria for burglary. In Queensland he was convicted for drug offences in 1997 and 2003; he was fined for the latter offence on 4 April 2003, about six weeks prior to the incident giving rise to the offence now under consideration.

[17] Of more significance is the fact that on two occasions in Western Australia, in 1975 and 1976, he was convicted of drink driving. He was also convicted of that offence

in Queensland; the offence was committed on 12 March 2002 when his blood alcohol reading was 0.061 and he was convicted on 10 April 2002.

[18] It is also of significance that, between the commission of the offence in question on 15 May 2003 and his conviction on 15 February 2005, the applicant committed a number of drug and traffic offences. On 28 July 2003 he was convicted of a drug offence committed on 2 July 2003, on 31 January 2004 he was convicted of a further drug offence committed on 5 December 2003, and on 14 October 2004 he was convicted of drug offences committed on 27 May 2004 and 24 June 2004. He was also convicted on 14 December 2004 of a property offence committed on 3 December 2003. He was also fined for speeding offences committed in January and February 2004. The drug and traffic offences committed between the date of the offence and date of trial tend to show a lack of remorse and a lack of appreciation of the potential serious consequences of drug taking and speeding.

[19] In his sentencing remarks the learned trial judge referred to the fact that the voluntary ingestion of methylamphetamine resulting in a high level of that drug in the applicant's system at the relevant time was a very serious concern. He pointed out, correctly, that the applicant's admitted lack of sleep for over 24 hours meant that he was "an even greater risk at the wheel". Pointing out that the maximum penalty was 10 years imprisonment, the learned judge then indicated that the deterrent aspect of sentencing was "more than ordinarily important" in this case. No allowance could be made for co-operation with the administration of justice and no allowance for remorse. The learned sentencing judge also noted that the applicant's "criminal history would restrict allowances". He observed that the only mitigating factor was the applicant's reasonable work history.

[20] The learned sentencing judge then referred to the applicant's evidence that after the incident he gave up using methylamphetamine. Referring to the post-accident drug convictions the learned sentencing judge then described the applicant as a "hypocrite" and noted that he was using "such drug in next to no time when you got out of hospital".

[21] The use of the term "hypocrite" in the course of sentencing remarks is not helpful. Nor is the description of the applicant's evidence that his niece grabbed the steering wheel thereby causing the accident as "opportunistic cynical - almost nauseating evidence". Such intemperate descriptions of an offender's conduct can readily result in an objective observer concluding that the sentencing process has miscarried.

[22] The learned sentencing judge did not refer to any comparable sentences in determining that the appropriate penalty was seven years imprisonment.

[23] Counsel for the respondent sought to uphold the sentence imposed by referring to the decision of this Court in *R v Rahn* [1998] QCA 338. He candidly conceded that the other authorities referred to by counsel for the applicant would not support such a high sentence.

[24] Rahn was a 27 year old male, with a limited criminal history, who pleaded guilty to a variety of offences committed over a period of some months commencing in July 1997. There were some offences of dishonesty in that month. Then on 14 August 1997 he committed the most serious of the offences. On that date he dangerously drove a motor vehicle whilst affected by an intoxicating substance, amphetamines, and caused death. Subsequently on 30 October 1997 he committed a serious

example of the offence of threatening violence. Between July 1997 and January 1998 there were 14 offences of dishonesty and also an offence in September 1997 of uttering counterfeit money. The learned sentencing judge imposed imprisonment for six and a half years on the dangerous driving causing death charge, six months cumulative with respect to the threatening violence offence, and 12 months cumulative with respect to the property offences. That meant Rahn received an effective sentence of eight years imprisonment, but there was a recommendation he be considered for release on parole after serving three years.

[25] The dangerous driving causing death offence, which carried the maximum penalty of 10 years imprisonment, was committed in the following circumstances. Rahn was driving a vehicle, trailing a boat on a trailer, along a road at Camira. The deceased was driving in the opposite direction. Rahn's vehicle moved onto the incorrect side of the road and the driver of the other vehicle, a mother of young children, was killed. A blood sample from Rahn revealed "0.35 milligrams per litre of amphetamine and 0.64 milligrams per litre of methylamphetamine". The Government Medical Officer stated that the level of methylamphetamine was more than 12 times the upper limit of what he considered to be a normal concentration of that drug in the blood of a user. It was also noted that there was a disturbing psychiatric report relating to Rahn.

[26] It was in those circumstances that the submission was made that the combination of the sentences made the result overall excessive. This court refused the application for leave to appeal and in doing so noted that "the major sentence in this combined sentencing exercise was not manifestly excessive."

[27] In my view *Rahn* can be distinguished. The real issue was whether the combination of the sentences made the overall sentence, applying the totality principle, manifestly excessive. The penalty imposed for the driving offence had to be assessed against the background of the other offences committed at about that time. Further, although the maximum penalty is the same, the fact that death results from the driving usually demands the imposition of a higher penalty than that imposed where the consequence is grievous bodily harm.

[28] Finally, it is of real significance in my view that there was in that case a recommendation that Rahn could be considered for release on parole after serving three years.

[29] In all circumstances I do not consider that *Rahn* is an authority supporting a sentence of seven years imprisonment, without any recommendation, in this case.

[30] In the course of the hearing reference was also made to *R v Frost; ex parte A-G (Qld)* [2004] QCA 309, *R v Wilde; ex parte A-G (Qld)* [2002] QCA 501, *R v McCormick* [2000] QCA 522, *R v Hoad* [2005] QCA 92, *R v Hine* [2002] QCA 212, *R v Simpson* [2003] QCA 100, *R v Thumm; ex parte A-G (Qld)* [1999] QCA 355 and *R v Merrill; ex parte A-G (Qld)* [2002] QCA 263. In considering those cases it must be borne in mind that not all carried the same maximum penalty. Here, as already noted, the maximum penalty was 10 years imprisonment. Further, with the exception of *McCormick*, in each case there was a plea of guilty entitling the offender to some amelioration in sentence. *McCormick* was a case of dangerous driving causing grievous bodily harm whilst affected by an intoxicating substance, namely methylamphetamine. The offender's prime mover mounted the footpath and

caused serious injury to five people. He appealed against conviction and sought leave to appeal against the sentence of three and a half years imprisonment. The sentence was upheld.

[31] In the present case the applicant drove his vehicle after being without sleep for more than 24 hours and after voluntarily ingesting a significant quantity of methylamphetamine. He had three prior convictions for driving whilst under the influence of alcohol and had a significant criminal history. He was a mature man aged 49 at the time of the offence and his lack of remorse was exacerbated his continuing to offend between the date of the incident and the trial. Overall the circumstances of the case did not entitle the applicant to much, if any, mitigation in determining sentence.

[32] As already noted, in my view *Rahn* can be distinguished and the other authorities referred to do not support a sentence of seven years imprisonment. Taking everything into account a sentence of seven years imprisonment is manifestly excessive, and the appropriate sentence given all the circumstances, including the personal circumstances of the applicant, is imprisonment for a period of five and a half years. The period of disqualification should stand.

[33] I would therefore grant leave to appeal, allow the appeal to the extent of setting aside the sentence of seven years imprisonment and substituting in lieu thereof imprisonment for a period of five and a half years.