

SUPREME COURT OF QUEENSLAND

CITATION: *R v Gray* [2005] QCA 280

PARTIES: **R**
v
GRAY, Dean Robert
(applicant)

FILE NO/S: CA No 129 of 2005
DC No 2857 of 2004
DC No 463 of 2005

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 12 August 2005

DELIVERED AT: Brisbane

HEARING DATE: 1 August 2005

JUDGES: McPherson, Williams and Jerrard JJA
Separate reasons for judgment of each member of the Court, McPherson and Williams JJA concurring as to the order made, Jerrard JA dissenting

ORDER: **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 SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – applicant convicted of dangerous operation of a vehicle causing death and grievous bodily harm while adversely affected by alcohol – applicant sentenced to four years imprisonment suspended after 18 months – applicant’s blood alcohol concentration was 0.125 per cent – applicant had no prior convictions and was 17 years old when the offence was committed – psychiatric report tendered describing applicant’s remorse as ‘manifest and profound’ – whether in all the circumstances the sentence imposed was manifestly excessive

R v Antoney [2000] QCA 180; CA No 402 of 1999, 16 May 2000, considered
R v Cusak; ex parte A-G (Qld) [2000] QCA 239; CA No 90 of 2000, 16 June 2000, considered

R v Hine [2002] QCA 212; CA No 31 of 2002, 21 June 2002, considered

R v Hoad [2005] QCA 92; CA No 434 of 2004, 8 April 2005, distinguished

R v Russell [2002] QCA 285; CA No 91 of 2002, 6 August 2002, distinguished

R v Stephenson [1999] QCA 519; CA No 295 of 1999, 17 December 1999, considered

R v Tabakovic [2005] QCA 90; CA No 3 of 2005, 8 April 2005, considered

R v Thumm; ex parte A-G (Qld) [1999] QCA 355; CA No 186 of 1999, 27 August 1999, considered

COUNSEL: A J Rafter SC with S Ryan for the applicant
R G Martin SC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **McPHERSON JA:** I agree with the reasons of Williams JA. The application for leave to appeal against sentence should be dismissed.
- [2] **WILLIAMS JA:** On 28 April 2005 the applicant pleaded guilty in the District Court to a charge that on 31 August 2003 he caused the death Erica Leigh Kovacs and grievous bodily harm to Sophie Therese Fripp by the dangerous operation of a motor vehicle whilst adversely affected by alcohol. He was sentenced to imprisonment for four years but it was ordered that such sentence be suspended after 18 months with an operational period of four years. He was disqualified from holding or obtaining a driver's licence for a period of three years. He seeks leave to appeal against that sentence on the ground that it was manifestly excessive.
- [3] The applicant was born on 3 January 1986 meaning that he was aged 17 years and 8 months when the offence was committed. He was then in grade 12 at the Victoria Point State High School. He was just over 19 years of age when sentenced. As is frequently the case with a person convicted of this type of offence he had no previous convictions.
- [4] The applicant had obtained a provisional driver's licence on 8 July 2003, about six weeks prior to the commission of the offence, and that licence carried a zero alcohol limit. Material put before the sentencing judge indicated that the applicant had driven the motor vehicle in question on a number of prior occasions, and was familiar with the road on which the accident occurred.
- [5] The applicant and a number of other young people attended a 21st Birthday party at Capalaba on the evening of 30 August 2003. Between 1.30am and 2.00am on 31 August a fight broke out at that party and the applicant and a group of young people agreed to leave and return to the applicant's home. It was decided that the group would use two vehicles, a sedan and a dual-cab utility; the latter vehicle was owned by the parents of one of the applicant's friends at the party named Bloomer. On being informed that Bloomer considered himself too intoxicated to drive, the applicant said that he was "right to drive". The applicant then got into the driver's

seat with Bloomer alongside him in the front passenger seat. There were three male youths in the rear seat of the dual-cab. Three girls then got into the tray of the utility and lay down with their heads towards the front; Sophie Fripp was on the passenger side, Jessica Lambert in the middle, and Erica Kovacs on the driver's side. A tarpaulin was placed over them. At about the time the journey commenced Sophie Fripp yelled out to the boys inside the utility to drive safely.

[6] As the vehicle was driven by the applicant along Mt Cotton Road he caused the vehicle to "just suddenly starting swerving on the road"; it was described as "fishtailing". Bloomer "got right up him" and told the applicant to drive sensibly because there were people in the back. Bloomer said that if the applicant was not going to drive properly, he should stop, and Bloomer himself would drive. Another passenger referred to the applicant "turning the steering wheel and weaving the car from side to side on the road."

[7] When the vehicle was "fishtailing" or swerving on the road the girls in the back of the utility began banging on the rear window of the cab yelling out for it to stop. According to Bloomer after he berated the applicant he straightened the car up. Then, to quote Bloomer:

"I think then he just took his eyes off the road and next thing I know he has drifted off to the left-hand side and off the road almost hitting some trees. Just before this happened Dean was looking at me. He had to swerve back towards the road to avoid hitting the trees. Once back on the road he again had to swerve on the road but was losing control."

Once the applicant lost control of the vehicle it slid sideways, hit some trees and rolled. Erica Kovacs was killed instantly and Sophie Thrupp suffered very serious injuries to her abdomen and jaw. There is no doubt those injuries will have a serious and permanent effect on her. She was aged 16 at the time of the accident.

[8] Mt Cotton Road, Sheldon, where the accident occurred was a two lane bitumen carriageway in good condition. The road was relatively straight for some distance up to where the incident occurred.

[9] Police were contacted at 2.16am and went to the scene. It was noted that the applicant's eyes were bloodshot, his speech was slurred and he was unsteady on his feet. He was visibly upset and crying, but co-operative and polite to the police. At 3.24am a sample of the applicant's blood was taken which on analysis gave a reading of 0.125 per cent. There was evidence that the blood alcohol level would have been higher at the time of the accident. The applicant did not participate in an interview with police. There was a committal hearing which lasted some two days during which a number of witnesses, including the passengers in the vehicle, were cross-examined. It was after committal for trial that the plea of guilty was entered.

[10] At sentence a psychiatric report was tendered by counsel for the applicant which referred to the applicant suffering "protracted abnormal grief" and describing his remorse as "manifest and profound".

[11] The submissions addressed to this Court on behalf of the applicant contended that the learned sentencing judge failed to give sufficient weight to the applicant's youth, previous good character, and deep remorse. It was also submitted that the sentence

was out of line with sentences imposed in similar circumstances. It was also submitted that the learned sentencing judge failed to "take into account the dangers associated with sending a young person to prison for the first time."

- [12] The Court is dealing with a young man with no previous convictions, and they are important considerations when it comes to determining the appropriateness of the sentence imposed on him. But equally it cannot be overlooked that causing the death of a fellow citizen is one of the most, if not the most, serious offence known in our society. Killing by grossly negligent conduct is, of course, significantly less serious than intentional killing, but the criminal law for centuries has recognised that the consequences of criminal conduct play a critical role in determining the appropriate sentence. For example, dangerous driving causing death must attract a more severe penalty than similar driving which fortunately does not have such a consequence. Further, it is not irrelevant here on the issue of sentence, that the applicant did not only cause the death of one person, but he caused very serious life-threatening injuries to another person who will suffer the consequences for the rest of her life.
- [13] This was not simply a case of negligent driving. From the outset it is clear that the applicant knew that there were people in the tray of the utility who were in a very vulnerable position; knowing that, he was under a duty to drive even more carefully. Notwithstanding that, he deliberately drove in a dangerous manner by causing the vehicle to fishtail. He was then berated not only by the person beside him in the front of the vehicle, but he was reminded of the perilous situation in which the girls were placed by their banging on the cabin and calling out for him to drive safely. Notwithstanding all of that he continued to drive in a deliberately reckless manner which ultimately resulted in the death and serious injury.
- [14] Superimposed on all that was his extremely high blood alcohol content, particularly for a young person. Given the high reading he must have known when he started to drive that his capacity to do was impaired. That is aggravated by the fact that he was then only the holder of a provisional licence.
- [15] As was put by counsel for the respondent, this was a case of "deliberate bad driving". In those circumstances counsel for the respondent submitted that the sentencing judge, and this Court on appeal, should focus on the deterrent aspect of sentencing. It is true, as he submitted, that young men are over-represented in offences of this sort, and, as already noted, many have no previous convictions.
- [16] The real question for this Court is to determine whether sufficient allowance has been made for the youth and previous good character of the applicant. The psychiatric report, as noted, made much of the applicant's remorse, but again that is not an infrequent feature of cases of this type. A person of previous good character who kills someone, and maims another, as a result of dangerous driving under the influence of alcohol, usually subsequently exhibits deep remorse.
- [17] The experienced sentencing judge referred to the age of the applicant, his lack of a criminal record, and his having an "otherwise good background". He referred to the applicant's good family upbringing and the continued support that he had from a great many people. He went on:
"Sentencing for offences of this nature is never an easy task, nor is it ever a pleasant task. No penalty that I impose on you can ever fully

compensate those that have been affected by this offence. An offence of this nature has an adverse impact on so many people. This is something that you will have to live with for the rest of your life. It has had an impact not only on you, but on your family, and perhaps the greatest impact of all has been on the family of the young lady who so tragically and unnecessarily lost her life, and the other young lady who suffered serious injury in the incident."

[18] The sentencing judge then went on to refer to the extent of intoxication, to the fact that the applicant had been "deliberately swerving the vehicle prior to the incident" and to the applicant's "subsequent inability to control the vehicle" which in his view was significantly contributed to by the extent of alcohol consumption.

[19] The learned sentencing judge then went on:

"I have been referred to a number of authorities. In general, I think it is right to observe that the Court of Appeal in this State has signalled a hardening of sentencing levels, an increasing of sentencing levels in relation to offences of this sort in recent times. All of these cases are capable of being distinguished in one way or another. It may be that your manner of driving was not so reckless as it was in some of those cases, nor as prolonged as it was in some of those cases, but the particularly significant feature of your case was the blood alcohol reading and your willingness to drive with such a reading.

As I have said to you, the results of your driving is something you will have to live with for the rest of your life. It has had an enormous impact, an unnecessary impact on so many people and has resulted, in one case at least, in the completely unnecessary loss of life.

I have regard to your youth, I have regard to your plea of guilty. I accept in your case that you are genuinely remorseful. I have regard to your lack of previous convictions . . . These matters I intend to reflect in an order that you should be released after serving a portion of the sentence which must inevitably be imposed on you. I believe in your case there is sufficient reason for making such an order in preference to one for a recommendation for release which was made in some of the cases to which I have referred, including those cases which involve older accused with, in some cases, bad traffic histories.

Weighing all of these matters in respect to the indictable offence I sentence to you to four years' imprisonment, but I order that that sentence of imprisonment should be suspended after you have served 18 months thereof, and I will state a period of four years from the making of this order during you which you must not commit another offence punishable by imprisonment if you are to avoid being dealt with for that suspended term."

[20] Those passages from the sentencing remarks clearly indicate, in my view, that the sentencing judge took into account all relevant matters and did not fail to have

regard to any matter which was of relevance. It follows that the only basis for challenging the sentence is that it was simply too heavy in the circumstances.

- [21] Counsel for the prosecution at sentence referred to the sentences in *R v Thumm; ex parte A-G (Qld)* [1999] QCA 355, *R v Russell* [2002] QCA 285 and *R v Hine* [2002] QCA 212. They were also the cases relied before this Court by counsel for the respondent. At first instance counsel for the applicant argued for a head sentence in the order of three to four years, but submitted it should be suspended after nine months or no more than 12 months. In this Court senior counsel for the applicant conceded that a custodial sentence must be imposed, but contended that it should require the applicant to serve only somewhere between six and 12 months in actual custody. He referred the Court to a number of comparable decisions: *R v Cusak; ex parte Attorney-General* [2000] QCA 239, *R v Tabakovic* [2005] QCA 90, *R v Stephenson* [1999] QCA 519, *R v Antoney* [2000] QCA 180 and *R v Hoad* [2005] QCA 92.
- [22] In *R v Hine* the offender was aged 26 and pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm whilst adversely affected by an intoxicating substance. His blood alcohol reading was 0.139 per cent. He collided at speed with a vehicle stationary at traffic lights after previously having driven through a red light at an earlier intersection. He had a good work history, and no criminal convictions. The sentence of four years imprisonment with a recommendation for parole after 18 months was confirmed on appeal.
- [23] In *R v Russell* the offender was sentenced after a plea of guilty to four years imprisonment with a recommendation for parole after 18 months of one count of dangerous operation of a motor vehicle causing grievous bodily harm with a circumstance of aggravation that she was adversely affected by an intoxicating substance. Her blood alcohol reading was 0.139 per cent. In that incident the offender's vehicle travelled on the incorrect side of the road and collided head-on with another vehicle. Russell was a 56 year old woman who at the time of sentence had recently been diagnosed with cancer; she had other physical disabilities. Her course of driving prior to the incident was prolonged; she had been warned by others that she was incapable of driving. The Court of Appeal regarded the original sentence as appropriate, but for compassionate reasons recommended she be eligible immediately to apply for parole.
- [24] The decision of this Court in *R v Thumm; ex parte Attorney-General* was on an appeal by the Attorney-General against a sentence of four and a half years imprisonment with a recommendation for eligibility for parole after serving 15 months for the offence of dangerous driving causing death with a circumstance of aggravation that at the time he was adversely affected by alcohol. It was a plea of guilty but not a timely one. The deceased and his daughter were walking on a footpath when a motorcycle being ridden by the offender went out of control, went up onto the footpath, and struck and killed the deceased. The offender was unlicensed and had a rather significant traffic history. This Court varied the sentence by substituting a period of 21 months in lieu of 15 months as the time at which the offender would be eligible to apply for parole.
- [25] Counsel for the applicant relied very heavily on *R v Cusak; ex parte Attorney-General* because of some perceived factual similarity to the present case. The offender and his companions had been drinking at a hotel in Mt Isa and then left in a

utility with the offender driving. In addition to passengers in the front seat there were two further passengers in makeshift seats in the tray of the utility. The vehicle rolled and one of the passengers in the tray was killed. The offender had a blood alcohol content of 0.17 per cent and had no previous convictions. He had however a number of traffic breaches. On pleading guilty to dangerous driving causing death whilst adversely affected by alcohol he was sentenced to three years imprisonment wholly suspended for four years. On the Attorney's appeal this Court increased the sentence to three years imprisonment, suspended after nine months for an operational period of three years. The offender in that case was aged 24. The sentence was significantly increased by this Court but nevertheless it must be treated with some caution because of the element of moderation usually associated with increasing a sentence on an Attorney's appeal.

- [26] In *R v Tabakovic* the offender pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm whilst adversely affected by alcohol. His blood alcohol concentration was 0.152 per cent. He was sentenced to three and a half years imprisonment, suspended after 16 months, for an operational period of five years. The offender there accelerated quickly from a stationary position at traffic lights causing the vehicle to fishtail, mount the footpath and collide with a bus shelter. He had no criminal history and a limited traffic history. He was 28 at the time of the offence. This Court came to the conclusion that the sentence initially imposed was manifestly excessive and substituted three years imprisonment suspended after 10 months.
- [27] The offender in *R v Antoney* pleaded guilty to dangerous operation of a motor vehicle causing death while his blood alcohol concentration was 0.174 per cent, and was sentenced to four years imprisonment with a recommendation for parole after 15 months. He had two previous convictions for drink driving and had previously been sentenced to a suspended term of imprisonment. He drove through a stop sign at a railway crossing and collided with a train. The sentence was not interfered with on appeal.
- [28] The offender in *R v Stephenson* was convicted after a trial of dangerous operation of a motorcycle causing death while affected by alcohol, the blood alcohol concentration being 0.157 per cent. The motorcycle went through two red lights before crashing and killing the pillion passenger. The offender was 41 years old and had a moderate traffic history and a minor criminal history. He was sentenced to four years imprisonment with a recommendation for parole after 15 months. His appeal against sentence was unsuccessful.
- [29] The offender in *R v Hoad* pleaded guilty to dangerous operation of a motor vehicle causing death while affected by an intoxicating substance. She had ingested a significant quantity of methylamphetamine and other drugs. She was aged 24 and had fallen asleep at the wheel. The initial sentence was five years imprisonment suspended after 18 months but on appeal that sentence was varied so that it was suspended after she had served nine months. She was the mother of a young child and the court was influenced by the fact that she had been exposed to a number of traumatic events in her life.
- [30] That review of authorities indicates that a sentence of four years imprisonment, suspended after 18 months, with an operational period of four years where the dangerous driving whilst affected by alcohol resulted in the death of one person and

grievous bodily harm to another is within range. The only feature distinguishing this case from the others is that the applicant here is somewhat younger. But against that his driving was much worse than that involved in a number of the cases referred to and, as already noted, he not only killed one person but caused grievous bodily harm to another.

- [31] In my view the facts of this case establish deliberate reckless driving whilst intoxicated, and whilst the applicant was aware that there were young people in a vulnerable position in the tray of the utility. The dangerous driving continued after the applicant's attention was drawn to what he was doing and after pleas that he drive safely.
- [32] It is conceded by senior counsel for the applicant that the applicant must spend some time in actual custody and that significantly reduces the force of the submission that the learned sentencing judge failed to have regard to the danger of sending a young person to prison.
- [33] In the circumstances I am not persuaded that the sentence was manifestly excessive and the application for leave to appeal against sentence should be dismissed.
- [34] **JERRARD JA:** In this application I have had the benefit of reading the reasons for judgment of Williams JA, and the order His Honour proposes. I respectfully disagree that this application for leave to appeal should be dismissed.
- [35] This is because the sentence of four years imprisonment suspended after Mr Gray has served 18 months is slightly higher than the sentences imposed in *R v Cusak; ex parte A-G (Qld)* [2000] QCA 239, in *R v Antoney* [2000] QCA 180, and in *R v Stephenson* [1999] QCA 519. *R v Cusak* was an appeal by the Attorney-General; that respondent had also driven a utility in which a passenger was killed. Mr Cusak had lost control of it when rounding a corner, after having just previously travelled onto the incorrect side of the road when negotiating an earlier corner at too great a speed. He had a blood alcohol content of 0.17 per cent, and a history of breaches of the *Traffic Act* 1949 (Qld). He faced a maximum term of 14 years imprisonment, and on appeal this Court sentenced him to three years suspended after nine months.
- [36] Mr Cusak had pleaded guilty, as did Mr Antoney. Mr Antoney had a blood alcohol content of 0.174 per cent. He had two prior convictions for drink driving five years earlier. He drove through a stop sign at a railway crossing, killing a passenger in his vehicle. He had a criminal history as well, and the sentence upheld was four years imprisonment with a recommendation for consideration for parole after 15 months. Then there was *R v Stephenson*; Mr Stephenson was convicted after a trial of dangerous operation of a motorcycle causing death, while affected with an intoxicating substance, namely alcohol. His blood alcohol concentration was 0.157 per cent. He had driven through two red lights on a motorcycle, and then lost control on a turn. His passenger was killed. He had a traffic history which included a conviction for careless driving, seven convictions for speeding, and two for disobeying a red light. He also had a minor criminal history; he was sentenced to four years imprisonment with a recommendation for parole after 15 months.
- [37] Mr Gray killed one person and caused another grievous bodily harm, so a higher sentence for him may be justifiable than for those other offenders, even though Mr Gray has no prior convictions at all. However, Mr Gray is also a very young

person, aged 17 when he committed his dangerous driving causing both death and grievous bodily harm, and the information placed before the learned sentencing judge shows that Mr Gray was extremely remorseful, to the extent that a psychiatrist diagnosed him as suffering from a pathological syndrome of complex bereavement. I respectfully consider that when a very young offender demonstrates very genuine remorse, it is an error for sentencing courts to impose sentences which really reflect little more in mitigation than the fact of a plea of guilty, and without apparent recognition of either of those two other matters of remorse and youth, each of which relevantly mitigates what would otherwise be an appropriate penalty.

- [38] Accordingly, I would allow this application for leave to appeal against sentence, and while I would not disturb the head sentence which reflects the consequences of the dangerous driving, I would recommend that that four year sentence be suspended after Mr Gray has served nine months of it.