SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cunningham* [2005] QCA 321
PARTIES:	**R** **v** **CUNNINGHAM, Richard Jayde** (applicant)
FILE NO/S:	CA No 145 of 2005 DC No 303 of 2004 DC No 305 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED EX TEMPORE ON:	29 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2005
JUDGES:	Jerrard and Keane JJA and Fryberg J 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** **3. Period of disqualification from holding or obtaining a driver's licence be varied to a period of 14 1/2 months from 18 February 2005**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - GROUNDS FOR INTERFERENCE - GENERAL PRINCIPLES - where the applicant was sentenced to nine months imprisonment, suspended immediately, for an operational period of two years and was disqualified from holding a driver's licence for three years - where counsel for the prosecution and the defence had agreed that the court ought to consider a sentence of six months imprisonment wholly suspended for a period of 12 to 18 months - where neither side was given an opportunity to be heard as to whether or not a period of disqualification from holding a driver's licence should also be imposed - whether this breach of natural justice provided

sufficient grounds for the Court of Appeal to exercise the sentencing discretion afresh

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 GRANTED - PARTICULAR OFFENCES - OTHER OFFENCES - where the applicant pleaded guilty to one count of assault occasioning bodily harm, one count of wilful damage to a motor vehicle and another count of assault occasioning bodily harm in company - where it was submitted that a disqualification from holding a driver's licence for three years was excessive - where it appeared that the applicant used motor vehicles as a medium for manifesting a tendency towards personal violence - whether or not the period of disqualification that had been imposed was manifestly excessive in the circumstances

TRAFFIC LAW - LICENSING OF DRIVERS - QUEENSLAND - DISQUALIFICATION, CANCELLATION AND SUSPENSION OF LICENSES - where s 187 *Penalties and Sentences Act* 1992 (Qld) allows a person to be disqualified from holding a driver's licence in addition to any sentence otherwise imposed - whether a disqualification imposed pursuant to this section must run from the date of conviction or from the date of sentence

Penalties and Sentences Act 1992 (Qld), s 187

In re Hamilton; In re Forrest [1981] AC 1038, applied
R v Price [2005] QCA 52; CA No 30 of 2005, 4 March 2005, considered
R v Smith [2004] QCA 126; (2004) 145 A Crim R 397, considered
Re Criminal Proceeds Confiscation Act 2002 (Qld) [2003] QCA 249; [2004] 1 Qd R 40, cited

COUNSEL: J D Briggs for the applicant
S G Bain for the respondent

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

KEANE JA: On 18 February 2005, the applicant was convicted on his plea of guilty of one count of assault occasioning bodily harm and one count of wilful damage to a motor vehicle. On 5 May 2005, the applicant was convicted on his plea of guilty of

a further count of assault occasioning bodily harm while in company. The offences occurred between June and August 2003.

On 5 May 2005 the applicant was sentenced with respect to all three offences to nine months' imprisonment suspended immediately for an operational period of two years. He was also disqualified from holding or obtaining a driver's licence for three years. The application for leave to appeal against sentence relates to the disqualification from holding or obtaining a driver's licence.

As to the circumstances of the offences, on 14 June 2003 at 1.15 am, the applicant was a party to an attack on a motor vehicle driven by a Ms Mifsud, a person already known to the applicant, she having attended the same school as he. The applicant drove a motor vehicle so as to force Ms Mifsud's vehicle to a stop. The applicant's companions then attacked her vehicle with a bat or bottles inflicting damage worth $1,812.

On 17 August 2003 at 7 pm, the applicant parked his vehicle beside that of a Mr Beattie in the car park of a McDonalds Restaurant. After making some provocative remarks to Mr Beattie, the applicant got out of his car and made an unprovoked assault on him. Mr Beattie suffered a broken nose and two severely bruised eyes.

On 30 August 2003, just after midnight, the applicant joined in an assault on an intoxicated 20 year old male at a late

night eatery. The assaulted man suffered a cut to the head and serious damage to at least two of his teeth.

As to the applicant's circumstances, the applicant was born on 24 November 1985, making him 17 years of age at the time of the offences and 19 years of age at the date of sentence. He left school in year 11. He has since been in steady manual employment.

At the time of his sentence the applicant was living at home with his mother and family. The learned sentencing judge was told that the applicant had tried to refrain from drinking which was said to be the cause of his problems. Counsel informed his Honour that the family intended to move to the Gold Coast to remove the applicant from bad influences.

The Crown Prosecutor submitted that the Court ought to consider a sentence of six months gaol wholly suspended for an operational period of 12 to 18 months. The applicant's counsel agreed with that submission. The applicant's counsel then asked, "Can I be of any further assistance, your Honour?" The learned sentencing judge replied in the negative.

The learned sentencing judge referred to the seriousness of the charges. His Honour took into account the applicant's pleas of guilty and his general cooperation with the administration of justice.

The applicant complains of three errors in the sentence. First, he says that he was denied the opportunity to make submissions in relation to the licence disqualification. He also complains that the period of disqualification is so excessive that it renders the whole sentence manifestly excessive. Finally, it is said that because the applicant had pleaded guilty to the wilful damage offence on 18 February 2005, the period of disqualification should have commenced from 18 February 2005, not 5 May 2005 as ordered by his Honour.

The disqualification was evidently imposed pursuant to section 187(1) of the *Penalties and Sentences Act 1992* (Qld) in addition to the sentence otherwise imposed on the applicant. The Crown Prosecutor had made no submission on that subject. The learned sentencing judge gave no indication that he was minded to exercise the discretion vested in him by section 187(1)(b) of the Act.

To impose a penalty without allowing the person affected to have an opportunity to respond is a clear breach of the rule of natural justice that a court is required to follow. As Lord Fraser of Tullybelton, in a passage approved by this Court in *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40 at 49, said in *In re Hamilton; In re Forrest* [1981] AC 1038 at 1045:

> "One of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he, or someone acting on his behalf, may make such representations, if any, as he sees fit. That is the rule of *audi alteram partem* which applies to all

> judicial proceedings, unless its application to a particular class of proceedings has been excluded by Parliament expressly or by necessary implication."

It has been recognised in previous decisions of this Court that the principle described by Lord Fraser is as applicable to sentencing as it is to any other judicial proceeding. See, for example, *R v Moodie* [1999] QCA 125; CA No 439 of 1998, 14 April 1999.

It follows that it is necessary to accept the applicant's submission that the learned sentencing judge erred in failing to observe the need to afford the applicant's counsel the opportunity to address him in relation to whether a disqualification should be imposed. In such circumstances it falls to this Court to exercise the sentencing discretion afresh.

For the applicant, it is submitted that a lengthy disqualification would be unduly harsh in that it would create a risk of unemployment for the applicant. Compare with *R v Calder; ex parte Attorney-General* [1987] 1 Qd R 348 at 356 - 357.

It can readily be understood that a lengthy period of unemployment would be likely to create a heightened risk that the applicant would reoffend, and so would be inconsistent with the basis on which the applicant was given the benefit of a wholly suspended sentence.

Further, it was submitted for the applicant that the offence on which the disqualification was based, that is the wilful damage offence, did not reveal a need to protect the public from the applicant's driving as opposed to his proclivities to personal violence. The force of this submission is significantly diminished by the consideration that a circumstance of mitigation advanced on the applicant's behalf at first instance was that the consumption of alcohol played a significant part in the applicant's offending conduct. That submission must inevitably have carried with it the concession that the applicant was affected by alcohol while he was driving in June 2003. Further, it is clear that the applicant's proclivity for personal violence while in the company of his friends is closely associated with the use of motor vehicles in that the use of motor vehicles afford the opportunity for offending and is a medium by which his tendency to personal violence and aggression manifests itself. Compare *R v Nhu Ly* [1996] 1 Qd R 543 at 547 - 548, 550.

Finally, it was submitted the previous decisions of this Court imply that a disqualification for three years was excessive given the nature of the offences committed by the applicant. See *R v Gruenert; ex parte A-G (Qld)* [2005] QCA 154; CA No 439 of 2004, 13 May 2005; *R v Price* [2005] QCA 52; CA No 30 of 2005, 4 March 2005 and *R v Smith* [2004] QCA 126; (2004) 145 A Crim R 397.

The cases to which the applicant referred were all cases which might be described as cases of culpable negligence in the

operation of a motor vehicle. While the consequences for the victims in these cases were more serious than the consequences for the complainant in the first charge here, the deliberate use of a motor vehicle by the applicant as the means of expressing personal aggression is a counterbalancing concern.

That having been said, in cases such as *R v Price* and *R v Smith*, the period of disqualification of the order of two years was regarded as an appropriate means of protecting the community from those disposed to endanger the community by the reckless use of motor vehicles.

Having regard to the applicant's youth, and the likely impact of a long period of disqualification on his prospects of employment, and the submission of counsel for the respondent, my view is that a period of suspension of 12 months is an adequate punishment to vindicate the interests of the community and protection from the applicant's irresponsible use of motor vehicles.

Under the Act the period of disqualification must commence at the date of conviction of the offence connected with the driving of a motor vehicle. That this is so is apparent from the language of section 187(1)(b) of the Act. The applicant pleaded guilty to the offence of wilful damage to a motor vehicle on 18 February 2005. Any period of disqualification must commence from that date. Since the applicant had evidently enjoyed the benefit of his driver's licence for some two and a half months after he had pleaded guilty, a period of

disqualification of disqualification of 14 and a half months is, in my view, appropriate.

In conclusion, in my opinion, the application for leave to appeal against sentence must be granted. The appeal should be allowed and the period of disqualification from holding or obtaining a driver's licence varied to a period of 14 and a half months from 18 February 2005.

JERRARD JA: I agree with the reasons for judgment just pronounced by Keane JA and with the orders proposed by His Honour. In my opinion it was certainly open to the learned sentencing judge to impose an order disqualifying Mr Cunningham from holding or obtaining a driver's licence for a period set by the learned judge in respect of the offence of wilful and unlawful damage of a motor vehicle which happened on 14 June 2003. Clearly enough that offence committed by Mr Cunningham happened in connection with or arose out of his driving of his motor vehicle.

He drove his vehicle in front of the complainant's vehicle, slamming on the brakes, and parking sideways across a lane so that his motor vehicle blocked the complainant's vehicle from continuing. Then Mr Cunningham's two passengers deliberately and extensively damaged the windows of the other vehicle using implements.

I also agree with Keane JA that the learned judge ought to have invited submissions from Mr Cunningham's legal

representatives and from the prosecution before deciding upon an order disqualifying Mr Cunningham from driving a motor car. The powers given by s 187 of the *Penalties and Sentences Act* are apparently infrequently used; in any event, infrequently enough that neither the learned prosecutor nor defence counsel at the time would reasonably have anticipated that the sentencing judge might be considering making an order under it.

Accordingly the learned judge's error in not ensuring procedural fairness itself resulted in two other errors. One was the length of the period of the disqualification and the other was the incorrect assumption that that disqualification applied from the date of sentence whereas it is clear from the terms of s 187 of the Act that it applies from the time of the conviction. Hearing from the parties ensures that errors of the latter kind are avoided. I agree with Keane JA as to the appropriate order for the length of disqualification.

FRYBERG J: I agree with the orders proposed by Justice Keane and with his Honour's reasons. The applicant was extremely fortunate not to have had to serve some actual time in gaol, so it is unsurprising that there is no challenge before us to that part of the sentence.

JERRARD JA: The order of the Court will be as proposed by Keane JA and the Court thanks counsel for the written and oral submissions made this morning and for the assistance given.
