SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cocaris* [2005] QCA 407
PARTIES:	**R** **v** **COCARIS, Katherine Nicole** (applicant/appellant)
FILE NO/S:	CA No 245 of 2005 DC No 2138 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2005
JUDGES:	McMurdo P, Jerrard JA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal** **2. Allow the appeal and order that the applicant be sentenced to two months imprisonment then released on probation with her consent for a period of 12 months under the supervision of an authorised Corrective Services Officer**
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 GRANTED – applicant convicted on her own pleas of guilty to dangerous operation of a motor vehicle whilst adversely affected by heroin and drug possession – applicant sentenced to 15 months imprisonment suspended after three months for an operational period of two years for the dangerous operation count – applicant not further punished for drug possession – applicant's driver's licence disqualified for two years – no prior criminal history – applicant had made efforts at rehabilitation prior to sentence – applicant aged 23 at time of offences – whether sentence manifestly excessive regarding length of actual imprisonment – whether appropriate sentence should combine imprisonment and probation

Penalties and Sentences Act 1992 (Qld), s 9

R v Bawden [2004] QCA 285; CA No 59 of 2004, 6 August 2004, considered
R v Fanning [2005] QCA 267; CA No 132 of 2005, 1 August 2005, considered
R v Neil [2001] QCA 41; CA No 363 of 2000, 15 February 2001, considered
R v Simpson [2001] QCA 109; CA No 309 of 2000, 21 March 2001, considered

COUNSEL: P E Smith for the applicant/appellant
P F Rutledge for the respondent

SOLICITORS: Howden Saggers Lawyers for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The relevant facts and issues are set out in the reasons for judgment of Jerrard JA so that I need only refer to them briefly in explaining my own reasons for agreeing with the orders proposed by Jerrard JA.

[2] The maximum penalty for the offence of dangerous driving with the circumstance of aggravation that the offender was affected by an intoxicating substance is five years imprisonment. This was a serious example of that offence.

[3] Ms Cocaris took heroin well-knowing that the drug would affect her capacity to drive carefully. She was a qualified practising social worker. Her conduct demonstrated a high degree of social irresponsibility but was consistent with a powerful heroin addiction. She drove dangerously in moderately busy traffic at 12.25 pm on Saturday, 11 September 2004 along Annerley Road near Fairfield Street, Brisbane. It seems she momentarily dozed off. Her vehicle which was travelling at about 60 kms per hour traversed onto the incorrect side of the road, hitting the oncoming vehicle of the unfortunate McSweeney family which was travelling at about the same speed. The photographs of the very extensive damage to both vehicles suggest that the impact was powerful. Mr McSweeney suffered a fracture of his tibia and a laceration. His wound required debridement under anaesthesia and "he had non-weight bearing for about three months". The prosecutor at sentence described the injury as significant but "just shy of grievous bodily harm". Mrs McSweeney, who was in the front passenger seat, sustained bruising to her chest but with no complications although she was four months pregnant. The baby in the back seat was uninjured. Jerrard JA has set out Ms Cocaris' injuries. It is fortunate that no-one was more seriously hurt.

[4] The learned primary judge rightly recognized the need for a salutary deterrent penalty. There were significant mitigating factors: the remorse and early plea of guilty, Ms Cocaris' prior good record, her comparative youth at 24 years and her efforts at rehabilitation. Despite the mitigating features, the learned primary judge was right in recognizing that this case warranted a salutary deterrent penalty. Some of the comparable cases referred to by Jerrard JA demonstrate that a period of actual detention was not mandatory but they do not demonstrate that the sentence was manifestly excessive. When offences of this kind are committed with the aggravating feature of the offender being affected by an intoxicating substance, this

may be an indication that the offender has a substance abuse problem. It is certainly the case here. Where there are efforts at and promising prospects of rehabilitation it may sometimes be appropriate to impose a structured probation order or an intensive correction order. I agree with Jerrard JA that the learned primary judge in sentencing the offender gave insufficient consideration to her comparative youth, her efforts at overcoming her heroin addiction and her need for continued supervision and support if she is to be successful in her rehabilitative efforts. The shorter period of imprisonment of two months followed by 12 months probation suggested by Jerrard JA should be substituted. I note that Ms Cocaris' counsel indicated her willingness to consent to a probation order.

[5] **JERRARD JA:** On 16 September 2005 Ms Cocaris was sentenced in the Brisbane District Court to 15 months imprisonment, suspended after three months for an operational period of two years, on her plea of guilty to a charge of dangerous operation of a motor vehicle when adversely affected by an intoxicating substance; the learned sentencing judge disqualified her as well from holding or obtaining a driver's licence for two years. Ms Cocaris also pleaded guilty to possession of the dangerous drug heroin, and the learned sentencing judge recorded a conviction on that plea but ordered no further punishment. Ms Cocaris has appealed against the sentence requiring that she serve three months in actual custody, and her counsel on this application, Mr P Smith, has urged either a sentence suspended from the date of judgment by this Court or an intensive correction order, or a sentence of imprisonment followed by probation as from the date of this judgment.

[6] Both offences were committed on 11 September 2004. Ms Cocaris was 23 years old then and 24 when sentenced. She had no prior criminal history and only one previous traffic infringement recorded, a speeding offence committed in late August 2004. She had Bachelor's Degrees in Arts and Social Work from the University of Queensland, had worked as a personal care assistant with the Paraplegic and Quadriplegic Association of Queensland from 2000, and with Madison Community Care since mid-2004 as a disability and youth worker.

Facts of the offences

[7] At about 11.00 am on 11 September 2004 she bought $50 worth of heroin in powder form, diluted half of it with distilled water and injected it, and kept the other half in a capped syringe for later use. She had worked a sleep-over shift the night before, looking after an "at risk" young girl in a hotel in Sunnybank, who was a new client for whom no accommodation had yet been allocated. Ms Cocaris was up late and returned to her own home at West End the next morning, 11 September 2004.

[8] About an hour and a half after injecting that heroin Ms Cocaris drove her vehicle from West End and onto Annerley Road, and after she had driven between three and four km her vehicle collided with another coming along Annerley Road in the opposite direction. Ms Cocaris had been travelling behind a tow truck, perhaps too closely behind, since it appears she described being caught by surprise at a turn to the left in road she was driving along, and when the tow truck driver slowed and moved to the left hand side of the road. Her vehicle proceeded ahead in a straight line and onto the incorrect side of the road. A woman driving behind Ms Cocaris saw her head slump forward and to the left immediately before Ms Cocaris crossed the centre line, as if she had collapsed or fallen asleep, and a collision occurred almost immediately between Ms Cocaris' car and the oncoming car driven by a Mr

McSweeney. Neither driver braked or swerved; both cars were travelling at a speed on or below the 60 kph speed limit.

[9] Mr McSweeney suffered a fracture of his tibia and a laceration. His female passenger, his wife, was uninjured; she was four months pregnant, and their nine and a half month old son was also uninjured. Ms Cocaris suffered a broken ankle, a broken collar bone, and two fractured vertebrae, and she was off work for two months. Her car was extensively damaged and because of that she suffered a financial loss of $20,500; and she had personally paid $10,500 compensation to Mr McSweeney by the date of sentence (by "personally" I mean that her insurance company declined to indemnify her because of her admitted consumption of heroin prior to the accident).

[10] As to that heroin consumption, Ms Cocaris told her case managers at the Roma Street Alcohol and Drug Dependence Clinic on 17 February 2005, when she requested treatment there for drug dependence, that she had been using opiates for two years. Her counsel explained to the learned sentencing judge that she had begun using heroin to cope with stress associated with her relationship with her boyfriend, for whom coincidentally that counsel had also appeared in the past.

[11] As it happened, a police vehicle had been following hers in the line of traffic at the time of the collision with Mr McSweeney's vehicle, and so police were already in attendance when the ambulance arrived. An ambulance officer noticed that Ms Cocaris' pupils were fixed and pinpoint, and Ms Cocaris told that officer "I took a little bit of heroin". The ambulance officer reported that to the police at the scene, who then located the syringe with the remaining heroin in her bag, and a Sharps kit with a used syringe in it in the bag. Ms Cocaris was taken to hospital by that ambulance, and on the journey there she told the ambulance officer that he ought not to have told the police about her having admitted to him that she had taken some heroin. She has not been quoted expressing concern at that time about Mr McSweeney.

The basis for the sentence

[12] The Crown contended before the learned sentencing judge that heroin can have a sedating effect on a user, and submitted that that was consistent with the description by the other driver of Ms Cocaris having slumped over and having appeared to fall asleep at the wheel. Counsel for Ms Cocaris conceded to the sentencing judge that there had been an observed move to her left in the seat, seen by the driver of the immediately following car, and while suggesting that perhaps Ms Cocaris may have been momentarily distracted by something in the car, informed the learned sentencing judge that Ms Cocaris "can't say that she didn't fall asleep or at least momentarily fall asleep. She can't say that she didn't. She didn't think that she did but she can't say." Counsel did not suggest that Ms Cocaris had ever said that she was momentarily distracted by anything she could identify.

[13] Analysis of the contents of the syringe showed a calculated weight of 19 mg (.019 grams) of pure heroin, consistent with Ms Cocaris having bought $50 of heroin in a low level street deal. Analysis of a specimen of blood taken on 11 September 2004 revealed morphine and codeine present, but no alcohol. In those circumstances the learned sentencing judge sentenced her on the basis that on that afternoon she was aware that she was already tired, that she had had very little sleep the night before,

having apparently worked a nightshift, and that she was "arguably in a highly dangerous condition at the time you were behind the wheel because of the effect on your capacity to properly control a motor vehicle because of your known tiredness combined with the effect of your voluntary injection of heroin." The learned judge added to that that Ms Cocaris had some knowledge of the effect of heroin, and that the matter was clearly not a case of momentary inattention or a driver doing their incompetent best, but a matter of driving "of real concern", because her potential to cause damage to property or injury to other persons was real and not insubstantial.

Efforts at rehabilitation

[14] That basis for imposing sentence was not challenged on the application for leave to appeal against it. Instead, Mr Smith submitted that the learned sentencing judge had erred in failing to take sufficiently into consideration the efforts Ms Cocaris had made towards her own rehabilitation from drug addiction. Counsel pointed to the fact that in early 2004 Ms Cocaris had sought specialist help from a Dr Reece, attempting to overcome that addiction, and had been placed on a Buprenorphine program for six weeks, and had thought that she had achieved a drug free state. However, she relapsed, as evidenced by her heroin usage in September 2004.

[15] On 17 February 2005 she presented for the first time at the Roma Street clinic, requesting treatment for her drug dependence, was registered, and was stabilised on a moderate dose of Buprenorphine. It appears that thereafter she had received regular doses of that drug from a pharmacy, continuing for the seven months up to the date of sentence. The learned sentencing judge was not told if the dosage had changed in that period. Her counsel did put before the judge the results of two analyses of urine, one collected on 22 March 2005 and the other on 9 September 2005, and no non-prescribed drugs were detected in either of those.

[16] Those 2005 events show efforts by her to combat heroin addiction by using prescribed drugs, and while Mr Smith argues that the learned judge expressly referred only to her 2004 efforts and not her 2005 ones, the only report from the Roma Street clinic was one dated 21 March 2005, which, oddly enough, referred to a letter from her solicitors dated 17 February 2005 asking for a report on her treatment at that clinic, the same date as the date on which she first went there. A more up to date report, and more information about her progress between February and September 2005, might have provided information upon which the judge could rely demonstrating that Ms Cocaris, by the date of sentence, had a more stable and ordered life with a vastly reduced risk of self harming behaviour capable of also injuring others.

[17] The information the learned sentencing judge did have did not go that far, and at least one matter put before the learned judge suggested that her life still had potentially chaotic elements in it. This was that she had not told her parents, with whom she was said to be living at the date of the sentence, that she had been charged, or that she was being sentenced that day. The learned sentencing judge was not even told that her parents knew by then of her heroin use.

Comparable cases

[18] Mr Smith pointed to other sentences approved or imposed by this Court. Some of those do suggest the sentence imposed on Ms Cocaris was at the higher end of an available range. They do not show that her sentence was manifestly excessive. The

one upon which Mr Smith placed most reliance was *R v Simpson* [2001] QCA 109. That applicant had pleaded guilty to dangerous operation of a motor vehicle with the circumstance of aggravation that she had a BAC of .169. She was sentenced to two years imprisonment completely suspended and fined $5,000, payable over two years. That applicant also pleaded guilty to being an unlicensed driver (her licence had expired), and to driving under the influence of alcohol. Those offences were committed while committing the offence of dangerous operation of a vehicle. That offender had a prior conviction for driving with a BAC of .119, incurred in April 1998, and the offences the subject of the application had happened on 4 May 1999. She had been seen driving erratically along Kingsford Smith Drive and the Gateway Arterial Road over a distance of about two kilometres, and she was then seen again about half an hour later driving erratically and in excess of the speed limit over the Redland Bay exit from the Pacific Highway. Ultimately she veered into a concrete barrier, spun across the road, and collided with the rear of another vehicle, causing it to spin out of control in turn and to strike an oncoming cement truck. Fortunately the driver of that other vehicle suffered only soft tissue injuries and an aggravation of degenerative changes in that driver's lumbar and cervical spine.

[19] Ms Simpson appealed against the imposition of the fine and a five year period of disqualification from driving, and this Court dismissed her application. Her sentence was certainly not manifestly excessive, and while it is more lenient regarding actual custody than that imposed here, Ms Simpson caused less injury to another person than Ms Cocaris did, and Ms Simpson was fined a significant sum.

[20] Mr Smith also relied on *R v Neil* [2001] QCA 41, where that applicant was sentenced to 18 months imprisonment suspended after four months for an operational period of two years. He had pleaded guilty to dangerous operation of a motor vehicle with a circumstance of aggravation namely that he was adversely affected by an intoxicating substance, that being a combination of methadone and self administered heroin. He had driven a van onto the incorrect side of Gladstone Road at Highgate Hill, colliding head on with an oncoming vehicle, injuring his own passenger, but injuring himself more severely. He suffered a broken leg. He had an extensive driving history, with four convictions for driving with a BAC over the prescribed limit, all incurred in the period between 1990 and 1995. His driving history was much worse than this applicant's, and his offence was very like hers. His application was dismissed; comparison with that case makes this applicant's sentence at the higher end of a range, but not manifestly excessive.

[21] Reference was made too to *R v Fanning* [2005] QCA 267, where that applicant pleaded guilty to dangerous operation of a motor vehicle while adversely affected by an intoxicating substance, and to breaking, entering, and stealing, and was originally sentenced to 18 months imprisonment suspended after six months. This Court reduced his sentence to one of 18 months suspended after three months. He had been seen driving at an excessive speed by police officers, and he lost control of his vehicle. When police officers came up with his car, he lost control of it again and on three separate occasions spun it 360 degrees. He then drove off at an excessive speed before being intercepted by police. There was no actual car chase; his BAC was .175. When on bail he committed an offence of breaking, entering, and stealing some eight months later, when he opened an office window at Carole Park, causing some damage, and stole a laptop computer and video camera. When caught later that day he was carrying an extensive array of house breaking implements. He was 22 years old when he drove the vehicle dangerously, 23 years

at the time of that break and enter, and 24 when sentenced. He had suffered from a lack of any effective family support for the last 10 years, had a good work history, and had taken apparently effective steps to overcome his addiction to drugs by the time of sentence. The sentence he received was almost the same as this applicant's; although his driving was more deliberately dangerous, there was no collision and no other people suffered. A comparison with that sentence does not establish that hers was too heavy.

[22] Finally, reference was made to *R v Bawden* [2004] QCA 285, in which that applicant was fined $1,000, to be paid within nine months, and disqualified from driving for 18 months, after being convicted of dangerously operating a motor vehicle while adversely affected by an intoxicating substance. He had been seen driving at about 140 kph in a 60 kph zone, and travelling on the incorrect side of the road at that speed through a blind bend on a major road. He drove dangerously over a distance of 3.1 km, and had a BAC of .149. He had excellent references, was only 20 when he committed the offence, had no criminal history, had good employment and a promising future. His application for leave to appeal against sentence was dismissed. That case did not particularly assist Mr Smith, because there was no collision with any other vehicle.

[23] Deterrence of others is always important when offenders are being sentenced for driving when adversely affected by intoxicating substances capable of making it dangerous for those offenders to be driving at all, too often tragically established by a collision in which serious injury is suffered. In this case the other driver had injuries falling, as the prosecutor submitted to the learned sentencing judge, "just shy" of grievous bodily harm. A deterrent penalty involving some actual time in custody was well justified. However, consideration of the circumstances of the applicant's life shows that she is a young woman with a considerable need for guidance from others, despite her formal qualifications in that same general field, and with a considerable capacity to make very poor choices of behaviour.

[24] The sentencing objective specified by the guideline in s 9(1)(b) of the *Penalties and Sentences Act* 1992 (Qld), namely of providing conditions in the court's order that will help an offender's rehabilitation, is not excluded by s 9(3)(b) of that Act. Accordingly, I respectfully consider that an appropriate sentence would have combined a period of imprisonment and a period of probation, as Mr Smith urged this Court to order. I therefore consider the learned judge was in error in preferring simply to suspend the sentence, because Ms Cocaris is much in need of assistance and supervision.

[25] In the circumstances I am satisfied that it is appropriate for that reason to set aside the sentence imposed, and to re-exercise the sentencing discretion. It is proper to modify the actual time in custody, to place it more at the mid point of the range. I would order instead that on the dangerous operation count the appeal be allowed and that Ms Cocaris be sentenced to two months imprisonment, and then released on probation with her consent for a period of 12 months under the supervision of an authorised Corrective Services Officer. I would not interfere with the order disqualifying her from driving for two years.

[26] **MUIR J:** I am in agreement with the reasons of McMurdo P and Jerrard JA and agree with the orders they propose.