

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Roser* [2005] QCA 457

PARTIES: **R**  
**v**  
**ROSER, Margaret Ellen**  
(applicant)

FILE NO/S: CA No 157 of 2005  
DC No 801 of 2005

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 9 December 2005

DELIVERED AT: Brisbane

HEARING DATE: 22 November 2005

JUDGES: McPherson and Keane JJA and Mackenzie J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

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 - where the applicant was convicted on her own plea of guilty of dangerous operation of a motor vehicle causing grievous bodily harm whilst adversely affected by an intoxicating substance - where the applicant had been overtaking in a dangerous manner that resulted in a head on collision with a vehicle travelling in the other direction - where the driver of the other vehicle suffered grievous bodily harm and was left with a permanent facial disfigurement - where the applicant's blood alcohol concentration at the time of the crash was estimated at between .11 and .15 - where the applicant had previously been fined on a number of occasions for drink driving - where the applicant was sentenced to imprisonment for four and a half years with a recommendation for post-prison community based release after 16 months - where the applicant was also disqualified from holding a driver's licence for three years - where the applicant had committed four further traffic offences between the date of the crash and the

date of sentence - whether the sentence imposed on the applicant was manifestly excessive

*Transport Operations (Road Use Management) Act 1995*  
(Qld), s 79(2), s 79A(2)

*R v Anderson* [2005] QCA 304; CA No 71 of 2005, 23 August 2005, cited

*R v Balic* [2005] QCA 212; CA No 57 of 2005, 17 June 2005, considered

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

COUNSEL: The applicant appeared on her own behalf  
M J Copley for the respondent

SOLICITORS: The applicant appeared on her own behalf  
Director of Public Prosecutions (Queensland) for the respondent

- [1] **McPHERSON JA:** No reason has been shown for interfering with the sentence imposed in this case. For the reasons given by Keane JA, I would dismiss the application for leave to appeal.
- [2] **KEANE JA:** On 20 May 2005, the applicant was convicted on her own plea of guilty of the dangerous operation of a motor vehicle causing grievous bodily harm whilst adversely affected by an intoxicating substance. She was sentenced to imprisonment for four and a half years, with a recommendation for post-prison community based release ("ppcbr") after serving 16 months. She was also disqualified from holding or obtaining a driver's licence for three years. The applicant desires to appeal against her sentence on the ground that it was manifestly excessive.

**Circumstances of the offence**

- [3] The offence was committed on 12 October 2003. On that occasion, the applicant drove a motor vehicle onto the wrong side of the Mt Lindsay Highway near Beaudesert and collided with a vehicle coming in the opposite direction. She was rushing back to Beaudesert to collect her two primary school aged children. She had been observed for at least three kilometres before the accident overtaking other vehicles in a manner which caused one vehicle travelling in the opposite direction on its correct side of the road to veer to the left to avoid a collision with the applicant's vehicle.
- [4] Mrs Grice, the driver of the vehicle with which the applicant collided, suffered grievous bodily harm as a result of the crash. If Mrs Grice had not received medical treatment, she would probably have died from the injuries sustained in the collision. Mrs Grice has been left with a permanent facial disfigurement and permanent palsy to the left side of her face. Her 14 year old son who was travelling with her received bruising, a pulmonary contusion and limb fractures.
- [5] The applicant's blood alcohol concentration ("BAC") was tested almost two hours after the accident and found to be .094, ie there was 94 milligrams of alcohol to

each 100 millilitres of blood.<sup>1</sup> Working backwards from this, the applicant's BAC was estimated to have been between .11 and .15 at the time of the collision. The learned sentencing judge proceeded on the basis that the applicant's BAC would have been .13 when the offence was committed.

- [6] When the applicant was interviewed by police about three months after the collision, she admitted that she had driven from Carole Park, which is 54 kilometres from Beaudesert. At this interview, she sought to understate the amount of alcohol she had consumed before setting out on the journey to Beaudesert.

### **The applicant's circumstances**

- [7] The applicant was born on 23 November 1963. She was 39 years of age at the date of the offence and 41 years of age at the date of sentence.
- [8] The applicant has a minor criminal history. More significantly, she has a troubling history as a driver which suggests an unusually high level of irresponsibility. Since the accident on 12 October 2003, the applicant has committed a further four traffic offences. Between 1984 and March 2004, she received eight speeding tickets.
- [9] More troubling, however, is the applicant's history of drunken driving. In 1986, she was fined for driving with a BAC of .09. On 26 October 2001, she was fined for driving with a BAC of .123. Of special concern is the circumstance that, after the accident in which Mrs Grice was injured, on 15 October 2004 the applicant failed to obey a traffic sign while driving with a BAC of .058. For that offence she was fined.
- [10] To place the applicant's previous offending in context it is useful to reiterate some comments I made earlier this year in *R v Anderson*:<sup>2</sup>
- "A blood alcohol concentration of .05 is defined by the [*Transport Operations (Road Use Management) Act 1995 (Qld)*] as being the 'general alcohol limit'.<sup>3</sup> A person who drives a motor vehicle with a blood alcohol concentration over this limit commits an offence.<sup>4</sup> It has become reasonably well known in the community at large that .05 is the blood alcohol level above which liability may attach for what is commonly referred to colloquially as 'drink driving'. Of course, it should be pointed out immediately that there is nothing in [the Act] that suggests a person cannot be taken to be 'adversely affected by alcohol' despite having a blood alcohol concentration below .05." (footnotes in original)
- [11] What is apparent is that the applicant not only has a history of drunken driving but a history of driving with a BAC well above that which is prohibited by statute.
- [12] Alcohol is not the only drug to have featured in the life of the applicant. On 6 October 2004, she was found guilty of possessing a dangerous drug and of possessing property suspected of having been used in connection with the commission of a drug offence. The applicant was sentenced to pay a fine as punishment for the commission of these offences. Their relevance for present

<sup>1</sup> All future references to blood alcohol levels in these reasons use this same scale of measurement.

<sup>2</sup> [2005] QCA 304; CA No 71 of 2005, 23 August 2005 at [28].

<sup>3</sup> *Transport Operations (Road Use Management) Act 1995 (Qld)*, s 79A(2).

<sup>4</sup> See, eg, *Transport Operations (Road Use Management) Act 1995 (Qld)*, s 79(2).

purposes is to highlight the difficulties for the applicant's rehabilitation posed by her drug and alcohol problem.

**The sentence**

- [13] The learned sentencing judge identified as particularly troubling features of this case the circumstances that the applicant drove in a deliberate and reckless fashion over a long distance while adversely affected by alcohol. Further, her subsequent traffic history showed a lack of remorse for her offending and an absence of any real effort to deal with her alcohol problem.
- [14] The learned sentencing judge took into account, on the other hand, the circumstance that the applicant herself suffered serious injuries in the collision. Further, the learned trial judge, in recognition of her plea of guilty and the circumstance that the applicant is the sole carer of her two children, was prepared to make a recommendation for early release from imprisonment.
- [15] The applicant's history since the accident, and particularly her offence of 15 October 2004, does not provide grounds for optimism in relation to her prospects of rehabilitation. Having said that, it appears that the applicant has, since her incarceration, been accepted into an alcohol and drug rehabilitation program and has joined Alcoholics Anonymous. In any event, the learned trial judge's recommendation for early release, with continued supervision for the balance of the term of four and a half years, would seem to provide a real opportunity for the applicant to rehabilitate herself.
- [16] The maximum sentence for the offence of which the applicant was found guilty was 10 years imprisonment.<sup>5</sup> Having regard to the applicant's bad history of drunken driving, her high BAC at the time of the accident, the fact it occurred after a prolonged period of driving under the influence of alcohol and the serious consequences her offending has had for Mrs Grice, a sentence of imprisonment for four and a half years was not excessive, notwithstanding the applicant's other personal circumstances.
- [17] The previous decisions to which this Court has been referred do not support any other conclusion. Two of these cases deserve particular mention.
- [18] *R v Balic*<sup>6</sup> was a case where the applicant, having recently ingested a large quantity of methylamphetamine, allowed his car to run off the road and into a telegraph pole. The passenger who was travelling with him suffered severe and permanent brain damage as a result of the accident. The applicant in that case had a troubling criminal and traffic history. After being found guilty after a trial by jury, he was sentenced to seven years imprisonment. This Court reduced that sentence on appeal to five and a half years imprisonment. Importantly for present purposes, McMurdo P noted that:
- "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 this case, the voluntarily intoxicated victim appears to have travelled in the vehicle driven by

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<sup>5</sup> *Criminal Code* 1899 (Qld), s 328A(4)(a).

<sup>6</sup> [2005] QCA 212; CA No 57 of 2005, 17 June 2005.

the applicant knowing that he had recently ingested a large quantity of methylamphetamine."<sup>7</sup>

- [19] It may be said in this case that the injuries suffered by the driver of the vehicle with which the applicant in this case collided were less serious than those sustained by the passenger in *Balic*, but those injuries are nonetheless permanent and certainly cannot be characterised as anything other than serious. Further, there can be no suggestion in this case that the person who sustained injury as a result of the applicant's reckless use of her motor vehicle had somehow consented to the risk posed by the applicant choosing to drive under the influence of alcohol.
- [20] Another useful point of comparison is *R v Russell*,<sup>8</sup> a case also involving a head-on collision between two vehicles brought about by the applicant straying onto the wrong side of the road while driving under the influence of alcohol. The driver of the other vehicle suffered serious injuries that, while again not as serious as those sustained in *Balic*, had a continuing negative effect long after the accident. In that case, a sentence of four years imprisonment with a recommendation for parole after 18 months imposed after a plea of guilty was held not to be manifestly excessive when regard was had to the circumstances of the offence that had been committed. That the court in that case was nonetheless moved to make the recommendation for parole effective forthwith was only because new evidence had come to light since the date of sentence that showed it was probable that the applicant in that case did not have long to live as the result of her being diagnosed with aggressive breast cancer.
- [21] The sentence imposed on the applicant in this case falls in between those imposed in *Balic* and *Russell*. A comparison of the facts of this case with those cases does not suggest that the sentence imposed was manifestly excessive. The applicant has the opportunity to achieve ppcbr after 16 months.
- [22] Having regard to these decisions, I consider that a head sentence of four and a half years was within the appropriate range for a case in which the harm caused to another, while permanent and serious, does not amount to a major physical handicap, and where the offender has a bad history of drunken driving. The applicant is concerned to have some certainty in relation to her release date, but it is to be emphasised that it is largely in the applicant's own hands as to whether she is released from actual custody in accordance with the recommendation made by the learned sentencing judge.
- [23] In my view, the sentence imposed struck a sound balance between recognising the seriousness of the applicant's offending and the leniency called for as a result of her personal circumstances and her early guilty plea.

### **Conclusion and orders**

- [24] No sufficient basis is shown for interfering with the exercise of discretion by the learned sentencing judge.
- [25] The application for leave to appeal should be dismissed.
- [26] **MACKENZIE J:** I agree with Keane JA's reasons and with the order proposed.

<sup>7</sup> [2005] QCA 212; CA No 57 of 2005, 17 June 2005 at [3].

<sup>8</sup> [2002] QCA 285; CA No 91 of 2002, 6 August 2002.