SUPREME COURT OF QUEENSLAND

CITATION:	*R v Evans* [2005] QCA 455
PARTIES:	**R** **v** **EVANS, Melissa Jane** (applicant)
FILE NO/S:	CA No 238 of 2005 DC No 401 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED EX TEMPORE ON:	8 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	8 December 2005
JUDGES:	de Jersey CJ, Williams JA and White 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 refused**
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 – where the applicant pleaded guilty to dangerous operation of a motor vehicle causing death with a circumstance of aggravation in respect of alcohol – where the applicant was sentenced to six years' imprisonment with a recommendation for eligibility for post-prison community-based release after two and a half years, and was disqualified from holding a driver's licence for five years – where the applicant returned a blood alcohol reading of .247 – where the driving conditions were favourable and the vehicle was unregistered, uninsured and had a flat left rear tyre – where the applicant had a past conviction for driving under the influence of alcohol – where the applicant was a single mother of six children – where the applicant demonstrated remorse and cooperated with the authorities – whether the sentence was manifestly excessive *R v Ibrahim* [2003] QCA 386; (2003) 40 MVR 183,

considered
R v McKinnon [1999] QCA 075; CA No 356 of 1998, 17 March 1999, considered
R v Smout [2005] QCA 120; CA No 31 of 2005, 15 April 2005, considered
R v Wilde; ex parte A-G (Qld) [2002] QCA 501; (2002) 135 A Crim R 538, distinguished

COUNSEL: T E Mossop for the applicant
M J Copley for the respondent

SOLICITORS: Smith & Associates for the applicant
Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: The applicant was sentenced in the District Court to a six year term of imprisonment with a recommendation for eligibility for post prison community based release after two and a-half years for the offence of dangerous operation of a motor vehicle causing death with a circumstance of aggravation in respect of alcohol. She was disqualified from holding a driver's licence for five years. She was also dealt with for a number of summary offences including driving while under the influence of liquor for which she was sentenced to a concurrent 12 month term.

She had pleaded guilty. She seeks leave to appeal against the sentence of six years with a recommendation after two and a-half years. Ms Mossop, her counsel, submitted that a recommendation should have been made for eligibility after 12 to 18 months, not after two and a-half years.

On 11th May 2003 the applicant drove her vehicle at about 4 p.m. along two streets in Beenleigh after she had been drinking throughout the day. Driving conditions were favourable. Her vehicle was unregistered, uninsured and had a

flat left rear tyre. She got into the vehicle in Tweedvale Street then drove erratically at speed down Crest Street.

The vehicle crossed the gutter and mounted the footpath a number of times, narrowly missed a parked car then approached a group of pedestrians on the footpath. That group comprised the deceased and his sister, mother and brother-in-law. The vehicle struck and killed the deceased. It travelled a further 124 metres before coming to a stop. It was grossly irresponsible driving to say the least.

About an hour later the applicant returned a blood alcohol reading of .247. She was 33 years old at the time. Her traffic history included a conviction for driving under the influence of liquor for which, on the 10th of July 2002, she had been fined $285 and disqualified for one month. Her reading then was .067.

The applicant is a single mother of six children. The ages of the children range between four years and 13 years. The imprisonment does not mean they are left without care, although it will be hard for mother and children inevitably.

The applicant demonstrated remorse and cooperated with the authorities. The deceased was a 36 year old man out walking to the home of other family members. It was Mother's Day. The deceased's parents have provided victim impact statements detailing the adverse and tragic consequences of the death of their son on their own lives.

The maximum penalty for this offence, including the circumstance of aggravation, has, since amendment of the *Criminal Code* in 1989, been 14 years' imprisonment. The sentencing Judge considered the starting point to be seven years which he then scaled back to six years, adding the recommendation as to post prison community based release.

While Ms Mossop did not in the end challenge the adoption of six years she did submit that the starting point should have been six years and not seven years. She based that on *R v Wilde; ex parte Attorney-General (Qld)* [2002] QCA 501. That was, however, a case of dangerous operation of a motor vehicle causing death but without the instant circumstance of aggravation. The Court there said that six years was the appropriate starting point. Ms Mossop sought to equate Ms Wilde's fleeing the scene with the involvement of alcohol here, submitting that the cases should in the end be regarded as comparable. But they cannot, principally because the maximum penalty applicable in *Wilde* was seven years' imprisonment whereas here it was 14 years' imprisonment.

Ms Mossop carefully analysed a number of cases, and she is to be commended for her helpful submissions. It suffices if I refer to three of them. In *R v McKinnon* [1999] QCA 075, the penalty imposed was the same as here. McKinnon's blood alcohol content analysed one and a-half hours after the collision was .219. His vehicle ran off the road into a parked car killing the occupant. Seven years earlier he had

been convicted of driving with a blood alcohol content of .310. He had apologised to his victim's family.

Significantly for the present the Court there referred to a comparable range of four to seven years' imprisonment and it should be noted that that observation was made at a time, that is 1999, when the pernicious inroads of the road toll were not appreciated quite as acutely as they are now.

Smout (*R v Smout* [2005] QCA 120) received the same sentence as this applicant. His driving caused the deaths of two persons and he had been warned not to drive. His blood alcohol content assessed as at the time of the collision was .292. He had accumulated two convictions for driving under the influence of liquor about two decades earlier.

Ms Mossop emphasised that Smout caused two deaths. Of course that was significant but a subsequent Court informed of *Smout* and dealing with a single death case would obviously not be constrained to approach the exercise in some sort of proportional way.

Ibrahim (*R v Ibrahim* [2003] QCA 386) drove with a blood alcohol content of .25. He drove at high speed and caused grievous bodily harm not death. He had five drink driving type convictions over recent years. He pleaded guilty and was sentenced to six years' imprisonment. No parole recommendation was made.

In my view those and other cases provide ample support for the view that the sentence imposed here fell within an appropriate range. It is a field where deterrence is of great importance. I would refuse the application.

WILLIAMS JA: I agree.

WHITE J: I agree.

THE CHIEF JUSTICE: The application is refused.
