# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v TX* [2011] QCA 68 |
| PARTIES: | **R**<br>**v**<br>**TX**<br>(applicant) |
| FILE NO: | CA No 282 of 2010<br>DC No 87 of 2010 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Childrens Court at Brisbane |
| DELIVERED ON: | 15 April 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 5 April 2011 |
| JUDGES: | Muir JA, Margaret Wilson AJA and Peter Lyons J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDERS: | **1. The application for leave to appeal be granted;**<br>**2. The appeal be allowed; and**<br>**3. That the order at first instance recording a conviction be set aside**. |
| CATCHWORDS: | CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – DISCRETION TO RECORD CONVICTION – RELEVANT CONSIDERATIONS – where applicant pleaded guilty to one count of dangerous operation of a vehicle causing grievous bodily harm to another under s 328A *Criminal Code* 1899 (Qld) – where applicant aged 16 years at the time of the offence – where decision whether to record a conviction against applicant governed by s 183 and s 184 *Youth Justice Act* 1992 (Qld) – whether sentencing judge erred in recording a conviction<br><br>CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – FACTUAL BASIS FOR SENTENCE – GENERALLY – where applicant pleaded guilty to one count of dangerous operation of a vehicle causing grievous bodily harm to another under s 328A *Criminal Code* 1899 (Qld) – where circumstances of aggravation not charged in the indictment – where circumstance of aggravation relied on by sentencing judge – whether sentencing judge erred in recording a conviction |

*Criminal Code* 1899 (Qld), s 328A, s 564
*Youth Justice Act* 1992 (Qld), s 183, s 184

*R v Briese, ex-parte Attorney-General* [1998] 1 Qd R 487; [1997] QCA 10, considered
*R v T* [1998] QCA 456, considered
*The Queen v De Simoni* (1981) 147 CLR 383; [1981] HCA 31, applied

COUNSEL: R East for the applicant
V Loury for the respondent

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

[1] **MUIR JA:** For the reasons given by Peter Lyons J, I would order that:
(a) The application for leave to appeal be granted;
(b) The appeal be allowed; and
(c) The order at first instance recording a conviction be set aside.

[2] **MARGARET WILSON AJA:** For the reasons given by Peter Lyons J, the order at first instance recording a conviction should be set aside. I agree with the orders proposed by Muir JA.

[3] **PETER LYONS J:** On 29 October 2010, the applicant was sentenced on his plea of guilty on one count of dangerously operating a motor vehicle. He applies for leave in respect of one order only, namely the recording of a conviction.

**Background**

[4] The count recorded in the indictment was based on s 328A of the *Criminal Code* 1899 (Qld) (*Criminal Code*). It included one circumstance of aggravation, that being causing grievous bodily harm to another person.

[5] At the same time, the applicant was dealt with for two related summary offences. The applicant's submissions assert that no separate order was made in respect of these offences; but the record reveals that in respect of one of them, the applicant was disqualified from holding a driver's licence for a period of twelve months. Nevertheless, it may be taken that no conviction was recorded in respect of the summary offences.

[6] The applicant's date of birth is 31 July 1992. He has no previous conviction for any offence.

[7] The offences dealt with on 29 October 2010 occurred in the early hours of the morning of 7 February 2009, almost six months before the applicant's 17th birthday.

[8] The offences occurred after the applicant took his mother's car, without her permission, and picked up three young girls (one at least of whom was previously known to him). He drove at times at speed, and on a number of occasions in a way described as doing "burnouts", ultimately losing control of the vehicle and crashing into a power pole.

[9] The circumstance of aggravation referred to in the indictment relates to one of the girls, who suffered an injury to her leg. This required surgical treatment on a number of occasions (including debridement and a split skin graft), leaving her with a significant scar, but it was expected that full function of the leg would be regained.

[10] After the accident, the applicant helped another of the passengers, who was unable to release her seatbelt, to get out of the car. The injured girl almost immediately began screaming for an ambulance. She was assisted by a person who arrived at the scene, and by one of the other girls who had been in the car driven by the applicant. The applicant went and sat in another car, and asked the driver of that car to take him to his home. When she did not do so, he got out of the car, and ran off.

[11] The applicant attended at a police station the next day, but the police officer who had responsibility for the matter was not available at that time. The applicant returned some days later, and began an interview, but then elected to obtain legal advice. He returned to the police station approximately two weeks later, but declined to be interviewed. He was then arrested.

[12] The committal was conducted by way of a full hand-up of evidence, without cross-examination. An indictment was presented in the Children's Court under the *Youth Justice Act* 1992 (Qld) (*YJ Act*) on 21 April 2010. A submission was made to the Director of Public Prosecutions on behalf of the applicant; which was rejected. Shortly after, the Director's office received an indication that the applicant was willing to plead guilty to the offences, resulting in his arraignment and pleas of guilty on 29 July 2010. An order was then made for the preparation of a report under s 151 of the *YJ Act*.

[13] The applicant participated in a Youth Justice Conference (*YJC*), which resulted in a YJC Agreement. This recorded the applicant's apology to the complainant, and that his three passengers wished the applicant well.

[14] For the purpose of the pre-sentence report, the applicant participated in an interview, in the course of which he disclosed that he had consumed a large quantity of alcohol in the period leading up to the offences. He also stated that he left the scene of the accident because he thought he was in danger of being hurt by bystanders who were gathering at the crash site. This fear stemmed from the applicant having previously been stabbed while attempting to help the victim of a crime, at which time a group of people had also gathered around.

[15] Exhibits at the sentencing hearing included the pre-sentence report, the YJC Agreement, a schedule of facts, a favourable reference from the applicant's employer, and letters of support from his parents and paternal grandparents. His maternal grandmother was present at the hearing.

[16] The primary punishment imposed by the learned sentencing Judge was a conditional release order, requiring the applicant's detention for 12 months, suspended immediately; with a requirement that the applicant participate in a program as directed by the Chief Executive, over the following three months. As has been mentioned, he was also disqualified from holding or obtaining a driver's licence for a period of 12 months.

[17] In his submissions on sentence, the prosecutor expressed concern in relation to the applicant's consumption of alcohol in connection with the offences. The prosecutor

submitted that the learned sentencing Judge could not take the applicant's consumption of alcohol into account, but submitted that her Honour could take into account that the applicant was willing to drive, despite having consumed alcohol. Her Honour suggested that it was more significant that he left the scene, stating that the most obvious conclusion was that he was afraid of what might be found, that is, that he sought to avoid being subjected to a breath test.[1]

[18] In the course of the submissions made on behalf of the applicant, the learned sentencing Judge returned to the pre-sentence report, observing on the basis of it that "the primary contributing factor is (the applicant's) excessive use of alcohol".[2] She also observed, "[w]ell, as far as the sentence is concerned … he's not adversely affected. He was not … adversely affected. But it is a relevant issue that he chose not to remain at the scene."[3] Her Honour also attributed his departure from the scene of the incident to the fact he had been drinking.[4]

[19] In her sentencing remarks, the learned sentencing Judge noted the applicant's explanation, as recorded in the pre-sentence report, for his departure from the scene of the accident. She also noted the references to his consumption of alcohol. She concluded that a major reason for his departure was a fear associated with his consumption of alcohol, resulting in his escaping a conviction for being drunk while driving dangerously. Her Honour stated that the applicant could not be sentenced on the basis that he was drunk when he was driving; but concluded that his failure to remain at the scene, and the fact that he removed himself before he could be subjected to a breath test, amounted to significant aggravation.[5]

[20] Having imposed the sentence, the learned sentencing Judge turned to the question of recording a conviction. She observed that ordinarily a conviction would not be recorded for a juvenile first offender, even for a serious offence, if based on criminal negligence. She noted that the applicant was "almost 17" and was engaged in dangerous manoeuvres that were deliberate. She then said, "Added to that is the fact that you ran away before the police arrived defeating any hope of testing you for alcohol". She observed that a conviction was less likely to have an impact on the applicant's employment, which has been in the area of labouring and as a factory hand. Her Honour decided to record a conviction.

**Contentions of parties**

[21] The contentions made on behalf of the applicant commence with a reference to the statement by Fraser JA in *R v WAJ*[6] to the effect that the *prima facie* position under ss 183 and 184 of the *YJ Act* is that a conviction should not be recorded against a child. It was submitted that the statement by the learned sentencing Judge to the effect that a juvenile first offender was ordinarily not subjected to a conviction even for a serious offence, if based on criminal negligence, was unduly restrictive. It was submitted that the injuries caused were at the lower end of the scale of injuries amounting to grievous bodily harm. It was submitted that the learned sentencing Judge erred in placing weight on the fact that the applicant was almost 17 at the

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1 Transcript, Day 1, page 4, line 45.
2 Transcript, Day 1, page 8, line 50.
3 Transcript, Day 1, page 9, lines 20 - 30.
4 Transcript, Day 1, page 10, line 17.
5 Transcript, sentence, page 5, line 17.
6 [2010] QCA 87 at [14]-[15].

time of the offence. It was submitted that the learned sentencing Judge failed to give proper effect to s 184(1)(c)(i), by failing to take into account the effect of a conviction on the applicant's rehabilitation. It was also submitted that the learned sentencing Judge took an unduly restricted approach to s 184(1)(c)(ii) of the *YJ Act*, by failing to recognise the effect of the conviction on the applicant's prospects of employment, in some field other than that in which the applicant was working at the time. It was further submitted that the learned sentencing Judge erred in taking into account aggravating circumstances, which had not been identified in the indictment. Reference was also made to the applicant's participation in YJC, a matter favourable to the applicant.

[22] For the respondent it was submitted that the applicant was not sentenced on the basis of his consumption of alcohol, or departure from the scene of the accident. It was submitted that otherwise the learned sentencing Judge properly took into account all relevant factors.

**Relevance of statutorily-identified circumstances of aggravation in sentencing proceedings**

[23] The offence with which the applicant was charged is created by s 328A of the *Criminal Code*. Subsection (1) makes it a misdemeanour to operate a vehicle dangerously in any place. Under subsection (4)(a), a person who operates a vehicle dangerously in any place, and causes grievous bodily harm to another person, commits a crime, and is liable to be imprisoned for a period of ten years. Under subsection (4)(b), the maximum term of imprisonment is extended to 14 years, if, at the time of committing the offence, the offender is adversely affected by the intoxicating substance. Under subsection (4)(c), the term of imprisonment is also extended to 14 years if the offender knows, or ought reasonably to know, that the other person has been injured, and the offender leaves the scene of the incident, except for the purposes of obtaining medical or other help, before a police officer arrives. Given that the injured girl was screaming for an ambulance while the applicant was nearby, there was clear evidence which could support a finding that he ought reasonably to have known that she had been injured. Both the applicant's consumption of alcohol (as referred to by the learned sentencing Judge), and his departure from the scene of the accident, are therefore statutorily defined circumstances of aggravation, increasing, in each case, the maximum penalty which might have been imposed on the applicant.

[24] Section 564(2) of the *Criminal Code* provides that, if any circumstance of aggravation is intended to be relied upon, it must be charged in the indictment. An almost identical provision of the *Criminal Code* (WA) was considered in *The Queen v De Simoni*.[7] Gibbs CJ (with whom Mason and Murphy JJ agreed) held that the section necessarily implied prohibitions, including a prohibition on a judge relying on a circumstance of aggravation that had not been included in the charge on the indictment. His Honour concluded that a sentencing judge is entitled to consider all of the conduct of the accused, including conduct which would aggravate the offence, save that the sentencing judge cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.[8] His Honour also observed:

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7 (1981) 147 CLR 383.

8 *The Queen v De Simoni* (1981) 147 CLR 383 at 388-389.

> "However, where the Crown has charged the offender with, or has accepted a plea of guilty to, an offence less serious than the facts warrant, it cannot rely, or ask the judge to rely, on the facts that would have rendered the offender liable to a more serious penalty."[9]

[25] *De Simoni* has been applied to sentencing in Queensland in *R v Boney, ex parte Attorney-General,*[10] and in *R v GAI; ex parte Attorney-General.*[11]

**Reliance on circumstances of aggravation**

[26] It is clear that the learned sentencing Judge relied upon one matter which could have been included in the indictment, namely, that the applicant left the scene of the incident, before a police officer arrived, in circumstances where there was evidence to establish that he knew, or ought reasonably to have known, that another person had been injured. However, her Honour did not expressly refer to this evidence, and there may be argument, which it is unnecessary to resolve, whether that affects the application of the principle identified in *De Simoni* to the present case.

[27] Her Honour relied on the applicant's intoxicated condition. She did this as the explanation for his departure, and undoubtedly regarded it as a circumstance which made more serious his conduct in leaving the scene of the incident. This is apparent both from her Honour's sentencing remarks, and her interventions in the course of submissions. While her Honour expressly recognised in her sentencing remarks that the applicant could not be sentenced on the basis of his intoxicated state, it is clear that she acted on this basis when deciding the conviction should be recorded.

[28] A decision whether to record a conviction against a child is the exercise of a statutory power conferred on the Court by ss 183 and 184 of the *YJ Act*, found in Division 4 of Part 7 of that Act. Part 7 is entitled "SENTENCING"; and Division 4 is entitled "Orders on children found guilty of offences". In s 183, the Court's power to decide whether a conviction is to be recorded is regulated by reference to s 175, a section which deals with sentence orders generally.

[29] For an adult, the analogous power to decide whether or not to record a conviction is conferred by s 12 of the *Penalties and Sentences Act* 1992 (Qld) (*PS Act*). The Act's title generally reflects the purposes of the Act (found in s 3). Section 12 is found in Part 2 of the *PS Act*, entitled "Governing principles".

[30] In *R v Briese, ex-parte Attorney-General,*[12] Thomas and White JJ said, "In our view the decision whether to record or not to record a conviction affects the offender, and is part of the sentence". That was in part the explanation of the Attorney-General's right to appeal against such an order, and the fact that a person against whom an order to record a conviction has been made might also appeal.

[31] These considerations make it plain that the principle established in *De Simoni* applies also to a decision whether or not to record a conviction.

[32] It would follow that a decision to record a conviction was in this case wrongly made. It is therefore necessary for the question to be reconsidered.

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9 Ibid at 392.
10 [1986] 1 Qd R 190.
11 [2009] QCA 298.
12 [1998] 1 Qd R 487 at 490.

**Should a conviction be recorded?**

[33] It is now well established that the *prima facie* position under provisions such as ss 183 and 184 of the *YJ Act* is that a conviction is not to be recorded against a child.[13] Even without reference to such provisions, reluctance has been expressed to record a conviction against a child in the case of a serious offence which is substantially the product of criminal negligence, rather than of malice or conscious wrongdoing.[14]

[34] In the present case, the applicant has no previous convictions. The learned sentencing Judge found that the offence was committed over a short period. The applicant, although not participating in an interview with police, was generally cooperative; indeed he voluntarily attended at a police station on the day after the incident. The committal proceeded by way of a full hand-up, without cross-examination. After a submission made on his behalf had been considered, an early indication was given of his intention to plead guilty. His plea of guilty must itself plainly be taken into account.

[35] The fact remains that the offence was a serious offence. Nevertheless, the complainant's injury is clearly at the lower end of the range of injuries which would qualify as grievous bodily harm. The applicant participated in a YJC, has apologised to the complainant, and has the good wishes of his three passengers.

[36] Section 184 of the *YJ Act* makes it necessary to consider the effect of recording a conviction on a child's chances of finding or retaining employment. The fact that the applicant at present has employment in a particular field from a supportive employer does not make this consideration irrelevant. Even in the case of a young adult, uncertainties about the future have been noted in this context.

[37] Reference was made to *R v T*.[15] Although the level of criminality in that case was significantly worse than in the present case, it is plain that the Court was significantly influenced by the young age of the offender; and that she acted "in a way, from panic".[16]

[38] Bearing in mind the *prima facie* position previously referred to, and notwithstanding the seriousness of the offence, the circumstances of this case on balance would justify an order that no conviction be recorded.

**Conclusion**

[39] The application should be allowed, as should the resulting appeal. The order recording a conviction should be set aside.

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13 *R v B* [1995] QCA 231; *R v SBP* [2009] QCA 408 at [21]; *R v WAJ* [2010] QCA 87 at [14].
14 *R v T* [1998] QCA 456.
15 Ibid.
16 Ibid at 7.