SUPREME COURT OF QUEENSLAND

CITATION:	*R v Forsythe* [2011] QCA 71
PARTIES:	**R** **v** **FORSYTHE, Bevan Carl** (applicant)
FILE NO/S:	CA No 10 of 2011 DC No 342 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	15 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2011
JUDGES:	Fraser JA and Atkinson and Peter Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was convicted of dangerous operation of a vehicle – where the applicant deliberately but spontaneously drove his vehicle onto the footpath and collided with the complainant – where the applicant's five year old son was in the vehicle – where the complainant's physical injuries were relatively minor but he suffers from ongoing depression and anxiety – where the applicant had an appalling traffic history but had entered an early plea of guilty and was otherwise a useful member of the community – where the applicant was sentenced to two years imprisonment with an immediate parole release date – where the applicant was subsequently taken into custody for a new offence – where the applicant contended that he only discovered his right to appeal after obtaining new legal representation – where the applicant argued that he was sentenced on an incorrect factual basis and the sentence was manifestly excessive – where the sentence imposed accorded with that propounded by defence counsel – whether the extension of time should be granted *R v Frame* [2009] QCA 9, applied *R v Gusa* [1994] QCA 510, considered *R v GV* [2006] QCA 394, applied

R v Pearce [2010] QCA 338, cited
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, applied

COUNSEL: The appellant appeared on his own behalf
D R Kinsella for the respondent

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

[1] **FRASER JA:** On 30 April 2010 the applicant was convicted on his plea of guilty of dangerous operation of a vehicle on Reserve Road, Upper Coomera, on 14 November 2008. He was sentenced to two years imprisonment with an immediate parole release date and he was disqualified from holding a driver's licence for three years.

[2] On 28 January 2011 the applicant filed an application for an extension of time within which to apply for leave to appeal against sentence. On such an application the Court considers whether there is any good reason for the delay in applying and whether it would be in the interests of justice to grant the necessary extension of time: *R v Tait* [1999] 2 Qd R 667 at 668 [5].

[3] The applicant is presently in custody, apparently because he has been charged with a subsequent offence which would constitute a breach of the conditions of his parole. He stated that after he was incarcerated he was moved to other correctional centres, and he was therefore unable to contact his legal representatives. As a result, he changed his legal representation, and only then discovered that he could appeal. This explanation is not verified by affidavit. I would be disinclined to accept it in light of the applicant's previous involvement in the criminal justice system. He was first convicted of an offence as long ago as 1991, when he was convicted of possessing a dangerous article and fined. He was convicted of various drug offences in 1995, and in 2005 he was sentenced to a wholly suspended term of 12 months imprisonment for an offence of unlawful grievous bodily harm committed in 2004.

[4] Despite the unsatisfactory nature of the applicant's explanation for his delay, the Court retains the discretion to grant an extension of time if a miscarriage of justice otherwise might be perpetuated: *R v GV* [2006] QCA 394 at [3]. It is therefore appropriate to consider whether there is any substance in the proposed application for leave to appeal against sentence.

Circumstances of the offence

[5] I have derived the following circumstances of the offence from the transcripts of the prosecutor's submissions and the sentencing judge's remarks.

[6] The applicant was 35 years of age when he committed the offence and he was 36 years of age when he was sentenced. At the time of the offence the applicant had with him in his car the five year old child of the applicant and his former partner. They shared custody of the child. The applicant was on his way to deliver custody of the child to his former partner when he saw the complainant walking on the adjacent footpath. The complainant had previously been in a relationship with and had just visited the applicant's former partner. The applicant swerved from his lane

into a bus lane, and drove his car over the kerb on to the footpath where he collided with the complainant. The complainant became airborne before landing on a grassed area. The applicant got out of the car and attended to the complainant, who was lying on the ground. The applicant accused the complainant that he had split up the applicant's family and had been going to shoot the applicant. The complainant responded to the effect that those events occurred more than 10 years earlier.

[7] The sentencing judge sentenced the applicant on the basis that his conduct in driving at the complainant was a deliberate but spontaneous act.

[8] The complainant suffered minor injuries in the accident, abrasions to head and shoulders, a bruised right hip and grazed right knee. Notwithstanding the relatively minor nature of the complainant's physical injuries, he suffered considerable pain and there were indications that the complainant now suffers from depression, frustration and anxiety, affecting both his personal life and his ability to work.

The applicant's circumstances

[9] The sentencing judge observed that the applicant's criminal record was not significant in the sentence but that he had an appalling traffic record which was significant in relation to the order for disqualification of the applicant's licence.

[10] There was a committal hearing with cross-examination of the complainant and witnesses, but during negotiations with the prosecutor an indication was made on behalf of the applicant that he would plead guilty. Because the Crown did not proceed with a number of charges the applicant's subsequent plea of guilty was treated as an early plea. The sentencing judge referred also to the applicant's good employment history, his relationship with another person with whom he had two children, favourable references suggesting that the applicant was otherwise a useful member of the community, and the applicant's ambitions to start a new manufacturing business.

Consideration

[11] The applicant argued that he was sentenced on a wrong factual basis. He contended that the collision occurred by accident and he did not know who his car had struck until after the collision. He also contended that it was the complainant rather than the applicant who had made the remark about the breaking up of a family. The applicant did not provide any evidence to support those contentions and he acknowledged that at the sentence hearing he understood and accepted that he was to be sentenced on the basis of the circumstances as they were outlined by the prosecutor. That is consistent with the fact that defence counsel did not challenge the accuracy of any of the prosecutor's submissions about the circumstances of the offence. In some respects defence counsel confirmed the accuracy of the prosecutor's submissions. Defence counsel noted, for example, that there was a past history between the applicant and the complainant, and that the complainant recounted in his statement that the applicant said to him that "[y]ou split up my family then. You were going to shoot me." Furthermore, when the sentencing judge observed in the course of argument that the applicant's driving was "spontaneous but, as I read it, intentional", defence counsel did not submit that any different inference should be drawn. For these reasons, the applicant's argument that he was sentenced on a wrong factual basis is without merit.

[12] The applicant also argued that a more appropriate sentence would have been a short period of imprisonment in actual custody with no period of parole. He argued that the prosecutor had submitted that such a sentence was appropriate, rather than the sentence of two years imprisonment with immediate parole. This argument was based upon a misunderstanding of the submissions made by the prosecutor and remarks made by the sentencing judge during the sentence hearing. The prosecutor submitted that, "a head sentence of two years imprisonment, to serve six months, is within range for this offence…". Defence counsel submitted that he had "no issue in respect of the head sentence of two years" but that the sentencing judge "might consider making an order that [the applicant] be eligible for parole immediately." Defence counsel referred to some cases and submitted that the cases did not support "the range of actual imprisonment being imposed." That was a reference to the period of six months which the prosecutor had submitted should be served in actual custody under the sentence of two years imprisonment, as defence counsel subsequently made plain by his submission that the appropriate sentence was "two years with immediate parole". In that context, the sentencing judge asked defence counsel what was the earliest date upon which the applicant could be released after he was sentenced to imprisonment. Defence counsel responded that the sentencing judge could fix any date for parole but that the authorities suggested that there was no benefit in imposing a very short period of imprisonment.

[13] In summary, the prosecutor submitted that the appropriate sentence was two years imprisonment with release on parole after six months and defence counsel submitted that the appropriate sentence was two years imprisonment with immediate release on parole. The sentencing judge was not bound by either party's submissions, but ultimately his Honour accepted defence counsel's submission, remarking that a short period of custody was more likely to be disruptive and make it less likely that the applicant would remain a useful member of the community. There is no substance in the applicant's argument that he should have been sentenced to a very short period of imprisonment to be served in custody with no period to be served on parole.

[14] The fact that the sentence imposed accorded with that proposed by defence counsel makes it difficult to accept that the sentence was manifestly excessive: see *R v Frame* [2009] QCA 9 at [6]. The applicant's sentence is consistent with Holmes JA's detailed analysis of authorities in *R v Pearce* [2010] QCA 338 at [9]-[17]. It is not necessary to recapitulate that analysis but I should discuss *R v Gusa* [1994] QCA 510, which is the most relevant of the comparable decisions cited to the Court. That case indicates that the applicant's sentence could not be regarded as being manifestly excessive. That offender was sentenced to three years imprisonment wholly suspended for three years for one count each of dangerous driving, common assault, and wilful damage. The offender, aggrieved by a relationship between his wife and the complainant who lived nearby, assaulted the complainant by grabbing his throat whilst the complainant was in his own car. The offender then returned to his car, drove it at some speed directly towards the complainant, and stopped only just before coming into contact. The complainant jumped out of the way and escaped injury. An aggravating circumstance not present in the applicant's case was that Gusa committed his offence whilst he was subject to a good behaviour bond arising from some pushing and shoving between him and the same complainant nearly 12 months earlier. However, the applicant's driving was more culpable because he drove his car off the carriageway and onto a footpath dedicated to pedestrians, he intentionally drove his car into collision with the complainant, he did

so with sufficient force to propel the complainant into the air, and he engaged in that highly dangerous driving whilst he had his very young child with him in his car.

[15] The maximum penalty for the offence is three years imprisonment and a fine of 200 penalty units. The applicant's driving was a very bad example of the offence. I think it clear that the sentence imposed upon the applicant was a sound exercise of the sentencing discretion reposed in the sentencing judge.

Proposed order

[16] I would refuse the application.

[17] **ATKINSON J:** I agree with the reasons of Fraser JA and with the order proposed by his Honour.

[18] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Fraser JA, with which I agree. I also agree with the order proposed by his Honour.