

SUPREME COURT OF QUEENSLAND

CITATION: *R v Johnson* [2011] QCA 78

PARTIES: **R**
v
JOHNSON, Joshua Raymond
(applicant)

FILE NO/S: CA No 263 of 2010
DC No 2264 of 2010

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 21 April 2011

DELIVERED AT: Brisbane

HEARING DATE: 11 April 2011

JUDGES: Fraser JA, Atkinson and Peter Lyons JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The application for leave to appeal be granted;**
2. The appeal be allowed; and
3. In respect of the sentence imposed for the charge the subject of the indictment, the term of imprisonment be varied to four years; that term to be suspended after the applicant has served a period of 12 months, with an operational period of four years.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – PARTICULAR OFFENCES – DRIVING OFFENCES – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant convicted of dangerous operation of a motor vehicle causing grievous bodily harm while adversely affected by alcohol – where applicant had blood alcohol concentration of 0.135 per cent – where grievous bodily harm was caused to two persons – where applicant on bail for driving a motor vehicle whilst his blood alcohol concentration exceeded the general alcohol limit – where applicant 17 years old at the time of the offence – where applicant had history of childhood disadvantage and difficulty adjusting to family relocation – where applicant pleaded guilty – where applicant sentenced to five years imprisonment suspended after 18 months – whether in all the circumstances the sentence imposed was manifestly excessive

R v Blanch [2008] QCA 253, distinguished
R v Gray [2005] QCA 280, considered
R v Hine [2002] QCA 212, applied
R v Hook [2006] QCA 458, considered
R v Quinn [2003] QCA 417, considered
R v Simpson [2003] QCA 100, considered

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

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

- [1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Peter Lyons J. I agree with those reasons and with the orders proposed by his Honour.
- [2] **ATKINSON J:** I agree with the reasons for judgment of Peter Lyons J and the orders proposed by his Honour.
- [3] **PETER LYONS J:** On 3 November 2010 Mr Johnson was sentenced on his plea of guilty to a charge of dangerously operating a motor vehicle, causing grievous bodily harm to two persons, at a time when he was intoxicated. He was sentenced to a term of imprisonment of five years, suspended after 18 months for an operational period of five years, and was disqualified from holding a driver's licence for a period of two years.
- [4] At the same time, he was sentenced on his plea of guilty to a charge of driving a motor vehicle whilst his blood alcohol reading was over the general alcohol limit, but not over the high alcohol limit. For this offence he was sentenced to a term of imprisonment of six months.
- [5] The applicant seeks leave to appeal against his sentence. He also wishes to place additional material before the court in respect of his sentence. He is self-represented.
- [6] The applicant's date of birth is 23 December 1991. The offences were committed on 7 December 2009, not long before his 18th birthday.
- [7] The offences occurred consequent upon a visit by the two complainants to the applicant's home, which involved discussions relating to possible modifications to the vehicle of one of them. One of those modifications, the lowering of the suspension, had been made to the applicant's vehicle, and the applicant and the complainants went for a drive in the applicant's vehicle to see how the vehicle handled with the lowered suspension. This was at about 5.30 pm.
- [8] Initially, the party drove around a housing estate in Mt Gravatt East, where the applicant was observed doing "burnouts". The applicant then drove out onto Cavendish Road, travelling north, and subsequently south along that road. His speed whilst driving south along Cavendish Road was estimated at between 80 km per hour and 120 km per hour. At this point, there are two lanes in each direction for traffic on Cavendish Road, and the speed limit is 60 km per hour. There were two cars travelling in the same direction as the applicant, one occupying each lane.

The applicant pulled out across double unbroken white lines to overtake these vehicles, causing a driver travelling in the opposite direction towards the applicant to take evasive action. The applicant then returned to the southbound side of the road, lost control of the car, and swung back across the northbound lanes of traffic, ultimately colliding with a tree. At a time which may have been about an hour after the accident, the applicant was recorded as having a blood alcohol concentration of 0.135 per cent. While the total driving time was about 15 minutes, it would seem that driving at high speed occurred over a rather brief period.

- [9] One of the passengers suffered a brain injury, a broken pelvis and a broken left arm. The brain injury was described as “extremely severe” when he was assessed six months after the accident. His rehabilitation was described by the learned sentencing judge as slow and painful. The hospital report and the psychologist’s report tendered at the sentence support her Honour’s finding that this complainant is left with an extensive disability. He was 23 years old at the time of the incident.
- [10] The other passenger suffered a fractured right femur and wounds to the right knee and left hand. The fracture, if left untreated, may have endangered his life. Not surprisingly, hospital treatment was required, including the insertion of a femoral nail.
- [11] The applicant grew up in New Zealand. He experienced difficulties at school, and was diagnosed as suffering from dyslexia. His behaviour at school was said to be suggestive of an attention deficit disorder. It appears that he engaged in alcohol and cannabis abuse, commencing from early adolescence.
- [12] The applicant completed year 11 in New Zealand. He apparently had some aptitude for mechanical work, and at times found work of this type. At other times since leaving school he has been engaged in other forms of employment (car wrecker, kitchen hand, and storeman).
- [13] The applicant’s family moved to live in Brisbane in January 2009. The applicant found the adjustment difficult, and his consumption of alcohol escalated in this period. He had several different jobs in succession, ultimately as a trainee chef with a leading restaurant. He resigned as a result of the long hours and low pay.
- [14] A psychologist’s report was tendered at the sentence. The applicant has been diagnosed with adjustment disorder and mild depression.
- [15] Since the accident, the applicant has undertaken counselling in respect to his alcohol consumption. The learned sentencing Judge appears, correctly in my view, to have taken this into account as indicative of favourable prospects of rehabilitation.
- [16] The applicant remained in contact with the complainants, in particular with the young man who suffered the brain injury. This complainant holds no animosity towards the applicant, regarding the event as “an accident”.
- [17] A few weeks before these offences, the applicant had driven a motor vehicle when he had a blood alcohol concentration of 0.07 per cent (for which he was subsequently fined \$300). He was on bail for this offence at the time of the present offences.
- [18] The applicant did not participate in a record of interview. He was, however, co-operative with the administration of justice. The matter proceeded by way of ex officio indictment.

- [19] Although relatively brief, the remarks of the learned sentencing Judge accurately described the major features of the events leading up to the commission of these offences, and the more significant circumstances relating to the applicant. Her Honour considered that deterrence was a major factor. She found the cases to which she had been referred to be of limited assistance. She imposed a longer term of imprisonment than had been contended for by the prosecution.
- [20] The respondent supports the sentence imposed by reference to *R v Blanch*.¹ That was a successful application for leave to appeal against sentence. The sentence originally imposed was one of six years imprisonment, with a parole eligibility date fixed so as to result in some two and a half years in actual custody. The latter time was reduced by six months. The applicant in that case was convicted on his plea of guilty of one count of dangerous operation of a motor vehicle, causing death and grievous bodily harm, while adversely affected by an intoxicating substance. The applicant had engaged in a high speed car chase in the early hours of the morning, in a vehicle in which he was carrying four passengers. There was other traffic on the road at the time. Travel at high speed continued for several minutes, the speed being estimated at between 150 km per hour and 180 km per hour shortly before he lost control of his vehicle. The applicant admitted to having driven at speeds in excess of 120 km per hour for some of this period, and that he had continued to drink while driving, and had been holding a can of drink until immediately before the accident. These events occurred at Southport.
- [21] This applicant had a blood alcohol concentration of 0.114 per cent; with the result that, at the time of the offence, the maximum penalty was 10 years imprisonment. This applicant was 20 years of age at the time of the offence. He was not charged for some 15 months after the accident. He was remorseful.
- [22] Because the applicant is not legally represented, Mr Copley SC, who appears for the respondent, has provided copies of the cases relied on on the applicant's behalf at the sentence. The first of those cases is *R v Hine*.² That applicant was 26 years of age at the time of the offence. He pleaded guilty to a single count, namely, dangerous operation of a motor vehicle, causing grievous bodily harm, while adversely affected by an intoxicating substance. His blood alcohol concentration was 0.139 per cent. The applicant had been travelling on Logan Road at Holland Park at about 9 pm, at excessive speed, estimated by one witness at 80 km per hour. He drove through a red light, without slowing down. At the next intersection, there were stationary vehicles. The applicant applied his brakes some eight metres back from one of these vehicles, but collided with it, forcing the vehicle to be propelled forward and crash into a telephone pole some 70 metres distant. The complainant, a 42 year old single mother of two teenage children, suffered serious injuries, including a brain injury from which she was not expected ever to entirely recover. As a result of the accident, her financial position had seriously deteriorated. The applicant was sentenced to a term of imprisonment of four years, with a recommendation for release after 18 months.
- [23] In *R v Simpson*,³ the applicant had pleaded guilty to one count of dangerous operation of a vehicle, causing grievous bodily harm, while adversely affected by alcohol. He was sentenced to five years imprisonment, with a recommendation that

¹ [2008] QCA 253.

² [2002] QCA 212.

³ [2003] QCA 100.

he be eligible for post prison community based release after 22 months, and was disqualified from holding a driver's licence for five years. He was 25 years of age at the time of the offence. He had a number of criminal convictions, and was the subject of a suspended sentence at the time of the offence. He was driving a vehicle in which there were a number of passengers. Initially, he had difficulties getting the vehicle out of a car park. Later, he travelled at a speed of about 80 km per hour. At one point, he drove straight through a roundabout, jolting his passengers. They all told him to slow down or stop. He continued to drive at a speed of 80 km per hour and one of the passengers then punched him, the intention no doubt being to persuade him to stop the vehicle. The applicant then took his hand off the steering wheel and punched the passenger. Not surprisingly, the car veered onto the wrong side of the road, narrowly missed a pedestrian, and struck a light pole. One of the passengers was very seriously injured, with multiple internal injuries and brain injuries. Another had significant fractures to the pelvis and left clavicle. A third passenger suffered less significant injuries. Two hours after the accident, the applicant had a blood alcohol concentration of 0.263 per cent. The sentence was reduced to a term of imprisonment of four years, suspended after 18 months.

- [24] The applicant in *R v Quinn*⁴ pleaded guilty to one count of dangerous operation of a motor vehicle, causing grievous bodily harm, while adversely affected by alcohol. The blood alcohol content was 0.188 per cent. The applicant was sentenced to three years imprisonment, suspended after 12 months, with an operational period of three years; and she was disqualified from holding a driver's licence for a period of two years.
- [25] The applicant in *Quinn* had been drinking for five hours. Shortly before the accident occurred, the applicant's passenger had twice asked her, unsuccessfully, to stop the car so that he could get out. She drove through a stop sign at a speed in excess of 70 km per hour, colliding with another vehicle (a mini bus taxi), which rolled over. Her passenger suffered a badly fractured left arm and a permanently disfigured shoulder with constant pain and little mobility. He had to cease work as a cabinet maker. This applicant was 25 years of age at the time of the offence. An application for leave to appeal against the sentence was refused.
- [26] *R v Gray*⁵ was concerned with an applicant who pleaded guilty in the District Court to a charge of causing the death of one person, and grievous bodily harm to another, by the dangerous operation of a motor vehicle, whilst adversely affected by alcohol. His blood alcohol content was 0.125 per cent. He was sentenced to a term of imprisonment of four years, suspended after 18 months. He was 17 years of age at the time of the offence, with no previous convictions. He had a provisional driver's licence, with the result that he was not allowed to drive a vehicle when any alcohol was present in his body.
- [27] He had attended a party, and drove a dual-cab utility from it in the early hours of the morning. There were four passengers in the cab part of the vehicle, and three girls on the tray of the utility. As he drove, he suddenly started swerving and commenced "fish tailing". One of his passengers spoke sternly to him, telling him to drive properly or else stop. The vehicle then drifted off the road, almost hitting some trees, and came back onto the road. It again slid sideways, hit some trees, and

⁴ [2003] QCA 417.

⁵ [2005] QCA 280.

rolled over. One of the girls was killed instantly, and another suffered very serious injuries to her abdomen and jaw, which, it was said would have a serious and permanent effect on her. This applicant's blood alcohol content was 0.125 per cent. The reasons of Williams JA, with whom McPherson JA agreed, stated that the offence of dangerous driving causing death must attract a more severe penalty than similar driving which does not have such a consequence. The sentence was not disturbed.

- [28] In *R v Hook*⁶ the applicant had pleaded guilty to an offence of dangerous operation of a motor vehicle causing grievous bodily harm to another person, while adversely affected by alcohol. The applicant's blood alcohol concentration was 0.165 per cent. She also pleaded guilty to driving a motor vehicle (a utility) when the number of passengers exceeded the maximum which the vehicle was capable of carrying. She was sentenced for the dangerous driving offence to a term of imprisonment of three years, suspended after 12 months.
- [29] The offence was committed in the early hours of the morning. There were two passengers in the vehicle. The applicant had failed to negotiate a bend in a major roadway, and collided with a tree. The speed limit was 80 km per hour, and there was no allegation that the speed limit was exceeded. The applicant was 21 at the time of the offences.
- [30] Of the cases relied upon on behalf of the applicant, the learned sentencing judge said that all of the driving "was done before the increase in the maximum penalty". Currently, the maximum penalty for the offence, involving as it does grievous bodily harm and driving while adversely affected by alcohol, is 14 years. Prior to 20 March 2007, the maximum penalty was 10 years, unless the concentration of alcohol in the offender's blood exceeded the high alcohol limit, which at that time was 0.15 per cent; in which case it was 14 years. Some, therefore, of the cases were not affected by the change in penalty.
- [31] It is difficult to derive much assistance from *Blanch*. That is because the speeds involved in *Blanch* were significantly greater, and it would seem that the high speed driving continued for a longer period of time. The matter is further complicated by the death of one of the passengers. While the difference in ages is not great, nevertheless one would expect more mature behaviour from a person aged 20, than a person who had not yet turned 18.
- [32] The appeal in *Simpson* proceeded on the basis that the maximum penalty was 14 years. Simpson's blood alcohol concentration was very high (0.263 per cent). He ignored warnings to slow down or stop. He was 25 years of age at the time of the offence. Yet the sentence imposed on him on appeal, four years imprisonment (suspended after 18 months), is appreciably lower than that imposed on the present applicant. Mr Copley submitted that in *Simpson* only one person suffered grievous bodily harm. A perusal of the reasons for judgment suggests that this submission is correct. However, two other passengers were injured, with what were referred to in the reasons for judgment as serious consequences for them.⁷
- [33] The blood alcohol concentration in *Quinn* was such that the maximum penalty was 14 years. While the sentence of three years (suspended after 12 months) may seem markedly low by comparison with the applicant's, the substantially lower speed

⁶ [2006] QCA 458.

⁷ [2003] QCA 100, at [13].

provides some explanation. Nevertheless, Quinn was 25 years of age at the time of the offence; she had been asked by her passengers to stop on two occasions so that they could get out; and the accident occurred after she deliberately drove through a stop sign, at a speed of 70 km per hour. Her blood alcohol level was also substantially higher than the applicant's.

- [34] *Hook's* case is of less assistance, notwithstanding that in that case, the blood alcohol concentration was 0.165 per cent. There was no allegation of excessive speed. Nevertheless, the applicant was some years older than the present applicant. It might be regarded at least as raising a question about the correctness of the sentence in the present case.
- [35] There is also some difficulty in deriving assistance from *Gray*, because the maximum penalty was lower than it is in the present case. Nevertheless, the driver in that case was of a very similar age to the present applicant, and his blood alcohol concentration was not markedly different. Since one of the passengers died, the case tends to suggest that the sentence in the present case is high.
- [36] Mr Copley challenged the utility of these cases on the ground that there was generally only one complainant. That is not true of *Gray*; and in *Simpson* there were serious consequences for two other people, though it was not alleged that they suffered grievous bodily harm.
- [37] In *Hine*, Mackenzie J drew attention to the wide range of sentences found in the authorities for offences of this kind. His Honour noted that it was rare that facts were identical from case to case; and stated that it was therefore necessary in an individual case to assess how serious the offence is to which the sentence relates, and, giving appropriate weight to mitigating circumstances, other relevant factors, and relativity with cases which are, broadly speaking, of similar seriousness, to impose a sentence which achieves justice in the particular case.
- [38] A case in which a person has driven a vehicle dangerously whilst under the influence of alcohol, and has caused grievous bodily harm to another person, is of its nature quite serious. While it is obvious that the present case is not near the bottom of the range in terms of the seriousness of harm, it cannot be regarded as being as serious as a case involving the death of another person. By comparison with the other cases referred to, the applicant's blood alcohol content was not particularly high. His relative youth is a matter of some significance. Although he had been driving a motor vehicle while under the influence of alcohol some few weeks before these offences, and was on bail at the time, these circumstances seem to me to be less significant, particularly when viewed in the light of his age, the personal difficulties previously referred to, and his psychological condition. Unlike some of the cases, there has been no suggestion in the present case that either of the passengers asked him to slow down or stop. Indeed, their interest in driving in a vehicle which had been modified to see how it performed, might suggest a wish to test the ability of the vehicle whilst travelling at some speed.
- [39] The applicant's remorse, while in principle of considerable importance in sentencing, is of little assistance in relating this case to other decisions. It is a not uncommon feature in these cases, the offence being one which, unfortunately, is committed by people who are otherwise generally law abiding and decent citizens.
- [40] In the end, it seems to me that the sentence was unduly harsh, and should be varied. However, it is necessary at this point to consider another aspect of the application.

- [41] The applicant seeks to place additional material before the Court. That material in essence speaks well of him, and indicates that an employer for whom he worked after the offence was willing to employ him on his release. Its general tenor is consistent with material that was before the sentencing Judge. I would refuse leave to the applicant to rely on this material on the question whether the sentence below should be disturbed. However, no objection is raised to considering it in the event that the sentence is to be varied. I would also take into account the fact that the applicant's family continue to provide support for him.
- [42] I would impose a sentence of four years imprisonment, suspended after 12 months to reflect in particular the applicant's youth, his personal circumstances, his co-operation including his plea of guilty, and his efforts at rehabilitation prior to sentence. No reason has been advanced to alter the sentence imposed for the summary offence.
- [43] The applicant seeks an order that he be released on parole. The implication may be that he seeks immediate release. In the present case, the importance of deterrence is such that an order for the applicant's immediate release is not appropriate. The applicant's oral submissions recognised this.
- [44] I would order that:
- (a) the application for leave to appeal be granted;
 - (b) the appeal be allowed;
 - (c) in respect of the sentence imposed for the charge the subject of the indictment, the term of imprisonment be varied to four years; that term to be suspended after the applicant has served a period of 12 months, with an operational period of four years.