SUPREME COURT OF QUEENSLAND

CITATION:	*R v Grabovica* [2012] QCA 180
PARTIES:	**R** **v** **GRABOVICA, Adnan** (applicant)
FILE NO/S:	CA No 285 of 2011 DC No 1144 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2012
JUDGES:	Fraser and White JJA, and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW − APPEAL AND NEW TRIAL − APPEAL AGAINST SENTENCE − PARTICULAR OFFENCES − DRIVING OFFENCES − GROUNDS FOR INTERFERENCE − SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE − where 17 year old applicant convicted on plea of guilty of dangerous operation of a motor vehicle causing grievous bodily harm while excessively speeding – where two of four persons who suffered grievous bodily harm were injured extremely severely – where applicant was travelling at between 104 and 118 kilometres per hour at time of collision – where applicant was evading police and travelling near a school at a time when other lawful traffic could reasonably be expected – where applicant said he had "blacked out" and could not remember much of the incident – where applicant had traffic history and his licence had been suspended at time of offence – where appropriate sentencing range identified by the primary judge was not challenged – whether the sentence imposed was manifestly excessive in all the circumstances *R v Amituanai* (1995) 78 A Crim R 588; [1995] QCA 80, cited *R v Johnson* [2011] QCA 78, considered *R v Murphy* [2009] QCA 93, cited

R v Simpson [2003] QCA 100, considered
R v Tabakovic [2005] QCA 90, considered

COUNSEL: A J Glynn SC for the applicant
S P Vasta for the respondent

SOLICITORS: Robertson O'Gorman Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** On 20 October 2011 the applicant was convicted on his plea of guilty of dangerous operation of a motor vehicle causing grievous bodily harm, with the circumstance of aggravation that he was excessively speeding. He was sentenced on the same day to five years imprisonment, with a parole eligibility date fixed on 20 June 2013 (after 20 months). The applicant was disqualified absolutely from holding a driver's licence. The applicant has applied for leave to appeal against his sentence on the ground that it is manifestly excessive.

Circumstances of the offence

[2] The applicant held a provisional driver's licence which permitted him to drive only automatic transmission cars and did not permit him to drive a turbo-charged vehicle. At the time of the offence, that licence was suspended and the applicant was driving a car with a turbo-charged engine and a manual transmission. The collision occurred around 5.20 pm on a weekday in November 2010 on a straight road with one marked lane in each direction separated by single white broken lines. There is a primary school about 100 metres south of the collision point. The speed limit was 60 kilometres per hour. There was a steady flow of traffic. The weather was fine. People were collecting children from after school care at the time of the collision. The applicant had two passengers in his car, Mr Rutter and Mr Geraghty, both 18 years old. The occupants of the other car were the driver, Mrs Bowden, aged 38, and her seven year old daughter Natalie.

[3] Shortly before the crash, the applicant was driving southbound. Mr Rutter estimated that the applicant was then driving at 70 kilometres per hour and a pedestrian estimated that the applicant was travelling at 80 to 90 kilometres per hour. Police driving north saw the applicant's car, did a u-turn, and activated the warning lights and sirens in an attempt to intercept it. The applicant accelerated heavily and crossed onto the incorrect side of the road to overtake cars in front of him. That happened near the primary school. The police deactivated their lights and sirens and pulled over onto the left hand side of the road. The applicant continued to drive on the wrong side of the road, heavily accelerating. Witnesses gave various estimates of the speed at which the applicant was driving as being 140 kilometres per hour, at least 140 kilometres per hour, and 140 - 160 kilometres per hour.

[4] Mrs Bowden, who was driving on the road in front of the applicant, commenced to turn right at an intersection. A passenger in the applicant's car yelled out to him to stop. The applicant braked heavily, leaving skid marks 33 metres long, before crashing into the driver's side of Mrs Bowden's car. Her car became airborne and rolled continuously until it came to a stop about 50 metres from the point of impact. Using CCTV footage and other evidence at the scene of the collision, it was

estimated that at the time of the collision the speed of the applicant's car was between 104 and 118 kilometres per hour and, before braking, the speed would have been between 130 and 141 kilometres per hour.

[5] Mrs Bowden and her daughter, and the applicant's two passengers, suffered grievous bodily harm. The injuries to Mrs Bowden and Mr Geraghty were extremely severe. Mrs Bowden suffered an injury to the brain described as "diffuse axonal injury (brain damage)", with slowing of activity in the frontal lobe. She suffered many injuries to her right arm and hand: the complete ("degloving") loss of skin to the right arm, back of the hand and wrist, and multiple fractures to various bones. She suffered multiple fractures to her pelvis, to her jaw, and to her face. She suffered a retroperitoneal haemorrhage, bleeding into the abdomen, and bruising to the small intestine. The loss of skin to her right arm, the fracture of the right arm, the fracture of the jaw, and the brain injury, each amounted to grievous bodily harm. She underwent multiple orthopaedic and plastic surgical procedures. She is left with injuries which appear permanent. At the time of sentence she was still undergoing rehabilitation in relation to the injuries to her right arm and her brain injuries. She showed significant impairment at a moderate to severe level in information processing speed and verbal expression.

[6] Natalie Bowden suffered a non-displaced fracture of her pelvis, a right kidney laceration with associated haematoma, a ruptured bladder (a three centimetre tear), and bruising around an eye. She required surgery to repair the ruptured bladder. The fracture of the pelvis and the lacerated kidney were managed conservatively. The tear to the bladder constituted grievous bodily harm. That injury, and the kidney laceration, caused severe pain that required narcotic analgesia by the ambulance officers and before her operation.

[7] Mr Geraghty suffered a closed head injury: bleeding within the tissues of the brain, bruising of the brain with swelling and bleeding, left frontal subarachnoid haemorrhage, and epileptic seizure. He sustained fractures, bruising, abrasions, and lacerations to his face; a fractured left second rib and bruise to the lung tissue; a fractured right arm near the wrist (distal radius), and a laceration to his left thumb with extensor tendon damage; and a fracture dislocation of the left foot and a fourth lumbar vertebra burst fracture. He required intubation and ventilation for his decreasing level of consciousness, and surgery to repair his facial fractures and the fracture to his right arm. The fracture to his ankle caused his foot to be at 180 degrees to its normal position. That required rapid reduction by emergency medical staff to restore circulation. Mr Geraghty's brain injury appeared to have resulted in permanent injury to his health. He requires supervision at all times because he is unsafe for cognitive reasons. He developed post-traumatic seizure disorder. The director of the brain injury unit at the PA Hospital considered that it was unlikely in the foreseeable future that he could return to work or be able to drive.

[8] Mr Rutter sustained a compound, minimally displaced fracture of the distal fibula, a partial detachment of the syndesmosis (the tissue connecting the tibia and fibula), and an associated 10 centimetre laceration over the left ankle (full thickness tear of the skin), an associated laceration in the muscle belly of peroneus tertius (a muscle used in some movements of the foot), a laceration on the shin, and bruising to the lower abdomen. He required orthopaedic surgery to clean the ankle wound and repair the partial detachment of the syndesmosis. The fracture of the fibula did not require operative fixation. The ankle was set in a cast and the laceration required surgical cleaning.

[9] The applicant was interviewed on his release from hospital on the day after the offence. He said that he held an automatic driver's licence which he believed allowed him to drive a manual car, although he had been fined for driving a manual car previously. He said that he could not remember anything other than losing the steering wheel and hitting either a car or a tree. He said that he had been travelling at 70 or 80 kilometres per hour, that there were no police cars in the vicinity of the crash, that he was not speeding or overtaking on the wrong side of road, and that the crash was not his fault. He said that he had "blacked out". He said that he had "blacked out" and crashed a car some three months earlier, but he had not sought any medical treatment for that supposed condition and he admitted that his mother had told him that he had crashed the previous car because of speeding. At the sentence hearing, however, the applicant did not seek to contradict the facts alleged by the Crown summarised in [2]-[4] of these reasons. He also did not challenge the Crown's allegation that he was aware that his licence was suspended at the time of the collision.

The applicant's personal circumstances

[10] The applicant was 17 years of age when he committed the offence and 18 years of age when he was sentenced. He had no prior convictions. He did have a relevant history of traffic infringements:

- 27 July 2010 - speeding (more than 13 kilometres per hour over the limit)
- 29 July 2010 - speeding (more than 20 kilometres per hour over the limit)
- 7 August 2010 - speeding (more than 20 kilometres per hour over the limit)
- 7 August 2010 - failed to display red plates front and rear of car
- 25 October 2010 - the applicant chose to undergo a 12 month good behaviour period instead of licence suspension for the four infringements
- 14 November 2010 - driving a defective vehicle (too low and a tyre devoid of tread) and failed to display red plates at front and rear of car
- 24 November 2010 - licence suspended (on the day of the offence)

Sentencing remarks

[11] In addition to referring to the circumstances of the offence and the applicant's personal circumstances, the sentencing judge made the following observations.

[12] The applicant's driving was of the most serious kind. It occurred in a built up area and in an area in which there was a school. It occurred at a time when other traffic was present and could sensibly be expected to be present. The dangerous driving was of relatively short duration but it was "deliberate and contemptuous of other road users" and, as such, was a serious case of this type of offending. The maximum penalty was 14 years imprisonment. The absence of a licence, the high speed and the nature of the area in which the applicant was driving were very serious aggravating circumstances. Mrs Bowden and Mr Geraghty had their lives changed forever; for them and their families, not a day would pass without ever present reminders of the applicant's dangerous driving and its effect on their lives. The sentence must reflect community denunciation.

[13] Whilst there was much to be said for the Crown prosecutor's argument that the applicant was less than frank at the interview, the sentencing judge did not make a definite finding about that matter, considering that such a finding would not affect the sentence. The applicant was a young man with a short but turbulent driving career. He knew that his licence had been suspended. He had no driver training and he was entirely too immature to have a licence and certainly too immature to be driving a car of the type he was driving. His immaturity justified absolute disqualification from driving.

[14] The Crown urged a range of five to seven years imprisonment, but the sentencing judge considered that range was a little too high because of the absence of alcohol, the short duration of driving, and the applicant's youth. The appropriate range was four to five years imprisonment. In deciding where in that range the applicant should be sentenced, the sentencing judge took into account that the applicant had developed a level of understanding and remorse since the accident occurred.

[15] The sentencing judge considered that the following matters were important in determining the appropriate sentence. The applicant set out to evade police. He drove at more than twice the speed limit. He drove deliberately on the wrong side of the road. The driving was in a built-up area when other traffic was present and was anticipated. The applicant had, for one so young, a very poor traffic history. He knew that he was not entitled to drive at all, let alone to drive the performance car he was driving. Most importantly, the consequences were horrific. The sentencing judge considered that in all of the circumstances, the appropriate sentence was at the upper end of the range. Parole eligibility, rather than suspension, was appropriate because the applicant's return to the community should be supervised and supported.

Consideration

[16] The applicant disclaimed any challenge to the sentencing judge's conclusion that the appropriate range of sentence was between four and five years imprisonment. The applicant argued, however, that the appropriate sentence was at the bottom of that range, four years imprisonment, with parole eligibility at between nine and 12 months from the date of sentence.

[17] The applicant argued that the sentencing judge should not have taken into account that the applicant's dangerous driving occurred near a school because the collision did not occur in school hours and no evidence was offered that the applicant knew of the existence of the school. The sentencing judge's reference to the location of the school was unexceptionable. At the sentence hearing, the applicant's counsel did not seek to contradict the statement by the Crown prosecutor that, at the time of the offence, "there was a steady flow of traffic…and there were people collecting children from the nearby school from after school care." As was submitted for the respondent, that was a fact relevant to the objective dangerousness of the applicant's driving. The sentencing judge did not err in taking it into account. Nor did the sentencing judge over-emphasise the point. Its significance was, as the sentencing judge mentioned immediately after noting that there was a school in the area, that the applicant drove dangerously "when other traffic was present and could sensibly be expected to be lawfully using the area". That was not contentious at the sentence hearing or in this application.

[18] The applicant also argued that his youth and immaturity were not properly reflected in the sentence imposed, and that a shorter non-parole period would provide for a longer period of supervision after his release. The sentencing judge took into account the applicant's youth and immaturity, particularly in the observation that the applicant was "a young man and it is important that a sentence that I impose should not have a crushing effect upon you." Although the sentence is a very severe one for such a young man, with no criminal history, the sentencing judge was required to determine the weight to be afforded to those circumstances in fixing upon the just sentence. His Honour was also obliged to have regard to the many aggravating circumstances, including the manifest dangerousness of the applicant's driving, the fact that he drove in that way without a licence, in the context of a bad traffic history, and to evade police, and the grievous bodily harm he caused to four people.

[19] The applicant referred to *R v Tabakovic* [2005] QCA 90, in which a sentence of three and a half years imprisonment to be suspended after 16 months was set aside on appeal and the offender was sentenced instead to three years imprisonment to be suspended after serving 10 months. That offender pleaded guilty to dangerously operating a motor vehicle and causing grievous bodily harm at a time when he was adversely affected by alcohol and when the concentration of alcohol in his blood exceeded 150 mg of alcohol per 100 ml of blood. Like the applicant, he was therefore exposed to a maximum possible penalty of 14 years imprisonment. Tabakovic stopped at traffic lights on a main street in Brisbane, and, after revving his car engine with his foot on the brake, upon the lights turning green he accelerated heavily during a left hand turn. His wheels screeched loudly, the car began to fishtail, and it veered up onto a kerb and footpath, colliding with the complainant and various structures.

[20] That driving apparently occurred over a shorter distance and duration than the applicant's driving. Like the applicant, Tabakovic had no prior convictions but he had a worse traffic history, including five offences of speeding and a failure to stop at a red traffic arrow. His licence had been suspended, although he had no prior history of drink driving. Mr Tabakovic was a mature man, whereas the applicant was very young, but otherwise Mr Tabakovic's personal circumstances were more compelling. He was driving because he had taken his three year old son out to allow his ill wife to get some sleep. After the offence he obtained the complainant's address and details from the police officer who interviewed him so that he could write a letter of apology to the complainant. He and his wife were paying off the cost of repairs to the bus shelter which he had damaged. He had a traumatic background in former Yugoslavia and, after arriving in Australia, had learned to speak English and had obtained steady employment. He was found to be remorseful and prepared to compensate the victims of his offence.

[21] Furthermore, Tabakovic's driving, although extremely dangerous, did not seem to be objectively as dangerous as the applicant's driving at great speed on the wrong side of the road. Most significantly, Tabakovic caused grievous bodily harm to one person. Jerrard JA referred to the prosecution having described the complainant as having made a reasonable recovery from his injuries after 12 months, whereas the applicant caused grievous bodily harm to four people, two of whom suffered extremely severe and lasting injuries. It is uncontroversial that the severity of the consequences of an accident caused by dangerous driving, although unforeseen and unintended by the offender, can matter a great deal in the determination of the just

sentence.[1] Having regard to these matters, *Tabakovic* does not indicate that the applicant's sentence is manifestly excessive.

[22] The applicant particularly relied upon the following statement made by Jerrard JA after an extensive analysis of authorities:

> "The cases to which this Court was referred, quoted at length herein, show that relevant matters in imposing sentence in such cases include, but are not limited to:
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> - the BAC, with the specific statutory increase in the maximum penalty from 10 to 14 years if the intoxicating substance is alcohol and the offender was over .15;
> - the duration of the unbroken journey in which the offender had driven while the offender's capacity was adversely affected by alcohol or another drug;
> - the distance over which an offender had been observed to drive in a manifestly dangerous way;
> - whether that manifestly dangerous driving was the result of deliberate choice by the offender, or of carelessness, or inattention and if so whether prolonged or momentary, or the result of some other cause, such as drowsiness or drugs;
> - the offender's prior traffic history and criminal history;
> - the offender's plea;
> - the extent of cooperation or non-cooperation with investigating bodies;
> - other conduct indicative of remorse or of its absence; and
> - matters personal to the individual offender."

[23] As to the first point, the applicant was not under the influence of alcohol, but the aggravating circumstance that he was speeding excessively at the time of committing the offence produced the same consequence that the maximum penalty was increased from 10 to 14 years. As to the second and third points, the duration and distance of the applicant's journey whilst he was speeding were short, but apparently not as short as in *Tabakovic*. As to the fourth point, the dangerous driving of each of the applicant and Tabakovic was the result of deliberate choice, but the applicant's offence was aggravated by the fact that he chose not to stop or slow down upon the siren and flashing lights being sounded on the police car, but rather to cross onto the incorrect side of the road and attempt to evade police. For the purpose of fixing upon a just sentence, there seems to be little significant difference between the applicant and Tabakovic in relation to the fifth point (traffic history), the sixth point (the plea of guilty), and the seventh point (the extent of co-operation with investigating bodies). Tabakovic presented with a stronger case in relation to remorse. The most significant point in the applicant's favour in that list relates to the last point, concerning the applicant's very young age. As Jerrard JA made plain, however, the list of points was not intended to be a comprehensive check list of matters relevant in sentence. In particular, as I have mentioned, the extent of the adverse consequences caused by an offender's dangerous driving is relevant.

[24] In a further outline of submissions which the Court gave the applicant leave to file after the hearing, the applicant submitted that *R v Johnson*[2] suggests that the penalty

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1 See, for example, *R v Murphy* [2009] QCA 93.

2 [2011] QCA 78.

imposed upon the applicant was too severe and that a sentence of the order of that imposed in *Johnson*, should be imposed upon the applicant. Johnson's sentence of five years imprisonment suspended after 18 months imprisonment was reduced on appeal to four years imprisonment suspended after 12 months. Johnson, like the applicant, was 17 years old. He drove on a main road at speeds estimated at between 80 and 120 kilometres per hour, where the speed limit was 60 kilometres per hour. He pulled out across double unbroken white lines to overtake vehicles travelling in the same direction, causing a driver travelling in the opposite direction to take evasive action. The applicant then returned to the correct side of the road, lost control of his car, swung back across the wrong side of the road, ultimately colliding with a tree. Johnson drove for about 15 minutes in all, but his driving at high speed occupied only "a rather brief period".[3] One of Johnson's passengers suffered an extremely severe brain injury, a broken pelvis and a broken left arm. That complainant, who was 23 years old at the time of the incident, was left with an extensive disability. The other passenger suffered a fractured right femur and wounds to the right knee and left hand, for which hospital treatment was required. A few weeks before the offences, the applicant had driven a motor vehicle when he had a blood alcohol concentration of .07 per cent, and he was on bail for that offence at the time of the present offence.

[25] Johnson pleaded guilty to the charge of dangerously operating a motor vehicle causing grievous bodily harm to two persons at a time when he was intoxicated. He was also 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. (About an hour after the accident, the applicant was recorded as having a blood alcohol concentration of .135 per cent.) Johnson did not participate in a record of interview but he was co-operative with the administration of justice. He remained in contact with the complainants, particularly the young man who suffered the brain injury. That complainant held no animosity towards the applicant.

[26] Peter Lyons J, with whose reasons I and Atkinson J agreed, regarded Johnson's relative youth as being a matter of some significance; the circumstance that he had been driving a motor vehicle while under the influence of alcohol some few weeks before the offences and was on bail at the time of these offences was less significant, in light of Johnson's age, some personal difficulties, and a psychological condition from which he suffered. Since the accident Johnson had undertaken counselling in respect of his alcohol consumption and the sentencing judge took that into account as indicative of a favourable prospect of rehabilitation. Peter Lyons J proposed the sentence of four years imprisonment suspended after 12 months to reflect, particularly, Johnson's youth, his personal circumstances, his co-operation including his plea of guilty and his efforts at rehabilitation before sentence.

[27] Although Johnson drove whilst under the influence of alcohol, and he drove at an excessive speed, for a brief period of time, the applicant's conduct, evading police by deliberately driving on the wrong side of the road in a built up area at a speed which was more than double the speed limit, was at least as culpable. Johnson had somewhat more favourable personal circumstances, so far as mitigation of the sentence is concerned. The most significant distinction between the cases, however, is that, whereas Johnson caused his two passengers to suffer grievous bodily harm,

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3 [2011] QCA 78 at [8].

one of them with an extremely severe injury, the applicant caused grievous bodily harm to four persons, two of whom suffered extremely severe injuries.

[28] In one of the cases analysed in *Johnson*, *R v Simpson*[4], the initial sentence of five years imprisonment with a recommendation for eligibility for post prison community based release after 22 months was reduced on appeal to four years imprisonment suspended after 18 months. That offender drove at 80 kilometres per hour over a raised roundabout, ignored his passengers' pleas to slow down, and took his hands off the steering wheel to retaliate against a front seat passenger who had punched him, apparently in an attempt to make him slow down. Three passengers were injured when his car veered onto the wrong side of the road and nearly hit a pedestrian, before striking a light pole. The applicant's partner suffered what McMurdo P termed "dreadful injuries", including chest injuries, internal bleeding and brain injuries. She was left with ongoing cognitive difficulties. Another passenger suffered fractures to the pelvis and left clavicle, and a third passenger suffered soft tissue injuries to the right hand and a possible fracture of a metacarpal. That offender had no relevant traffic history, but he had a significant criminal history and he was heavily intoxicated at the time of the offence. He was not as young as the applicant (he was 25), but the President, with whom Williams JA and Philippides J agreed, noted that he was his partner's fulltime carer when she was released from hospital, he assisted her throughout her rehabilitation as well as financially supporting her and her children from a previous relationship at the time of sentence, he "…has had to face directly the grim consequences of his offending", his imprisonment caused hardship to his partner, and he was genuinely remorseful.

[29] However, the most important point of distinction is again the severity of the consequences of the offending. The applicant injured four people, rather than three, with extremely serious injuries suffered by two people, rather than one. None of the many cases which were analysed in *Tabakovic* and *Johnson* involved as many as four complainants who sustained grievous bodily harm including two complainants who suffered extremely severe injuries with lasting effects.

[30] The question whether *Johnson* and *Simpson* in particular indicate that the applicant's sentence is manifestly excessive has given me some concern. Their imprisonment of four years was subject to early suspension, whereas the applicant is merely eligible to apply for parole after 20 months of his five year term. However, having regard to the distinguishing features which I have mentioned, and especially the terrible havoc which the applicant caused in his offence, I have ultimately concluded that his sentence, although perhaps at the upper limit of the sentencing discretion, is not so severe as to evidence an error which justifies this Court's interference.

Proposed order

[31] I would refuse the application.

[32] **WHITE JA:** I have read the reasons for judgment of Fraser JA and agree with his Honour that in the circumstances of this case the sentence is not manifestly excessive. The devastating consequences for the victims of the applicant's grossly dangerous driving cannot, of course, be ameliorated by the punishment imposed

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4 [2003] QCA 100.

upon him. However, that punishment needs to be proportionate not only to the nature of the culpable conduct but also to its consequences.[5]

[33] I agree with the order proposed by Fraser JA.

[34] **ANN LYONS J:** I agree with the reasons of Fraser JA and with the proposed order.

5 *R v Amituanai* (1995) 78 A Crim R 588; [1995] QCA 80.