SUPREME COURT OF QUEENSLAND

CITATION:	*R v Moody* [2016] QCA 92
PARTIES:	**R** **v** **MOODY, Donald John** (applicant)
FILE NO/S:	CA No 138 of 2015 DC No 35 of 2015 DC No 77 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Bundaberg – Unreported, 19 June 2015
DELIVERED ON:	15 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	12 February 2016
JUDGE:	Gotterson and Morrison JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of dangerous operation of a motor vehicle causing death and grievous bodily harm while adversely affected by an intoxicating substance – where the applicant was a 44 year old with a long history of polysubstance abuse – where the applicant had ingested amphetamine, methylamphetamine, diazepam, nordiazepam and THC at the time of the collision – where the applicant was driving on the wrong side of the road at the time of the collision, having already driven 178 km and been awake for two days under the influence of drugs – where the collision was catastrophic for a family, as two teenagers were rendered paraplegic and their mother was killed – where the applicant was sentenced to nine year's imprisonment with no expressly fixed parole eligibility date – whether the sentence was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant submitted that because the sentencing judge said that he placed great weight

on the applicant's plea in determining not to declare a serious violence offence, his Honour failed to make an allowance for the plea of guilty in arriving at the sentence of a period of imprisonment – where the sentencing remarks were over nine pages long, contained significant detail and his Honour stated that in "all of the circumstances my determination is to impose nine years' imprisonment" – whether the sentencing judge failed to make an allowance for the plea of guilty

Penalties and Sentences Act 1992 (Qld), s 161A

R v Frost; ex parte Attorney-General (Qld) (2004) 149 A Crim R 151; [2004] QCA 309, considered
R v Ross [2009] QCA 7, considered
R v Thomas (2015) 69 MVR 521; [2015] QCA 20, considered
R v Ungvari [2010] QCA 134, cited
R v Vessey; ex parte Attorney-General (Qld) (1996) 86 A Crim R 290; [1996] QCA 11, considered

COUNSEL: M J Copley QC for the applicant
M Cowen QC for the respondent

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

[1] **GOTTERSON JA:** I agree with the order proposed by Jackson J and with the reasons given by his Honour.

[2] **MORRISON JA:** I have read the reasons of Jackson J and agree with those reasons and the order his Honour proposes.

[3] **JACKSON J:** On 19 June 2015, the applicant was convicted of dangerous operation of a motor vehicle causing death and grievous bodily harm while adversely affected by an intoxicating substance and sentenced to nine year's imprisonment.[1] He applies for the leave to appeal against that sentence on the grounds that, first, a less severe sentence was warranted because the learned sentencing judge failed to make an allowance for the plea of guilty or, second, because the sentence was manifestly excessive.

The collision

[4] On 28 December 2012, the M family were driving from Bundaberg to Childers along Childers Road. At the relevant point Childers Road is a sealed bitumen two lane roadway separated by a single painted broken white line with a signed speed limit of 100 kph.

[5] The road was relatively straight, clear and unobstructed for several hundred metres in each direction from the point of impact. There had been periodic showers that evening. The road surface was wet. Traffic was light.

[6] Mr M was driving the family in a Holden Astra. Mrs M was in the front passenger seat. S, their 15 year old daughter, and D, their 13 year old son, were in the rear seats.

---

[1] The applicant was also convicted of possession of the dangerous drug methylamphetamine, for which he was sentenced to imprisonment for a period of three months. It was further ordered that the applicant be disqualified from holding or obtaining a driver's licence absolutely.

Their 12 month old daughter was in a baby capsule behind Mr M. All were wearing appropriate seat belts or restraints.

[7] Earlier that evening, at 6.00 pm, the defendant left Gympie to drive to Agnes Waters. At the point of the collision he had driven 178 kms from Gympie.

[8] Mr M was driving at the speed limit on the left hand side of the road. The Astra's headlights and the windscreen wipers were operating. He saw a set of headlights coming towards him on the other side of the road. As the vehicles approached he realised the other vehicle was on his side of the road. He reduced speed but a collision ensued.

[9] There was severe impact damage to the front of the Astra, particularly on the front passenger side. The defendant's vehicle was a Toyota Hilux utility. There was severe impact damage to the front end of the Hilux as well, particularly on the passenger side.

[10] Observations at the scene, inspection of the contact damage to both vehicles, measurements made of the road markings and the rest positions of the vehicles as well as markings and debris on the road indicated the circumstances of the collision. The Astra was travelling in the southbound lane within the line markings when it was struck almost head on, but offset towards the front passenger side corner. The Hilux was on the wrong side of the road. The only apparent evasive action was that both vehicles were steered to the right just prior to the impact.

Intoxicating substances

[11] A specimen of blood taken from the defendant just over an hour after the collision showed that the defendant had ingested amphetamine, methylamphetamine, diazepam, nordiazepam and THC. In particular, the concentration of methylamphetamine was 0.21 mgs per kg, diazepam was 0.26 mgs per kg and nordiazepam was 0.47 mgs per kg.

[12] In concentrations of 0.1 mg per kg or above, the toxic effects of methylamphetamine are usually evident. They may include confusion, restlessness, paranoia, delusions, violence, hyperactive reflects, tremor, flushing and profuse sweating. The ability to pay attention, concentrate and exercise appropriate judgment is reduced. The intensity of the toxic effects may depend on the degree of tolerance developed by the user. However, acute and chronic use of methylamphetamine causes impairment in the ability of a driver to safely control a motor vehicle.

[13] Witness observations of the defendant immediately after the collision were consistent with methylamphetamine use.

[14] Police located methylamphetamine in the defendant's car. They also located a syringe in the defendant's bag. The defendant claimed it belonged to his girlfriend. He denied that he was under the influence of anything when the collision occurred. He denied that he went onto the wrong side of the road, although he described the moment before the collision as both cars tried to dodge the wrong way when they collided.

[15] When questioned by police, the defendant denied being an amphetamine user. He denied consuming any methylamphetamine on the day of the crash. When the results of the blood test were put to him during his interview the defendant stated that he might have taken methylamphetamine orally the night before and that it would have been in his drink as that was the only way he took it. None of these statements appear to have been true.

[16] Rather, the defendant had ingested methylamphetamine on the evening of 26 December 2012. On the evening of 27 December 2012 he purchased more methylamphetamine and injected himself at about midnight.

The catastrophic consequences of the offence

[17] The collision was catastrophic for the M family.

[18] Mrs M was killed.

[19] D suffered a traumatic brain injury, severe abdominal injuries and a spinal cord injury. Surgery for the abdominal injuries entailed removal of large parts of his bowel and colon. The spinal injury has left him paraplegic. The paraplegia is accompanied by sensory loss below the waist. Other injuries included a lacerated spleen and fractured elbow. If his injuries had been left untreated they almost certainly would have resulted in death.

[20] D's medical management is complicated by chronic pain, blood in his urine, intolerance in his gastrointestinal tract, malnutrition, cognitive deficits, recurrent urinary tract infections and psychosocial issues.

[21] Dr Vernon Hill, a highly experienced specialist in rehabilitation, described D's spinal injuries as paraplegia below the level of the 12th thoracic segment which is a truly complete lesion. The spinal injury is a lower motor neuron injury with a suspected vascular component resulting in dense paralysis. It is suspected that both his bladder and bowel are also effected by the paralysis.

[22] As to his traumatic brain injury, D has made a relatively good recovery, considering that his Glasgow Coma Score was 8 on admission and that it took nine weeks before he came out of post-traumatic amnesia.

[23] Two years after the accident D required seven hours of care per day. He will require help and supervision at school throughout the course of his school days. If he is able to live independently, once he is old enough, he will need at least six hours of domestic assistance per week and assistance for other tasks he will not be able to do from a wheelchair. If he is able to manage all the activities of daily living there will still be problems which will likely require rapid assistance from time to time. It is as yet unclear how much D's traumatic brain injury will impact upon his ability to manage independently, and the amount of additional care that he will require is still difficult to predict.

[24] He will, however, always have a fragile independence and any injury to his upper limbs will mean that he becomes dependent upon either an electric wheelchair or being pushed. He is susceptible to pressure sores. They are likely to be an ongoing problem. He is likely to spend at least on average ten days a year for the rest of his life requiring hospitalisation for one or other of a number of conditions.

[25] S, too, suffered a traumatic brain injury, a lung injury, a severe abdominal injury and a spinal injury. The abdominal injury required surgery for a lacerated spleen, ruptured diaphragm, stomach herniation, tears to her abdominal wall and a perforated colon.

[26] The spinal injury has left S with paraplegia and sensory loss below her waist.

[27] S's medical management has been complicated by ongoing chronic pain, recurrent muscle spasms, cognitive deficits, displacement of her spinal metal work, recurrent urinary tract infections, and psychosocial issues.

[28] In 2014 S's spinal cord injury had not stabilised. She was still regaining some deep touch sensitivity in her lower limbs and had regained use of her hip flexors and abductors bilaterally following her initial discharge.

[29] S has been taught to intermittently self-catheterise. However, she has been troubled with urinary tract infections. Such infections present a threat to her because she has only one fully functional kidney because of the injuries from the collision. It may be that she will need to have the partially functioning kidney removed at some point.

[30] There is ongoing interference with S's bowel function. It is likely that she will in future require hospitalisation for haemorrhoids during her life.

[31] S has four hours of support three days per week and two hours on two other days per week. She has a four hour respite carer each Saturday.

[32] Once she is able to drive to move into a purpose built facility on attaining independence, S would require six hours per week help with domestic tasks and three hours per week assistance to help carry out other functions. Even so, such independence would be quite fragile because of the risk of any minor injury to her upper limbs or pressure sores which would significantly increase her care requirements.

[33] Both D and S are required to live a regimen of treatments and drugs to manage their conditions.

[34] As Dr Hill explained, both D and S, as people who have sustained paraplegia will develop osteoporotic changes in the bones of their paralysed limbs. They are at risk of long bone fractures of the lower limbs in the event of even a trivial fall. In later life, people who sustain paraplegia experience or are at risk of arthritis in the upper limbs from overusing for recurrent lifting and pushing of a wheelchair.

[35] The brief summary of D and S's circumstances set out above does not in any way fully expose the extent of the difficulties they confront due to their disabilities resulting from the collision. In particular, it does not even touch on the extent of the past, present and future psychological aspects of their loss and injuries.

[36] Mr M suffered severe lacerations to his arm that required surgery as well as fractures to his right foot. In addition he had an undisplaced left proximal humeral fracture and left rib fractures.

[37] The foot fractures were repaired surgically on 9 February 2013.

[38] The baby was not seriously injured.

The applicant's circumstances

[39] The applicant was born on 11 August 1968, making him 44 at the time of the offences. His criminal history included two minor stealing offences. However, on 8 November 2004 he was convicted of producing dangerous drugs, possessing dangerous drugs and possessing utensils and pipes. Further, on 10 January 2008 he was convicted of possessing dangerous drugs and failure to properly dispose of needle and syringe.

[40] His driving history also shows that on 14 April 2001 he was convicted of driving or attempting to put in motion or in charge of a motor vehicle under the influence of liquor. On 13 July 2001 he was convicted of driving whilst disqualified. There were a number of speeding offences over the period between 1992 and 2012.

[41] Commencing with daily cannabis use from the age of 14, the applicant had a long history of polysubstance abuse. He misused amphetamines, morphine, alcohol and benzodiazepam prior to the 2012 offences. He had suffered episodes of drug induced psychosis and depression. He had not engaged with a mental health service.

[42] On the day of the offence, the applicant was living in Agnes Waters. Other members of his family lived there. He had purchased drugs in Eumundi and was returning home. He had been awake for two days and under the effect of amphetamine.

[43] He recalled seeing lights approaching him and claimed to be disoriented. He claimed he "didn't know which way [he] was going".

[44] The applicant's substance abuse coincided with the end of his formal schooling at the age of 14 during the second semester of year nine. Through his teenage years the applicant worked. At 19, he joined the Australian Army. He was discharged for cannabis abuse after he served a short period in military prison.

[45] A report by a clinical psychologist described the applicant's long history of polysubstance abuse and found that he had a polysubstance dependency disorder. Around the time of the collision, or possibly afterwards, it appears that his abuse increased. The drugs he was using in 2012 included cannabis (daily), amphetamines or methamphetamines (daily), alcohol, morphine and benzodiazepams. He had no history of treatment or abstinence.

[46] The psychologist's report referred to concerns as to the applicant's mental health identified by suicidal ideation. The applicant claims to have "bad thoughts" which involved self-harm behaviour. In February 2015, he attempted to self-harm while intoxicated. He was reportedly in a drug induced psychosis.

[47] The applicant also has a chronic back injury apparently first suffered in 1997.

[48] The psychologist opined that the applicant presented in 2013 with a cluster of signs and symptoms consistent with an adjustment disorder with secondary depression. His clinic presentation was further exacerbated by acute trauma symptoms and severe polysubstance dependency disorder.

Sentencing remarks

[49] At the beginning of his Honour's remarks the sentencing judge said as follows:

> "I take into account the plea of guilty and reduce the sentence I would otherwise have imposed on you. Ultimately, for the reasons I express, I've placed great weight on that plea and have determined not to impose a serious violence defence [sic] declaration in this case. The plea is a main factor in determining that, although it was a close run thing. I'll explain how I will approach the sentence later. I also take into account the plea to the possession of the dangerous drug charge and reduce the sentence I would impose on that."

[50] Later, the learned sentencing judge continued:

> "Now, there was a gross breach of the road rules here. It was grossly dangerous. I do accept though this is one of the major turning points when I considered the imposition of an SVO is that which was stated by the majority in *R v Thomas* [2015] QCA 20, that is, one must analyse the dangerous operation itself. Now, whilst it is true it was grossly dangerous to drive with that methylamphetamine in your system from Gympie, it's not suggested there was deliberate reckless driving in the sense of speed or erratic behaviour up until the point of the accident and I need to focus on that firmly when I consider this matter.
>
> On the other hand, the consequence are beyond imagination almost in this case."

[51] Later again, his Honour continued:

> "I now turn to the issue of the serious violence offence declaration. Whilst this is a borderline case, focusing on the actual dangerousness, as I must the real dangerousness here was the crossing over onto the wrong side of the road at or about the collision point. It's not suggested there was deliberate reckless driving prior to that. Of course, it was entirely irresponsible to have the speed on board, but it's not suggested that you drove at an excessive speed or erratically prior to this point. There's the plea of guilty which is important. On the other hand, of course, there is the significant impact, which I cannot ignore in this case, on a family."

The applicant's contentions

[52] The applicant's primary contention was that because the learned sentencing judge said that he placed great weight on the applicant's plea in determining not to declare a serious violence offence, his Honour failed to make an allowance for the plea of guilty in arriving at the sentence of a period of imprisonment of nine years.

[53] In my view, the applicant's submissions focussed too narrowly on a few sentences of the sentencing remarks. In particular, his Honour said that he took into account the plea of guilty and reduced the sentence he would have otherwise imposed upon the applicant. The sentencing remarks extend for over nine pages of type written text. They are not to be reduced in the way that the applicant contended. Having carefully articulated the surrounding facts in greater detail than I have set out above, the learned sentencing judge concluded as follows:

> "In all of the circumstances my determination is to impose nine years' imprisonment as a flat sentence."

[54] That reference to the circumstances should be directly related to the matters that were set out by his Honour in the nine pages of remarks. They included acknowledgement of the purposes for which the court is required to sentence an offender, that the circumstances of the offence satisfied the requirements of the definition of "violent offender", a detailed analysis of the facts, reference to the principal cases relied upon by the applicant before the learned sentencing judge and a careful analysis of the applicant's plea in mitigation.

[55] The applicant's submissions focus upon the plea of guilty as going solely to the determination of whether the applicant was to be convicted of a serious violent offence, by

taking a few passages from the sentencing remarks out of their overall context. Second, they fastened on the circumstance that his Honour made a determination of the question of whether the applicant was to be convicted of a serious violent offence before he pronounced the period of nine year's imprisonment he determined to impose as the head sentence. From this structure of sentencing remarks, the applicant sought to contend that learned sentencing judge had confined his analytical consideration so as to take the applicant's plea of guilty into account only upon the question of a serious violent offence. I am unable to accept that step in the applicant's argument.

[56] In my view, it is not demonstrated that the learned sentencing judge made any such error. If his Honour had determined that the appropriate sentence was a period of ten year's imprisonment it would not have been necessary to consider separately whether a conviction of a serious violent offence was required.[2] However, the sentence his Honour determined to impose was nine years, so it was necessary to separately consider whether a conviction of a serious violent offence should be made. The two questions are inevitably connected.

[57] The applicant's second ground of appeal is that the term of imprisonment of nine years is manifestly excessive. The applicant relied on *R v Thomas*[3] as its principal authority for that proposition.

[58] In that case, Holmes JA and Mullins J identified the duration of the dangerous operation of the vehicle and whether there was any element of deliberate reckless driving as relevant factors in assessing the offending conduct. As to the first factor, their Honours distinguished between the time and distance over which a defendant drives while his faculties are impaired and the duration of his driving which was actually dangerous and which resulted in death, being the gravamen of the offence.[4]

[59] As to any element of deliberate reckless driving their Honours said as follows:

> "As to the second factor, there is a significant difference between the case of an intoxicated driver who deliberately undertakes dangerous manoeuvres and one who is overcome by the effects of his intoxication so that he loses control of his vehicle. *R v Hallett*, which falls into the second category, seems on its facts the most closely analogous to the present of the comparable decisions cited. As here, it involved, not deliberately reckless driving, but driving which was dangerous because of the effect of methylamphetamine in impairing that applicant's ability to drive safely. It was accepted that he had consumed the methylamphetamine some days earlier, but the concentration of methylamphetamine in his system was significantly higher (.36 mg per kg) than that affecting the applicant here (.22 mg per kg). It seems unlikely that Hallett was any less aware than the present applicant of the deleterious effects of his condition on his capacity to drive competently."[5]

[60] The sentence in *Thomas* was nine year's imprisonment with eligibility for release on parole after three years. On appeal, it was reduced to seven years with parole eligibility at two years, four months.

---

2 *Penalties and Sentences Act* 1992 (Qld) s 161A.
3 (2015) 69 MVR 521.
4 *R v Thomas* (2015) 69 MVR 521, 522 [2].
5 *R v Thomas* (2015) 69 MVR 521, 522 [3].

[61] The applicant fastened on *Thomas*, *R v Ross*[6] and *R v Frost; ex parte Attorney-General*[7] as showing by way of comparison that the term of seven years was appropriate in this case. The applicant further submitted that *Frost*, where there was a sentence of nine years with no recommendation for parole, was a significantly more serious case.

[62] *Frost* was a more serious case than the present in some respects. The driving was dangerous over a distance of 14 kilometres and persisted in despite repeated requests from a passenger in the vehicle for the driver to stop. Three people were killed by the offending conduct.

[63] In *Ross* the dangerous driving was observed to occur over a distance of almost one kilometre and involved extravagant manoeuvres and speed as great as 138 kph in a 70 kph zone. It engaged three of the four circumstances of aggravation under s 328A(4) of the *Criminal Code*.

[64] *Thomas* involved intoxication upon methylamphetamine. The defendant lost control of his vehicle at a roundabout while driving four children home from school. One was killed and another suffered grievous bodily harm. The other two sustained minor injuries. The applicant acknowledged that *Thomas* involved less serious dangerous operation than the applicant's case and as well that the child who suffered grievous bodily harm was not nearly as seriously injured as D or S.

[65] Although I accept the clear logic of a distinction between dangerous operation consisting of a deliberate dangerous manoeuvre or high speed driving over a lengthy distance or time and non-deliberate dangerous operation over a short distance or time, I do not accept that the distinction can be analysed into any particular range or period that is appropriate for the sentence in a particular case. As the remarks in the joint judgment make clear, they were directed solely to the conduct constituting the dangerous operation. However, a proper approach to sentencing clearly also involves an appropriate consideration of the consequences of the offending conduct and also any background conduct or immediate circumstances of the defendant which led to it.

[66] In this case, those immediate circumstances cannot be divorced from the context that the defendant had been intoxicated on methylamphetamines and other dangerous drugs for a period of days when he went to Eumundi to obtain more drugs, injected himself further with methylamphetamine and then proceeded to drive on the highway at highway speeds for the considerable distance from Eumundi or Gympie to Agnes Waters. This is how he came to be on Childers Rd. Whilst it must be acknowledged that he was not deliberately using his vehicle as a weapon or to drive dangerously, the degree of comparative culpability involved in his preparedness to drive long distances at relatively high speeds in such an intoxicated state is not to be discounted.

[67] The defendant was no less dangerous to the M family because he was not acting deliberately in the manner of his driving so as to cause harm. He was acting deliberately in driving a long distance in a seriously intoxicated state.

[68] Second, the catastrophic effects for the M family must be vindicated by an appropriate sentence. For the rest of their lives, D and S will suffer from the ongoing physical disabilities and psychosocial impacts brought about by their grossly injured conditions. The daily struggle and risks of life as a paraplegic are not things from which they have the opportunity to extricate themselves by diligent efforts of rehabilitation.

---

6 [2009] QCA 7.

7 (2004) 149 A Crim R 151.

[69] The respondent submits that *R v Vessey*[8] supports the sentence imposed. Vessey drove down the wrong side of the road for about 150 metres and then through a give-way sign without braking. He collided with a vehicle whose driver died of his injuries several days later. Vessey's blood alcohol concentration was 0.2 per cent taken about one and a half hours after the collision. He had a bad history of driving while under the influence of liquor.

[70] The respondent submitted that while Vessey may have had a "lesser" history of relevant traffic offences, the consequences of the applicant's driving in the present case are worse and far outweigh the consequences of Vessey's driving.

[71] The learned sentencing judge's decision in the present case was a determination that whilst a head sentence of nine years without a declaring a serious violent offence was appropriate to the applicant's offending, a period of four and a half years for eligibility for parole was appropriate also. In my view, there is no reason in the circumstances to conclude that the head sentence of nine years was manifestly excessive. Once it is acknowledged, as it should be, that *Thomas* was not as serious as this case, the applicant's argument upon that question loses most of its force.

[72] The final question is whether the learned primary judge ought to have fixed a parole eligibility date shorter than the period of four and a half years, which followed from failing to fix any date.

[73] Commonly, a one-third mark of the period of the sentence of imprisonment for parole eligibility may be seen to be an appropriate starting point to recognise an early plea of guilty and cooperation in the administration of justice[9] and fixing parole eligibility at an early stage may be an important way of properly recognising the significance of those and other mitigating circumstances.[10] However, there is no rule that a sentencing judge must fix the date for eligibility either at the one-third mark or some other early date.

[74] In my view, and as the learned primary judge viewed it, the question whether a conviction of a serious violent offence should have been made was a near run thing in this case. Although the learned sentencing judge decided not to make a declaration to that effect, it seems clear that in his view the circumstances of the case were so serious or grave that it was not appropriate to fix parole eligibility at an early stage to recognise the significance of the plea of guilty. There was not much else in the way of mitigating circumstances in this case.

[75] Looking at the sentence and the sentencing process as a whole, it may be said that it was condign punishment not to fix parole eligibility at an earlier date. It is clear that the circumstances of the case disclosed reasons for that approach. In my view, the sentence cannot be said to have been manifestly excessive.

[76] It follows that I would dismiss the application for leave to appeal against sentence.

---

8 (1996) 86 A Crim R 290.

9 *R v Ungvari* [2010] QCA 134, [30].

10 *R v Ross* [2009] QCA 7, [20].