SUPREME COURT OF QUEENSLAND

CITATION:	*R v Browne* [2016] QCA 111
PARTIES:	**R** **v** **BROWNE, Robert Wayne** (applicant)
FILE NO/S:	CA No 268 of 2015 DC No 104 of 2015 DC No 298 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore – Date of Sentence: 24 September 2015
DELIVERED ON:	29 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	5 April 2016
JUDGES:	Fraser and Gotterson JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm while adversely affected by an intoxicating substance, as well as to five related summary offences – where, for the indictable offence, the applicant was sentenced to four years' imprisonment to be suspended after 16 months with an operational period of four years, and was disqualified from driving or obtaining a driver's licence for four years – where the applicant was further punished for two summary offences: disqualified from driving or obtaining a driver's licence for a period of six months for driving under the influence of liquor, and for a period of six months for failing to provide a specimen of blood for test on requirement – where the Court granted the applicant an extension of time to file an application for leave to appeal against sentence – where the applicant filed an application for leave to appeal against sentence, alleging the sentence was, in all the circumstances, manifestly excessive – where the applicant alleges that the court's attention had not been drawn to the fact that the effect of a newly prescribed anti-depressant was unknown to him and

may have caused the appearance of intoxication at the time of the offence – where the applicant alleges that the learned sentencing judge did not afford sufficient weight to the evidence of the paramedic who treated the applicant at the scene – where there was overwhelming evidence of the applicant's significant state of intoxication – where the statements concerning the effects of the newly prescribed anti-depressant were not supported by any evidence – whether the sentence imposed is manifestly excessive

Criminal Code (Qld), s 328A(4)

R v Johnson [2011] QCA 78, considered
R v Pham (2015) 90 ALJR 13; [2015] HCA 39, applied
R v Robinson [2004] QCA 467, considered
R v Roser [2005] QCA 457, considered
R v Saltmarsh [2007] QCA 25, considered
R v Tabakovic (2005) 154 A Crim R 30; [2005] QCA 90, considered
R v Tresize [2011] QCA 139, considered

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

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** On 29 April 2015, a single-count indictment was presented at the District Court at Maroochydore. It alleged an offence against s 328A(4) of the *Criminal Code* (Qld) in that on 30 May 2014, at Maroochydore, the applicant, Robert Wayne Browne, dangerously operated a vehicle in Dalton Drive Maroochydore, causing grievous bodily harm to the complainant, Haydyn John Cliff. The count further alleged that, at the time, the applicant was adversely affected by an intoxicating substance.[1] At a hearing on 24 September 2015, the applicant pleaded guilty to the offence as charged, as well as to five related summary offences.[2] He was convicted of all offences.

[3] On the same day, the applicant was sentenced for the indictable offence to four years' imprisonment to be suspended after a period of 16 months with an operational period of four years, and was disqualified from driving or obtaining a driver's licence for four years. The applicant was further punished for two of the summary offences. He was disqualified from driving or obtaining a driver's licence for a period of six months for driving under the influence of liquor, and for a period of six months for failing to provide a specimen of blood for test on requirement.

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1 *Code*, s 328A(4)(b)(i).

2 One charge of committing a public nuisance; one charge of assault or obstructing a police officer; one charge of driving under the influence of liquor; one charge of failing to provide a specimen as required of breath for breath test, or saliva for saliva test; and one charge of failing to provide a specimen of breath for analysis or blood for test on requirement.

[4] On 30 October 2015, the applicant filed an application for extension of time within which to appeal, along with an application for leave to appeal against sentence. On 20 November 2015, the Court granted the applicant an extension of time to file the application for leave to appeal against sentence.

Circumstances of the offending

[5] The circumstances of the offending are set out in the Schedule of Facts (Exhibit 3)[3] which was tendered by the prosecution without objection from defence counsel.[4]

[6] At about 9 pm on 30 May 2014, the complainant and one of his friends, Baiden Howard, left the complainant's residence on Dalton Drive. Each was carrying a bag. They were to be picked up by a mutual friend, William Wilkie. By that time, Mr Wilkie had arrived and parked his hatch back sedan on the opposite side of Dalton Drive.

[7] As they were about to cross, the complainant saw the applicant's white station wagon approaching from the west along Dalton Drive. It was about 150-200 metres away and moving in a 'swervy' manner. As the complainant was opening the rear driver's side door of Mr Wilkie's vehicle, the applicant's vehicle collided with Mr Howard's bag, tearing it from his hands. It then hit the hatch back and the complainant. The complainant was thrown up onto the bonnet of the applicant's vehicle. It came to a stop approximately 60 metres from the initial collision point. In addition to the complainant, Mr Howard, and Mr Wilkie, these events were observed by the complainant's mother, as well as an off-duty police officer, Constable Low.

[8] The 16 year old complainant suffered transverse fractures to the tibia and fibula of his right leg, as well as cuts and grazes to his head and legs. Surgery was necessary to avoid a potential shortening and deformation of his right leg. His victim impact statement revealed that he was still suffering from physical limitations and pain close to 18 months after the incident.

[9] Constable Low approached the applicant who confirmed he was the driver, responding to a question by stating, "It's alright, I'm not going anywhere I know I stuffed up and hit him. I shouldn't have been drinking".[5] Constable Low could smell alcohol on the applicant's breath, and observed that he was unsteady on his feet, his eyes were glazed over and his pupils were enlarged. The applicant further admitted to Constable Low that he had been drinking at a friend's house.

[10] The Schedule of Facts recounts the observations of the other witnesses concerning the appearance and behavior of the applicant after the incident. They are accurately summarised in the respondent's written submissions as follows:

> "2. Police officer Darren Edwards noted that the applicant was argumentative, refused to provide a breath specimen, smelt strongly of alcohol, spoke with slurred speech, had glazed eyes and was unsteady on his feet.
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> 3. Police officer Callan Johns referred to the applicant's bloodshot eyes, slow speech, unsteadiness and smell of liquor.

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3 AB66-70.
4 AB16; Tr1-10 ll42-45.
5 AB73.

4. Baiden Howard, friend of the complainant, referred to the applicant's behavior being "really slow, really spaced out…like he was really drunk".

5. Michael Wilkie, another friend of the complainant, described the applicant stumbling all over the road, having blood shot eyes and appearing to be drunk.

6. Michelle Gardiner, a resident on the street, noted the applicant looked "dazed and out of it" and thought that the applicant was drunk or high on drugs.

7. James Mayfield, paramedic who treated the applicant at the scene, was told by the applicant that he had consumed 4 to 5 beers. Mayfield did not detect any obvious smell of liquor or other obvious signs of intoxication.

8. Heidi Quinn, Registered Nurse who treated the applicant at the hospital, noted a smell of alcohol on the applicant and noted his eyes to be bloodshot.

9. Andrew Adams, Security Supervisor at the hospital, noted that the applicant was aggressive and violent.

10. Dr Ian Mahoney, Forensic Medical Officer, was provided with relevant information and was asked to provide an expert opinion on whether the applicant was impaired by drugs and/or alcohol at the time of the offence. He opined, 'while there are several circumstantial elements here that suggest the driver may have been impaired by drugs and/or alcohol at the time of the crash, in the absence of any breath analysis or toxicology results, one can't be certain that the driver was definitely impaired by alcohol and/or drugs at the time of the crash.'"

[11] When asked to do so by Constable Johns, the applicant refused to provide a specimen of breath or of blood, even though he had stated he would provide a specimen of blood once at Nambour General Hospital.[6] The applicant also behaved in a belligerent and uncooperative manner, at one point kicking out a rear window of a police vehicle in which he had been placed.[7]

The applicant's history of offending

[12] The applicant has a history of drug and alcohol related offences, committed since he was 23 years of age.[8] More relevant for present purposes is his traffic offence history over 16 years which includes speeding, driving under the influence of liquor and unlicenced driving offences.[9] He has accumulated a 12 month period of disqualifications from driving for three offences of driving under the influence of liquor, committed in 2001, 2003 and 2008.[10]

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6 AB80.
7 AB113.
8 AB62-63.
9 AB64-65.
10 *Ibid*.

The applicant's personal history

[13] The applicant was born in 1979. He was 34 at the time of the offence and 35 at sentence. Prior to imprisonment, he held a position of employment as a part-time casual cleaner at a Noosa resort.[11] In September 2015, Dr Andrew Caldwell, medical practitioner, described the applicant as having significant problems with depression and anxiety, initially due to a relationship breakdown.[12] In a report dated 19 June 2015, Mr Bob Andersen, clinical psychologist, described the applicant as a regular drinker of alcohol and semi-regular smoker of marijuana. The applicant informed Mr Andersen that he had taken a newly prescribed sleeping pill and an anti-depressant, Avanza Soltab 15 mg (Mirtazapine), on the night before the offence, and three doses of Diazepam (Valium),[13] for which he had had prescriptions since 10 March 2014,[14] at intervals during the course of the day on which the offence occurred.

Sentencing remarks

[14] In the course of his sentencing remarks, the learned sentencing judge referred to the applicant's personal history and history of offending, as well as the circumstances of the current offending.

[15] His Honour acknowledged that much had been said in submissions about the level of the applicant's intoxication and that it therefore fell to him to consider the evidence on that point. It had been put in submissions by the prosecution that an inference could be drawn that, at or about the time of the collision, the applicant had actually been consuming beer from a can.[15] The learned sentencing judge declined to draw such an inference. He also rejected a submission made on behalf of the applicant to the effect that his errant driving was due to a combination of moderate intoxication and relationship break-up distractions.

[16] Instead, his Honour drew an inference that the applicant had been drinking during the journey from his friend's residence and that he was "quite significantly" and "substantially" affected by alcohol.[16] His Honour explained his analysis of the evidence on point, and how he arrived at his conclusion, in the following way:

> "… Firstly, you made admissions at the scene to Constable Low that you had been drinking. Your position is that you had had four and maybe five drinks at your friend's place prior to commencing driving…
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> Part of exhibit 4, the photographs, shows the inside of your vehicle after the collision. There are a significant number of empty beer cans; and, as well, there is a closed form of esky, which contained a number of unopened stubbies of beer.
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> [Counsel for the defence] made a submission relating to the four lift-tops that were found in your possession after the accident. They were in your pocket. He makes the submission that on his examination of those photographs, none of them show the lift-top removed. In fact, when one examines the cans which are strewn from just near the gear

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11 AB158.
12 AB140.
13 AB132.
14 AB150.
15 AB19; Tr1-13 l46-47.
16 AB57; Tr4 l42-45.

lever, underneath the seat and in the backseat, as far as I can tell there is only in which the open top can be revealed, and that indeed shows that the pull-top is present. The other empty beer cans cannot be seen, that is, the opening cannot be seen.

What convinces me that you drank more than you were prepared to accept comes from the overwhelming evidence of those who observed you at the scene. Firstly there was Constable Low, who could smell alcohol and thought you were intoxicated. The first-response police officers in effect said you were swaying, unsteady on your feet and smelt strongly of liquor. The complainant's 16 year old friend, [Baiden] Howard, says after the accident it seemed like you were "really drunk". Mr Wilkie said he observed you stumbling all over the place; and he described you as being drunk and "off your face". Michelle Gardner described you as being drunk. And later on at the hospital, when you were belligerent and uncooperative, the nurse, Nurse Quinn, observed indicia of alcohol consumption.

I do take into account that the ambulance officer, Mr Mayfield, did not in his examination of you observe indicia of alcohol. But clearly - even on your own admission – you had consumed four or five beers immediately prior to the accident; so the fact that he could not smell liquor is surprising, and is perhaps due to the fact that he was concentrating on his medical duties.

My conclusions in this regard are also fortified by your post-accident conduct. I accept that you probably were in shock; and you sustained some minor injuries. It is accepted that you were belligerent and non-cooperative, almost immediately after making admissions to Constable Low.

You refused to undertake a roadside breath test, saying that you intended to have a blood test at the hospital. When you were taken to the hospital, you refused to have a blood test, leading to the offences to which you have pleaded guilty today.

Certainly, I am prepared to accept that, at the time you were also taking medication… Undoubtedly, when you were diagnosed antidepressants by general practitioners and drugs like Valium, you would have been told not to drink alcohol with such drugs.

I am satisfied that an inference can be drawn that you had been drinking during the journey from your friend's place, but I cannot draw an inference that you were drinking just prior to the collision, which would have been an aggravating feature. I am also satisfied that you were quite significantly affected by alcohol, but because a blood alcohol reading was never taken, I am unable to say to what extent by expression of a blood alcohol concentration. The dangerous driving operation can be described as serious and significant over a period of 150 to 200 metres, at a time when you were substantially affected by alcohol, involving swerving in and out of the designated carriageway. I think it is highly unlikely that you were distracted, as you maintain now."[17]

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17 AB56; Tr3 l35-AB58; Tr3 l3.

[17] In addition, and separate to the issue of intoxication, the learned sentencing judge referred to the following matters in determining the applicant's sentence:

- the applicant's remorse;
- the likelihood that, at the time, the applicant was suffering from some form of fairly mild reactive depression and anxiety;
- the applicant's character references;
- the closeness of the applicant to his family and the difficulties that may be faced as a result of imprisonment;
- the psychological report prepared by Mr Andersen, which, his Honour observed, did not lead him to conclude that the applicant's moral culpability was reduced because of depression and anxiety;
- the extreme seriousness of the complainant's leg injury and the adverse impacts on his quality of life;
- the significance of general deterrence and denunciation of an offence of this type; and
- the applicant's positive progress towards rehabilitation.

The ground of appeal

[18] The sole ground of appeal in the applicant's Notice of Appeal is that the sentence is, in all the circumstances, manifestly excessive.[18]

Applicant's submissions

[19] At the hearing of the application, the applicant appeared on his own behalf via video link. His written outline alluded to two separate matters which he requested the Court to consider.[19] Having heard the applicant's oral submissions, I would summarise these two matters as follows:

whilst his counsel had said at the sentence hearing that "…on Mr Browne's instructions…he…just prior to driving, had some of that sleeping pill…",[20] the court's attention had not been drawn to the fact that the Avanza he took was prescribed for him just the day before.[21] The applicant said in submissions that it is dissolved on the tongue and absorbed much more quickly into the blood system than an ingested tablet. He did not know that at the time. The applicant has speculated that the Avanza might have been the cause of his appearance of intoxication at the time of the offence; and

that the learned sentencing judge did not afford sufficient weight to Mr Mayfield's evidence that he did not detect any obvious smell of liquor or any other signs of intoxication. The applicant placed emphasis on the facts that Mr Mayfield holds a bachelor's degree in Health Science (Paramedic) and that he was in the company of the applicant for a substantial amount of time after the offence.

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18 AB165.
19 Written Submissions for the Applicant, paragraphs 1-4.
20 AB30 Tr1-24 l112-14.
21 AB150.

[20] The applicant has also attached to his written outline summaries of the sentencing decisions of this Court in *R v Tabakovic*,[22] *R v Robinson*,[23] and *R v Johnson*[24] in support of his stated ground of appeal.

Respondent's submissions

[21] The respondent observed, correctly, that the applicant had not advanced as a separate ground of appeal that the inference of fact drawn by the learned sentencing judge as to his level of intoxication was tainted by error. It was submitted that, notwithstanding that, the inference was open on the evidence and was not erroneously drawn.

[22] The respondent also relied on the decisions of this Court in *R v Tresize*,[25] *R v Saltmarsh*,[26] and *R v Roser*[27] for comparative purposes.

Discussion

[23] The two matters raised in the applicant's written outline relate to the same broad issue, namely, whether and, if so, to what extent he was adversely affected by alcohol at the time of the offence. It is possible to regard these matters as having been raised by the applicant for two quite separate purposes. One is to pursue an argument that he was not at all adversely affected by alcohol at the time. The other is to challenge the inference as to the extent of his intoxication that was drawn and was taken into account in assessing the criminality of his offending.

[24] As to the first of these purposes, it must be said at once that it is not open to the applicant to contend that he was not adversely affected by the intoxicating substance, alcohol. By his own plea of guilty, he accepted that he was in fact affected by an intoxicating substance, as was alleged as a circumstance of aggravation in the count to which he pleaded. Had the applicant wished to pursue this purpose, it would have been necessary for him to have sought leave to vacate the plea of guilty, which he has not done.

[25] Turning to the second purpose, for the following reasons, I am unpersuaded that his Honour erred in drawing the inference that he did. First, it was clearly open on the evidence for him to have concluded that the applicant was quite significantly affected by alcohol, and had been drinking during the journey from the friend's residence. The evidence included the observations of the witnesses to the collision, of Constable John and of Ms Quinn, as well as the photographic evidence of opened and unopened beer cans, distinct from those with missing lift-tops found in the applicant's pocket.

[26] Secondly, the observations made by Mr Mayfield, qualified as he might be, are no counterbalance to the overwhelming evidence of the applicant's significant state of intoxication. Moreover, Mr Mayfield was not a witness to the offence. He did not see the manner in which the applicant was driving, the collision, or the contents of the applicant's vehicle.

[27] Thirdly, the applicant's statements concerning the drug Avanza were unsupported by any evidence as to its effects. None was before his Honour and no application to adduce such evidence in this application has been made.

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22 [2005] QCA 90.
23 [2004] QCA 467.
24 [2011] QCA 78.
25 [2011] QCA 139.
26 [2007] QCA 25.
27 [2005] QCA 457.

[28] I now turn to consider the cases to which the applicant has referred. I note that in none of them, had the offender pleaded guilty to an additional summary charge or charges as the applicant had here. Of course, on the approach open to, and adopted by, his Honour, the sentence for the indictable offence reflected the totality of the criminality of that offence and the summary offences.

[29] In *Tabakovic*, the offender was a 28 year old father. He had a blood alcohol concentration of 0.152 per cent. He had "revved up" his vehicle at a stop light, taken off, veered onto a curb and collided with the complainant and multiple items of property. The incident caused lacerations to the complainant's head and chest, requiring intensive physiotherapy. On a plea of guilty he was sentenced to three and a half years' imprisonment suspended after 16 months. His appeal to this Court was allowed and a sentence of three years' imprisonment suspended after 10 months was substituted. The offender's deliberate and reckless driving was over a very short distance, which may be contrasted with the distance of at least 150-200 metres in which the applicant drove dangerously. In addition, the offender in *Tabakovic* had no prior criminal history nor any convictions for driving under the influence of alcohol.

[30] The offender in *Johnson* was sentenced to five years' imprisonment suspended after 18 months on a plea of guilty. His sentence was reduced on appeal to four years' imprisonment suspended after 12 months. The offender had a history of drug and alcohol related dependencies. He was diagnosed as having an adjustment disorder and mild depression. Notably, the offender was only 17 years old; the complainant was a passenger in the vehicle; he and the complainant were testing modifications they made to the vehicle; and no evidence was adduced that the complainant asked the offender to slow down or stop.

[31] In *Robinson*, the offender was a 23 year old provisional licence holder who, with a blood alcohol concentration of 0.06 per cent, drove onto the oncoming lane to pass a vehicle. This happened in front of a suburban school at around 3 pm. The offender collided with an oncoming vehicle whilst travelling 20 km over the 40 kph speed limit. He continued onto the footpath and collided with a seven year old boy and his father. The child suffered similar injuries to that of the current complainant, that is, a fractured tibia and fibula above the ankle, with a minor displacement of those bones, and bruising and tenderness to other parts of his body. On a plea of guilty the offender was sentenced to two and a half years' imprisonment suspended after nine months. His appeal against this sentence as being manifestly excessive, failed. In my view, the decision in *Robinson* is of marginal assistance here. It established no more than the sentence imposed in the circumstances of that case, was not manifestly excessive. Also, although the level of the applicant's intoxication was never known, the current maximum penalty for his offending is 14 years whereas that for the offender in *Robinson* was 10 years.[28]

[32] As to the decisions relied on by the respondent, the circumstances in *Saltmarsh* have the most similarity to those in the applicant's case.

[33] The female offender in *Saltmarsh* was 32 years of age. She was observed from a distance to be driving erratically, but not speeding, on a residential street. Her tyres screeched and her vehicle mounted the footpath. It collided with the 78 year old complainant who was walking along the footpath. He suffered an unstable vertebral fracture,

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[28] See *Criminal Code and Civil Liability Amendment Act* effective 20 March 2007.

a subarachnoid hemorrhage and a fracture of the right fibula. His residual disabilities significantly impaired his quality of life. The offender accelerated away from the accident without stopping. She failed to provide a breath specimen when the vehicle was located at a nearby school. The offender did however, provide such a specimen 45 minutes later. It showed a reading of 0.281. The offender pleaded guilty and was sentenced to four years, nine months imprisonment, suspended after 21 months for an operational period of five years. She had no prior criminal history, or history of driving under the influence of alcohol. She was attending rehabilitation for alcohol addiction. It was also accepted that the offender was remorseful by virtue of the guilty plea and letter of apology. An application for leave to appeal against the sentence as being manifestly excessive was refused. de Jersey CJ considered that it was not manifestly excessive especially when the ameliorating effect of the suspension after 21 months was taken into account.[29]

[34] Reference was made by this Court to *Saltmarsh* in *Tresize*. There, leave to appeal against a sentence of five years' imprisonment with a parole eligibility date after 18 months, as being manifestly excessive, was refused. The 33 year old offender drove erratically over a considerable distance weaving in and out of traffic doing "burn outs". He collided with a vehicle when he was on the wrong side of the road. He attempted to flee the scene. He was found to have a blood alcohol concentration of 0.19 percent and 12 mg/kg of the active ingredient of cannabis in his blood. The offender had a history of offending involving "hooning" behavior. The 21 year old complainant suffered a comminuted fracture of the wrist. It healed with a deformity which caused continuing pain.

[35] In *Roser*, Keane JA, with whom McPherson JA and Mackenzie J agreed, expressed the view that a head sentence of four and a half years imprisonment was within the appropriate range for a case in which the harm caused to another, while permanent and serious, does not amount to a major physical handicap, and where the offender has a bad history of drunken driving.[30]

[36] Having regard to these decisions, I consider that it is fitting that the applicant serve the sentence imposed for the totality of the offending. I am unpersuaded that the applicant's sentence is unreasonable or plainly unjust. Applying the approach recently endorsed by French CJ, Keane and Nettle JJ in *R v Pham*,[31] I am not at all inclined to conclude that there must have been some misapplication of principle on the part of the learned sentencing judge in arriving at it.

Disposition

[37] For these reasons, in my view, the applicant's ground of appeal has no prospects of success. His application for leave to appeal must therefore be refused.

Order

[38] I would propose the following order:

Application for leave to appeal against sentence refused.

[39] **DOUGLAS J:** I agree with the reasons of Gotterson JA and the order proposed by his Honour.

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29 At p8.
30 At [22] cited in *Tresize* at [30].
31 [2015] HCA 39; (2015) 325 ALR 400 at [28].