SUPREME COURT OF QUEENSLAND

CITATION:	*R v Liu* [2016] QCA 186
PARTIES:	**R** **v** **LIU, Jia-Qing** (applicant)
FILE NO/S:	CA No 122 of 2016 DC No 785 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 5 May 2016
DELIVERED ON:	18 July 2016
DELIVERED AT:	Brisbane
HEARING DATE:	14 July 2016
JUDGES:	Fraser and Philippides JJA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was convicted on his own plea of one count of dangerous operation of a vehicle causing death – where the applicant was sentenced to two years imprisonment, suspended after three months, and with an operational period of three years – where the applicant contended that the sentencing judge erred in adopting, on a plea of guilty, a starting point of six to eight months actual imprisonment prior to consideration of mitigation – whether the exercise of the sentencing discretion miscarried CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his own plea of one count of dangerous operation of a vehicle causing death – where the applicant was sentenced to two years imprisonment, suspended after three months, and for an operational period of three years – whether the sentence was manifestly excessive

R v Allen [2012] QCA 259, cited
R v Boubaris [2014] QCA 199, considered
R v Damrow [2009] QCA 245, cited
R v Gruenert; Ex-parte Attorney-General (Qld) [2005] QCA 154, cited
R v Hart [2008] QCA 199, cited
R v Hopper; Ex-parte Attorney-General (Qld) [2015] 2 Qd R 56; [2014] QCA 108, cited
R v Kohler [2010] QDC 502, cited
R v MacDonald (2014) 244 A Crim R 148; [2014] QCA 9, cited
R v Maher [2012] QCA 7, considered
R v Murphy [2009] QCA 93, cited
R v Osborne [2014] QCA 291, cited
R v Towers [2009] QCA 159, cited

COUNSEL: B J Power for the applicant
D Nardone for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **PHILIPPIDES JA:** The applicant seeks leave to appeal against sentence imposed on 5 May 2016, on his conviction on a guilty plea, of one count of dangerous operation of a vehicle causing death. The applicant was sentenced to a period of two years imprisonment, suspended after three months, for an operational period of three years and disqualified from holding or obtaining a driver's licence in Queensland for a period of three years.

Circumstances of the Offence

[3] The applicant was 23 years old at the time of the offence and 24 at sentence. The offence occurred on the morning of 9 March 2015 when the vehicle the applicant was driving collided with another vehicle. In the applicant's vehicle was his wife and an associate, who died from injuries sustained in the accident. The applicant, who was born in Taiwan, was on a working holiday in Australia with his wife. They and the deceased were working as fruit pickers near Bundaberg and were on their way to work on the morning in question.

[4] The accident occurred at an intersection in a 100km/h zone. The applicant entered the intersection and failed to give way as was required by the give way sign present at the intersection. As a consequence, he drove through the intersection, colliding with the other vehicle. Emergency services attended at the scene and the deceased was found to be deceased, as a result of head injuries from the collision. The applicant also suffered significant injuries, including head injuries. His wife was taken to hospital but released the following day. The driver of the other vehicle was not injured, although his passenger suffered a chipped bone in his thumb and other superficial injuries.

Sentencing Remarks

[5] In imposing sentence, the sentencing judge observed that, while the road markings were unclear at the time, there was a prominently displayed and clearly marked give way sign which the applicant had failed to obey. His Honour accepted that the applicant was unable to offer an explanation of what occurred because of significant injuries he had suffered. However, the sentencing judge observed that, as there was no evidence of braking or an attempt to stop, it appeared the applicant either did not see the give way sign or did not understand its effect. The applicant's "unfamiliarity with the road" and indeed "Australian driving conditions" provided some explanation for not understanding the road sign. However, that did not excuse the applicant's conduct in failing to give way, a requirement which existed to protect road users.

[6] The sentencing judge took into account that the applicant was "deeply remorseful", had no criminal or traffic history and was "otherwise of very good character". The applicant's remorse was also demonstrated by him having pleaded guilty at the earliest time. However, his Honour stated that the primary consideration in a case such as this was to consider the dangerousness of the driving in the circumstances. The sentence imposed was required to reflect denunciation of the conduct involved and to act as a deterrent to others. An aspect of deterrence was ensuring that visitors to Australia knew and appreciated the road rules.

[7] In considering the sentencing discretion as to whether a period of actual imprisonment should be served, his Honour observed that the authorities put before him indicated that it was a rare case that did not require a custodial term, although it was not inevitable in every case. The sentencing judge had regard to the fact the applicant had a family in Taiwan that included a young child and that that matter, along with the applicant's language barrier, meant a period of actual imprisonment would be more difficult for the applicant. Taking those considerations into account, his Honour concluded, nonetheless, that a period of actual imprisonment was appropriate. In imposing a sentence of two years' imprisonment suspended after three months imprisonment for an operational period of three years, the sentencing judge stated that ordinarily:

> "I would have suspended your sentence after a period of six to eight months in jail but I have reduced that period to three months in lieu of all the particular circumstances to which I have referred".

Grounds of Appeal

[8] The application for leave was brought on the basis of two grounds of appeal. The first ground was that the sentence was manifestly excessive with regard to the period of actual custody imposed. The second ground was that the starting point of six to eight months imprisonment, on a plea of guilty, adopted by the sentencing judge prior to consideration of mitigation caused the exercise of the sentencing discretion to miscarry, so that the sentencing discretion was required to be exercised afresh. The applicant contended that the sentence imposed ought to be varied by ordering that the sentence be suspended at the date of the appeal hearing (at which time he had served two months and ten days imprisonment).

Consideration of Grounds of Appeal

[9] It is to be noted that the applicant did not contend that the head sentence was outside the proper scope of a sound exercise of a discretion. At sentence counsel for the applicant

had advocated for a head sentence of between 18 months and two and a half years imprisonment. It was also accepted by the applicant's counsel that the wide sentencing discretion reflected in the comparable authorities made the first ground of appeal as to the custodial term very difficult to argue. It was further conceded in that regard that counsel's concession at sentence was relevant. That concession was that, notwithstanding the submission that a wholly suspended sentence was urged as appropriate, it could not be said that there was binding authority that required such an outcome.

[10] The applicant's primary argument therefore was that, based on the objective level of seriousness of offending in this case, the learned sentencing judge "erred in finding that six to eight months of actual imprisonment was the ordinarily appropriate starting point on a plea of guilty before consideration of personal mitigation". The applicant's contention was thus that the sentencing judge improperly imposed the sentence from a starting point of two years imprisonment suspended after six to eight months.

[11] I accept the respondent's contention that the applicant's reading of the sentencing Judge's remarks is erroneous. Nowhere in his Honour's remarks did he state that the exercise of the discretion began from any particular starting point. His Honour's reference to "ordinarily" may be understood, as the respondent submitted, as highlighting that the court had made a proper consideration of and made substantial allowance for, the relevant mitigating features, as well as the early plea of guilty, to explain the justification for a suspension after only a short period of custody, that is at one eighth of the head sentence. Ground 2 is thus not made out. There was no error in the sentencing proceedings justifying the exercise of the sentencing discretion afresh.

[12] As was stated in *R v Osborne* [2014] QCA 291 at [46] by Henry J (with whom Holmes JA and McMeekin J agreed), in respect of the timing of a suspension of a sentence:

> "[It] should not be pre-determined arithmetically for the same reason there should not be a judicially determined sentencing starting point for the duration of imprisonment prior to parole or a parole eligibility date. Nor do the cases suggest the existence of a norm for the timing of the suspension relative to the duration of the head sentence. For instance, while the sentence was suspended after the service of one-third of the head sentence in *Huxtable*, the relevant proportion was one-quarter in the case of *R v Murphy* and two-sevenths in the case of *R v Maher*."

[13] The decision referred to in the above extract of *R v Maher* [2012] QCA 7, which was not brought to the attention of the sentencing judge, illustrates the width of the sentencing discretion. There, a sentence of three years imprisonment suspended after serving nine months with an operational period of three years (and a disqualification for four years) imposed for an offence of dangerous operation of vehicle causing death was not considered manifestly excessive. The 44 year old applicant had limited criminal and traffic histories, which were accepted as being "well in the past". The offender had turned his vehicle right into another road and "straight into the oncoming path of the deceased". The deceased was on a motorcycle which had its headlights on. The deceased activated his brakes but was unable to avoid the collision. Evidence suggested the deceased was travelling at the speed limit immediately before the collision. The sentence was imposed on the basis that the dangerous driving was not able to be categorised as arising as a result of momentary inattention. The conclusion

reached by the sentencing judge that a substantial length of the roadway was straight and that there was no visual obstruction to obscure the motorcycle was found to be open, as was the inference that the prolonged period of inattention was likely brought about by fatigue. The Court reiterated the strong role for general deterrence in this area, stating at [43]:

> "The public must have a level of understating that those who engage in driving must do so carefully to protect other users of the road. If they drive dangerously by prolonged inattention, whether resulting from fatigue, distraction from passengers or some other reason, and cause thereby the death or serious injury of another, punishment which strongly denounces that conduct will be imposed. The head sentence of three years was not outside the range of a sound sentencing discretion."

[14] Although the applicant's conduct reflected a prolonged period of failing to keep a proper lookout, his offending was not as serious as that of Maher's and he had no prior history at all. That was reflected in the heavier head sentence imposed on the older offender in *Maher,* who was also required to serve six months longer in actual custody. *Maher* supports the sentence imposed as well within a sound exercise of the sentencing discretion.

[15] Further, the authorities put before the sentencing judge by the applicant, including *R v Boubaris* [2014] QCA 199, *R v MacDonald* [2014] QCA 9, *R v Hopper; Ex-parte Attorney-General (Qld)* [2015] 2 Qd R 56, *R v Towers* [2009] QCA 159, *R v Osborne* [2014] QCA 291 and *R v Kohler* [2010] QDC 502, do not demonstrate that the sentence imposed was not open. Nor do the cases referred to by the respondent, including *R v Damrow* [2009] QCA 245, *R v Hart* [2008] QCA 199, *R v Gruenert; Ex-parte Attorney-General (Qld)* [2005] QCA 154, *R v Murphy* [2009] QCA 93 and *R v Allen* [2012] QCA 259, support the proposition that the sentence imposed was manifestly excessive in a short period of actual custody to be served.

Order

[16] I would refuse the application.

[17] **BURNS J:** For the reasons expressed by Philippides JA, I agree that the application for leave to appeal against sentence should be refused.