SUPREME COURT OF QUEENSLAND

CITATION:	*R v Covington* [2003] QCA 342
PARTIES:	**R** **v** **COVINGTON, Paul Adam** (applicant)
FILE NO/S:	CA No 97 of 2003 DC No 28 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED EX TEMPORE ON:	7 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2003
JUDGES:	McMurdo P, Jerrard JA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Application for leave to appeal against sentence granted and appeal allowed to the following extent. Instead of the sentence of five years' imprisonment imposed at first instance, substitute a sentence of three years' imprisonment to be suspended after 15 months with an operational period of four years**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – where applicant convicted of dangerous operation of a motor vehicle with circumstance of aggravation – where applicant sentenced to five years imprisonment and disqualified from holding or obtaining a drivers licence for five years – where applicant also dealt with for summary offence of driving whilst disqualified – where applicant had extensive traffic history – where co-offender sentenced to lesser sentence – whether sentence disparate and manifestly excessive in all the circumstances *Lowe v The Queen* (1984) 154 CLR 606, considered *R v Cusak* [2000] QCA 239; CA No 90 of 2002, 16 June 2000, considered *R v Fripp* [2003] QCA 4; CA No 345 of 2002, 29 January 2003, considered *R v McAnelly; ex parte A-G* [1996] QCA 126; CA No's 375 and 408 of 1995, 10 May 1996, considered

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COUNSEL: G M McGuire for the applicant
L J Clare for the respondent

SOLICITORS: Canning Craymer Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant, together with Cooke and Young was charged with two counts of dangerous operation of a motor vehicle with the circumstances of aggravation of causing both death and grievous bodily harm. All three pleaded not guilty. Young was acquitted on all counts and discharged. Cooke was convicted only on the second count of dangerous operation of a motor vehicle with circumstances of aggravation, and the applicant convicted only on the alternate count of dangerous operation of a motor vehicle with circumstances of aggravation. The offence occurred on the 13th of May 2002. Cooke was sentenced to two and a half years imprisonment and was disqualified from holding or obtaining a drivers licence for three years. The applicant was sentenced to five years imprisonment and was disqualified from holding or obtaining a drivers licence for five years. Covington was also dealt with for the summary matter of driving whilst disqualified, to which he pleaded guilty and for which he was given no further punishment. He applies for leave to appeal against that sentence, contending that it is manifestly excessive.

The maximum penalty for the indictable offences was seven years imprisonment and for the summary offence 18 months imprisonment.

The applicant was 20 at the time of the offence and 21 at sentence. He had a concerning past with, most significantly, a previous conviction for dangerous operation of or interference with a vehicle on 28 August 2000, for which he was convicted on 15 September 2000 in the Ipswich Magistrates Court and fined $500.

He also had an extensive traffic history commencing in 1998 and his licence had been cancelled through demerit points on four occasions. The offence of the previous dangerous driving occurred in the following way. The applicant spun the car wheels on a wet road surface for about 10 minutes, during which he revved the vehicle loudly, and caused screeching of tyres and fishtailing. During this performance, a young girl rode by on a bike. The applicant's vehicle brushed her bike and knocked the girl over causing cuts and abrasions to her legs. She was treated by the ambulance but did not require further attention. The applicant turned himself into police and voluntarily took part in a record of interview in which he made full admissions.

An additional concern here is that the applicant committed subsequent offences after he was charged with the present offence. On the 14th of February 2003 at Maryborough he was charged with contravening a direction and failing to stop as directed at a random breath test; driving an unregistered and uninsured motorcycle; unlicensed driving; and having a false, or tampered label on the motorcycle. He pleaded guilty but at

the time of his sentence on this matter he had not been sentenced.

The applicant's co-offender, Cooke, was 18 at the time of the offence and 19 at sentence. He had no previous criminal convictions and only two relatively minor entries on his traffic history. The deceased, Matt Forsyth, was Cooke's best friend. Cooke was employed at sentence at the Dinmore Meatworks. He had undergone grief counselling, was a pallbearer at Mr Forsyth's funeral and has great remorse about the death.

The facts constituting the offence are as follows. On 13 May 2002 six young men, all friends, were driving in two vehicles on the Cunningham Highway near Ipswich. The applicant was the passenger in a utility driven by Young. Cooke was driving a Gemini with three passengers, including Matthew Forsyth, the deceased, and Benjamin Lehmann, who suffered grievous bodily harm. At some point, rubbish was thrown from the driver's side of the Gemini towards the other vehicle. Later, the utility was in front of the Gemini and the applicant threw two or three plastic bottles back in the direction of the Gemini being driven by Cooke. Cooke veered to avoid the bottles in a manner that was unnecessary, lost control and crashed, with the tragic consequences I have outlined.

The fatal accident was preceded by a lengthy period of driving, commencing at the Dinmore Meatworks where the protagonists were employed, during which the two vehicles

travelled at excessive speeds, swerved and fishtailed and together twice overtook another vehicle. It seems that the applicant and Young, in their vehicle, returned to the accident scene when they realised there had been an accident. When they observed others at the scene they left, but were subsequently apprehended by police.

Mr Lehmann was transferred from Ipswich General Hospital to Royal Brisbane Hospital on the 13th of May, where he was treated for brain injuries, a fractured shoulder, a bilateral wrist fracture, and a deep laceration to his right ear. He was in intensive care and underwent plastic surgery and orthopaedic surgical procedures. He was transferred to the neurosurgical ward on 17 May. He then undertook occupational speech and physiotherapy for two weeks until his discharge on 29 May, when he still required two people to assist with his mobility. He was then transferred to the Ipswich Hospital pending a rehabilitation bed becoming available at the Princess Alexandra Hospital Brain Injury Rehabilitation Unit.

Victim impact statements tendered at the sentence referred to the enormous grief suffered by the family of the deceased, Matthew Robert Forsyth, and the significant and ongoing problems experienced by the family of the seriously injured young man, Benjamin Lehmann. Mr Lehmann will suffer the consequences of this accident for the rest of his life.

Her Honour sentenced on the basis that the applicant threw at least one object deliberately; that it was a deliberate and

aimed throwing; that he was wilfully blind to the possible outcomes; at the time the vehicles were travelling in excess of 100 kilometres per hour on a major highway; if not jocularity there was at least a total lack of appreciation of the seriousness of the behaviour of those in the two vehicles in all the circumstances.

The applicant left school in grade 10 and has had a good work history. He injured his shoulder whilst dirt bike racing and he has not been able to afford to have it repaired. It was said at sentence that, as a result of the offence, he has been ostracised by former friends and been the subject of retributive violence. He has suffered flashbacks of the horror of the incident.

The applicant contends that the sentence of five years imprisonment was in the circumstances manifestly excessive especially when compared to the sentence imposed on Cooke, who was the driver immediately responsible for both the death and grievous bodily harm. He contends the disparity between his sentence and the sentence imposed on Cooke is such as to cause a justifiable sense of grievance: see Lowe v The Queen (1984) 154 CLR 606.

The applicant's conduct in deliberately throwing plastic containers at the vehicle driven by Cooke in circumstances where both vehicles were travelling at very high speeds on a busy highway, makes him no less culpable than Cooke, who reacted in an unsafe but nevertheless predictable manner, with

tragic consequences. Once it is accepted that Cooke and the applicant were equally culpable there are reasons for imposing a more lenient penalty on Cooke. Cooke was younger and had a minor traffic history whilst the applicant had an alarming traffic history and a previous conviction for a like offence, which should have been a timely warning to him about the potential consequences of dangerous conduct in vehicles on the roadway. The applicant did not learn his lesson from his previous error and even after the tragic consequences of his behaviour here, he continued to commit other traffic offences. Neither he, nor Cooke, had the benefit of the remorse shown by an early plea of guilty. The only factors in the applicant's favour were that first, alcohol was not involved, and second, that he was still a young man so that prospects of rehabilitation could not be excluded, despite his subsequent conduct. There were proper grounds for a distinction between the penalty imposed on Cooke and that on the applicant and he cannot reasonably feel aggrieved because a distinction was made. But is the distinction too great, making the sentence manifestly excessive?

A review of the schedule of offences for dangerous driving causing death and/or grievous bodily harm without alcohol provided by the respondent does demonstrate that the sentence imposed here for such a young offender was, at least, at the very high end of the range. The factors that supported a heavy penalty were that the applicant was responsible for the death of one young man and serious permanent injury to another who will daily have to face the detrimental effect of those

injuries on his quality of life. The sentence imposed must reflect this. The other serious factor was the applicant's concerning history. On the other hand, alcohol or drugs were not involved and the applicant is young and immature; that immaturity is reflected in his conduct in the commission of this offence, which indirectly, rather than directly caused death and grievous bodily harm. His rehabilitation cannot be discounted.

There are no sentences with which we have been provided comparable to the unusual facts here but some are of some assistance. In R v McAnelly; ex parte Attorney-General [1996] QCA 126; CA Nos 375 & 408 of 1995, 10 May 1996, McAnelly was sentenced to four years' imprisonment with a recommendation for parole after 18 months and a licence disqualification for five years for dangerous driving causing death. He was 34 years old, much older than this applicant, and pleaded guilty. He was driving on a relatively straight level stretch of road and crossed over onto the wrong side of the road on at least six occasions over two kilometres prior to the collision. He was largely on the wrong side of the road when the collision occurred. The complainant died in hospital five weeks later. The respondent was uninjured. McAnelly was sentenced on the basis that his driving was a substantial course of conduct. He was on bail in respect of other offences including disqualified driving at the time. He had a previous significant traffic history including drink driving and had prior offences for dishonesty. On appeal, his licence was disqualified absolutely, but the sentence was otherwise not

disturbed. Unlike this applicant McAnelly was a mature man with a worse criminal history, but he was responsible for the death of one person without the aggravating factor of causing grievous bodily harm to another and had the mitigating factor of a plea of guilty.

In R v Fripp [2003] QCA 4; CA No 345 of 2002; 29 January 2003, Fripp was 24 years old, three years older than this applicant and pleaded guilty to dangerous driving causing grievous bodily harm, dangerous driving and an assortment of property and traffic and drug offences. He had previous convictions for property and drug offences, had breached bail on at least two occasions and was on bail when some of the offences were committed. He was also in breach of a suspended sentence and had a poor traffic record involving 41 offences arriving out of 26 separate incidents. He was addicted to amphetamines. All of the indictable offences involved motor vehicles except for two involving drugs. The most serious offences were the charges of dangerous driving. When directed by police to stop or pull over he sped off involving police in chases in the course of which speeds were attained of 130 to 140 kph in 60 kph zones and in traffic conditions which involved a considerable risk of death or serious injury to the driving public. The offence of dangerous driving causing grievous bodily harm involved the loss to the owner of the stolen vehicle of $16,000. The complainant suffered spinal injuries and can now only walk with the assistance of a stick or frame and has permanent weakness in her right hand. Fripp was sentenced to four years' imprisonment with a recommendation

for parole after two years. He was older than this applicant and his criminal and driving history was even more serious. On the other hand, he pleaded guilty and did not additionally cause the death of another.

The applicant emphasises the matter of R v Conquest; ex parte Attorney-General [1995] QCA 567; CA No 395 of 1995; 19 December 1995, where Conquest had a relatively serious criminal history and was driving a stolen vehicle deliberately on the wrong side of the road when he collided with three pedestrians killing one and causing grievous bodily harm to the other two. He demonstrated little remorse and on appeal his term of imprisonment was increased from two years to three years' imprisonment. It must be noted that since 1995 sentences for offences of this nature have tended to increase in recognition of the need for deterrence.

The applicant also relies on the more recent matter of R v Cusak [2000] QCA 239; CA No 90 of 2000, 16 June 2000. Cusak had a blood alcohol reading of .17 per cent when he committed the offence of dangerous driving causing death. He had no criminal convictions but had a significant traffic history. He was driving a utility at an unsafe speed when the vehicle rolled and a passenger in the tray was killed. The victim was found to have acquiesced in the conduct, something that could perhaps also be said about the protagonists in this offence. Originally Cusak was sentenced to three years imprisonment wholly suspended. On appeal the full suspension was

overturned and the sentence was suspended after nine months imprisonment.

The respondent emphasises the matter of R v Wilde; ex parte Attorney-General [2002] QCA 501; CA No 283 of 2002; 19 November 2002. Wilde was the driver of a stolen motor vehicle which collided with a group of cyclists, killing one and injuring another. Witnesses had observed Wilde driving erratically prior to the collision. After the collision she drove off and motorists who had witnessed the incident followed her attempting to stop her. During this chase she travelled at excessive speeds and through a red light. She was subsequently apprehended by police. She was 41 years old, a mature woman and pleaded guilty. Wilde had a substantial criminal history for offences committed in New Zealand and Australia including convictions for offences of dishonesty and drugs. She had a bad traffic history including convictions for speeding, careless driving and driving under the influence of liquor. Her licence had been cancelled four times and she was on bail at the time she committed this offence. She was originally sentenced to two years and four months imprisonment for the driving offence with an effective sentence of three years and 10 months and a recommendation for parole after 18 months. On appeal her sentence for the driving offence was increased to five years' imprisonment with an effective sentence of six and a half years' imprisonment and she was recommended for parole after serving three years of that sentence. Wilde, of course, is a much more serious case than

the case here because of her previous history, age and the circumstances of the offence.

A review of all these matters in the end demonstrates that the sentence imposed here, despite its very serious aspects which I have set out earlier in these reasons, was manifestly excessive. It did not adequately reflect his youth and consequential rehabilitative prospects or the particular circumstances of the offence and, in so far as it was double the sentence imposed on his co-offender, it was disparate and manifestly excessive.

A sentence of three years' imprisonment suspended after 15 months with an operational period of four years properly reflects the competing factors here. If the applicant does not take up the opportunity to rehabilitate he will have to serve the remainder of his suspended sentence. The sentence should remain a real deterrent to stupid young people who would behave so irresponsibly and dangerously with cars at high speed on a motorway.

I would grant the application for leave to appeal against sentence and allow the appeal to the following extent. Instead of the sentence of five years' imprisonment imposed at first instance substitute a sentence of three years' imprisonment to be suspended after 15 months with an operational period of four years.

JERRARD JA: I agree.

MUIR J: I agree.

THE PRESIDENT: That is the order of the Court.

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