SUPREME COURT OF QUEENSLAND

CITATION:	*R v Roser* [2004] QCA 318
PARTIES:	**R** **v** **ROSER, Matthew Scott** (applicant)
FILE NO/S:	CA No 265 of 2004 DC No 1432 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED EX TEMPORE ON:	1 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	1 September 2004
JUDGES:	McMurdo P and Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, McMurdo P and Jerrard JA concurring as to the orders made, Williams JA dissenting
ORDERS:	**1. Grant application for leave to appeal against sentence** **2. Allow the appeal** **3. Instead of ordering that the imprisonment be suspended after three months order that it be suspended forthwith**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – FIRST OFFENDERS – SUSPENSION OF SENTENCE – PARTICULAR CASES – where applicant convicted of dangerous operation of a motor vehicle – where sentenced to 12 months imprisonment suspended after three months – where applicant admitted at the scene to driving 40 km over the speed limit and causing head-on collision – where driver in oncoming car sustained substantial injuries – where applicant showed immediate remorse and had no criminal history – whether fully suspended sentence was within range *R v Anderson* (1998) 104 A Crim R 489, cited *R v Grant* [1998] QCA 238; CA No 143 of 1998, 15 July 1998, cited *R v Hamilton* [2000] QCA 286; CA No 75 of 2000; 21 July

	2000, cited *R v Harris; ex parte A-G (Qld)* [1999] QCA 392; CA No 161 of 1999, 21 September 1999, cited *R v Wales* [2002] QCA 463; CA No 254 of 2002, 31 October 2002, distinguished
COUNSEL:	S P Barry for the applicant M J Copley for the respondent
SOLICITORS:	Ryan & Bosscher for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant pleaded guilty on 30 July this year to one count of dangerous operation of a motor vehicle causing grievous bodily harm on 10 November 2003. He was convicted and sentenced to 12 months imprisonment suspended after three months and was disqualified from holding or obtaining a driver's licence for two years. In respect of a summary offence of unlicensed driving he was convicted but not further punished. He contends that the sentence was manifestly excessive.

He has no criminal history or traffic history. He was 17 at the time of the offences and is now 18 years old. The maximum penalty was seven years imprisonment.

The circumstances of his offending are as follows. At about 9.30 p.m. he drove his mother's car, without her permission, south on Deebing Creek Road near Ipswich, a sealed semi-rural road, at speeds of up to 120 kilometres per hour. The speed limit is 80 kilometres per hour. The complainant, a 19 year old woman, was driving her car in the opposite direction. When the applicant saw the lights of her car he braked hard,

lost control of the car and skidded onto the wrong side of the road, colliding with the complainant's car head-on. He immediately ran to the complainant's car and when he saw she was injured, unconscious and covered in blood, he called triple 0 on his mobile telephone.

The complainant lived nearby and neighbours who saw the accident notified her parents who attended at the scene. The complainant was trapped in the vehicle for two hours before she was removed. When the police arrived at the scene the applicant immediately accepted responsibility and showed great remorse. He said:

> "She didn't do anything wrong. She was just here when I was being a dickhead. I shouldn't have been speeding. I shouldn't have been driving."

He accompanied police to the Ipswich Police Station where he gave them details of how the accident occurred and volunteered that the speed he was driving at was dangerous. The prosecutor relied on his admissions to establish that he was driving at 120 kilometres per hour.

The complainant suffered deep lacerations to her right forearm and left leg and a depressed fractured cheekbone. She had surgery on 21 November 2001 for a repair to the cheekbone. The complainant, in a victim impact statement, writes of the physical and emotional stress she has suffered since the accident. She has significant scarring which still causes her physical discomfort and embarrassment. Her family have also been emotionally affected by the accident.

The applicant was in steady employment as a labourer at sentence and was engaged to be married to his fiancée who was seven months pregnant. In her sentencing remarks, the learned primary Judge, after outlining the circumstances of the case, noted:

> "[I]t seems to me that a term of imprisonment is the sentence that has to be imposed in this case, even despite your tender years."

If, in making these comments, the learned primary Judge considered that a fully suspended sentence was not within the appropriate range, her Honour erred. In circumstances such as these, where the offender has no prior criminal history, alcohol is not involved, has pleaded guilty, is only 17 years old and has rendered assistance to the victim and expressed remorse, a non-custodial sentence is open. See for example *R v Hamilton* [2000] QCA 286; CA No 75 of 2000, 21 July 2000; *R v Grant* [1998] QCA 238; CA No 143 of 1998, 15 July 1998; *R v Anderson* (1998) 104 A Crim R 489 and *R v Harris* [1999] QCA 392, CA No 161 of 1999, 21 September 1999.

Unlike *Hamilton*, this was a case of deliberate dangerous driving, not a momentary lapse, although, in my view, it was not as serious a case as, for example, a deliberate attempt to run a red light in a 10 tonne truck as in *R v Wales* [2002] QCA 463; CA No 254 of 2002, 31 October 2002. The applicant's dangerous driving here arose from his travelling at an excessive speed; when he realised he had to brake, he lost

control of the car with disastrous consequences for the innocent complainant.

The sentence imposed did not give sufficient weight to the very many mitigating factors here, in particular, his extreme youth and rehabilitative prospects and the very great remorse shown by him by his immediate acceptance of responsibility and assistance to the victim at the scene. A fully suspended sentence should have been imposed in all these circumstances.

I would allow the appeal and instead of ordering that the imprisonment be suspended after three months order that it be suspended forthwith.

WILLIAMS JA: The facts constituting the dangerous operation of a motor vehicle causing grievous bodily harm and the personal circumstances of the applicant have been set out in the reasons for judgment of the President. In my view, the learned sentencing Judge made no error in the exercise of her sentencing discretion. She fully appreciated the difficulties presented by the circumstances of the case and had to decide whether, given those circumstances, the applicant should be required to serve an actual period in custody. There is no doubt that driving on the road in question at 120 kilometres an hour whilst unlicensed called for a custodial sentence as the head sentence. The sentence imposed was, in my view, within the range even given the applicant's age and was not manifestly excessive. The application should be dismissed.

JERRARD JA: The learned sentencing Judge in this matter has considerable experience. Nevertheless, I consider the sentence imposed did reveal an error of principle; namely, not giving sufficient weight to two matters. One was this applicant's immediate acceptance of blame for what had happened and the steps the applicant immediately took to exhibit his genuine remorse and acceptance of responsibility. The second was his extreme youth. In conjunction, those two matters show, in my judgment, that this applicant had a considerable capacity to respond to a lenient penalty which would have been entirely appropriate. Accordingly, I consider the learned sentencing Judge did err in not recognising those matters sufficiently when the Judge imposed a term of imprisonment to be actually served. I agree with the order the President proposes.

THE PRESIDENT: The orders are as I have outlined.
