SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cottam; ex parte A-G (Qld)* [2004] QCA 351
PARTIES:	**R** v **COTTAM, Scott Trevor** (applicant/appellant) **R** **v** **COTTAM, Scott Trevor** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NOS:	CA No 159 of 2004 CA No 180 of 2004 DC No 839 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	27 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2004
JUDGES:	McPherson and Jerrard JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the application and appeal against sentence** **2. Set aside the sentence imposed** **3. Remit the matter to the District Court at Brisbane for hearing and sentencing according to law**
CATCHWORDS:	CRIMINAL LAW – SENTENCING – FACTUAL BASIS FOR SENTENCE – where applicant pleaded guilty to dangerous driving, and, at the sentencing hearing, through his counsel, offered an explanation to mitigate his dangerous driving, that was disputed by the crown – whether learned sentencing judge erred in rejecting the applicant's explanation, when no evidence had been called on the matter

COUNSEL:	T D Martin SC for the applicant/appellant/respondent S G Bain for the respondent/appellant
SOLICITORS:	Woodgate Hughes for the applicant/appellant/respondent Director of Public Prosecutions (Queensland) for the respondent/appellant

McPHERSON JA: Scott Trevor Cottam pleaded guilty on 17 May 2004 in the District Court to a charge of dangerous driving causing death as well as causing grievous bodily harm to another person. On 25 May he was sentenced to a term of 4 1/2 years imprisonment, with a recommendation for parole after two years. This is both an application for leave to appeal against sentence on the ground of its severity and an appeal by the Attorney-General against that sentence on the ground of its inadequacy. For convenience I will refer to Cottam throughout as the applicant.

It is not necessary to revisit the detail of the offences here beyond saying that there were several people in cars or along the road who saw what happened. Witness statements presented by the Crown at the sentence hearing described a prolonged course of dangerous driving by the applicant extending over a distance of 400 or 500 metres. They claimed to have seen him doing a series of "fishtails" while travelling at speeds estimated to have been between 100 and 120 kph. The vehicle spun out of control before crossing the median strip and collided with the vehicle driven by the deceased, who was accompanied by a passenger who was the person who suffered the grievous bodily harm.

On this appeal the applicant has raised two specific points against the sentence imposed, as well as the more general ground that the sentence was manifestly excessive. The first concerned the matter of remorse. I need not directly deal with it on this application. The second concerns an explanation given by counsel for the applicant at the sentence hearing. He said, in the course of his submissions, that the applicant's dangerous driving had been caused when - and I quote,

> "his foot became wedged between the accelerator and the brake pedal. He was wearing large work boots. What he then did was entirely wrong and inappropriate. In an endeavour to free his boot he depressed the accelerator without success, did it again, and yet a third time."

Prosecuting counsel, who was Mr John Copley, waited until the end of the applicant's sentencing submissions and then said,

> "Your Honour, that explanation in relation to a foot being caught in respect of a pedal, the explanation tended to explain this course of driving. If that is to ameliorate the circumstances I would insist upon the giving of evidence in relation to it. This is simply a case of skylarking, in the Crown's submission - if that's the right term - it is irresponsible driving - that fact in relation to a foot being caught."

I have not quoted it precisely but that is the effect of what Mr Copley said. To this his Honour responded as follows,

> "Mr Copley, I can set your mind at rest. Such an explanation in the context of the description given by the Crown witnesses is, in my view, inherently unlikely and I am not obliged to accept it, and I don't."

It was, I think, open to his Honour to reject the explanation advanced but I consider he could do so only if it was either withdrawn by counsel for the applicant or his Honour rejected it after hearing the applicant give evidence of his

explanation and seeing him cross-examined about it. Neither of those things, in fact, happened.

On behalf of the Attorney-General Ms Bain of counsel submitted that at the hearing it was nevertheless still open to the applicant to give the evidence in question, which he had failed to do; but I consider Mr Martin SC is correct in saying that the applicant would by then have been justified in concluding that his Honour had prejudged the matter against him and that his giving evidence would therefore achieve nothing.

The difficulty in which this Court is, in consequence, now placed on appeal is that, in the absence of an unchallengeable finding as to the veracity or otherwise of the applicant's explanation, we have no means of deciding between the two versions of what caused the applicant's vehicle to behave in the manner observed by the witnesses; that is to say, whether it was the result of the applicant's reckless skylarking, as the Crown contended, or of his foot becoming in some way wedged between the accelerator and brake pedal, as the applicant himself claimed. We do not, as it happens, even know whether his vehicle was an automatic or a manual vehicle so as to be able to assess the weight, if any, to be given to the explanation advanced on his behalf at the hearing.

The difference between accepting one rather than the other of these two versions of what occurred may, and probably would,

have a significant impact on the duration of the sentence that was to be imposed.

In these circumstances, and much as it is to be greatly regretted from the standpoint of all those who are concerned in the outcome of these proceedings, I consider that the Court has no alternative but to direct that the sentencing process be reheard by another Judge, who will be able to make a finding on the factual matter in dispute.

Accordingly, and for this purpose, I would -

1. allow the application and the appeal against sentence;
2. set aside the sentence imposed;
3. remit the matter to the District Court at Brisbane for hearing and sentencing according to law.

JERRARD JA: I agree.

WHITE J: I agree with that.
