# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Gruenert; ex parte A-G (Qld)* [2005] QCA 154 |
| PARTIES: | **R**<br>v<br>**GRUENERT, Juergen Theodor**<br>(respondent)<br><br>**EX PARTE ATTORNEY-GENERAL OF QUEENSLAND**<br>(appellant) |
| FILE NO/S: | CA No 439 of 2004<br>DC No 104 of 2004 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Appeal by A-G (Qld) |
| ORIGINATING COURT: | District Court at Mackay |
| DELIVERED ON: | 13 May 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 March 2005 |
| JUDGES: | Williams and Keane JJA and Fryberg J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Sentence appeal by the Attorney-General dismissed** |
| CATCHWORDS: | APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER - APPLICATIONS TO INCREASE SENTENCE - OTHER OFFENCES - where respondent aborted overtaking manoeuvre in face of oncoming traffic - where movement back to correct side of the road resulted in the crashing of another vehicle - where respondent was convicted after trial of dangerous operation of a motor vehicle causing death - where sentencing judge characterized conduct of respondent as "momentary inattention" - where sentence of 18 months imprisonment wholly suspended and suspension of licence for six months imposed - whether conduct of respondent properly characterized as "momentary inattention" - whether sentence manifestly inadequate<br><br>*R v Harris; ex parte A-G* [1999] QCA 392; CA No 161 of 1999, 21 September 1999, cited<br>*R v Balfe* [1998] QCA 014; CA No 444 of 1997, 20 February 1998, cited |

*R v Manners; ex parte A-G (Qld)* [2002] QCA 301; (2002) 132 A Crim R 363, cited
*R v Anderson; ex parte A-G (Qld)* [1998] QCA 355; (1998) 104 A Crim R 489, cited

COUNSEL: D L Meredith for appellant
A J Glynn SC for respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for appellant
Bill Cooper & Associates (Clermont) for respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Keane JA in this matter. There is nothing I wish to add thereto. I agree with those reasons and with the order proposed.

[2] **KEANE JA:** The respondent to this appeal by the Attorney-General of Queensland was convicted on 26 November 2004 after a trial of dangerous operation of a motor vehicle causing death. The offence in question occurred on 19 September 2002.

**Background**

[3] Shortly after 4.00 pm in the afternoon the respondent was driving a truck on the Peak Downs Highway heading towards Mackay. The learned sentencing judge observed that the photographic exhibits showed that the respondent had a clear view for a length of the highway which allowed him to overtake safely. The speed limit on this area of the highway was 100 kph. The respondent overtook a white utility towing a caravan travelling in the same direction. The utility was being driven by Johannes Krop. Mrs Elizabeth Ann Krop was in the passenger seat. According to Mrs Krop, they were travelling at between 70 and 80 kph. The respondent started to overtake them as they approached the Stockyard Creek Bridge on what was, as I have mentioned, a relatively straight stretch of the highway. It was a fine clear day.

[4] The respondent moved alongside the Krops' vehicle in an overtaking manoeuvre, but then veered back into the lane in which the Krops were travelling before his truck had fully passed their vehicle. Mr Krop moved to the left of the road in order to avoid a collision and was forced off the road onto a grass verge. The truck being driven by the respondent did not come into contact with the vehicle being driven by Mr Krop. Mr Krop tried to get his utility and caravan back onto the road, but the momentum of the caravan, having descended down a strong incline into an earthen drain, flipped the utility over. Mr Krop, who was not wearing a seat belt, was partially thrown out of the utility and trapped under it. He died as a result of the injuries he sustained.

[5] When they came to a stop the utility and caravan stretched across both lanes of the road, stopping the rest of the traffic travelling in both directions. The respondent did not stop.

[6] Mr Joseph Wilkinson and his son witnessed the accident. They gave evidence that they were in a car coming from the other direction. Their evidence was that, if they had not slowed down, the respondent would have hit them, and that there was insufficient room for the respondent to overtake the Krops' vehicle without creating a danger of a collision with them. This was contrary to the evidence of Mr Darren Miller, who said that it appeared to him that the respondent had sufficient time to

pass the Krops' vehicle without colliding with the Wilkinsons' vehicle. It is urged by the respondent that the learned sentencing judge must be taken to have resolved this conflict in favour of Mr Miller's evidence.

[7] However this may be, the appellant now concedes that the Crown case put to the jury was that the essence of the respondent's dangerous driving was the manner in which the respondent pulled back onto his correct side of the road, rather than in undertaking a dangerous manoeuvre when he moved onto the right hand side of the road to overtake the Krops' car and caravan. The substance of the Crown case was that the respondent failed to keep a proper lookout when he was returning to the correct side of the road and thereafter when he failed to stop.

[8] The respondent did not give evidence. It was suggested to Mrs Krop in cross-examination that she was wrong when she said that her husband had been forced off the road. It was suggested to her that Mr Krop had over-reacted, and that the respondent had, in fact, been past the Krops' vehicle when he pulled in front of it. The jury must be taken to have rejected this suggestion.

**The decision below**

[9] The learned sentencing judge described the case as "one of momentary inattention" on the part of the respondent. He also observed that the respondent had no previous convictions of a criminal nature or for traffic offences, that he had been driving for over 30 years and that he has "an exemplary character". His Honour went on to conclude:

> "The factors which are relevant here are that this was a dangerous act but of a momentary nature of pulling in when there was some threat from the vehicle coming in the opposite direction, it was not over a long period of time obviously, there is no alcohol involved and no excessive speed. Given your previous history, the prospects of rehabilitation are good. In this case there was a delay, the charges were not laid until August 2003, the events having occurred in September 2002 and the committal did not occur until the 19th February 2004 and the trial is now November 2004, this would have been hanging over your head for over two years. During that time of course you have continued in a useful employment as attested to by your employer.
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> … A conviction is recorded, 18 months imprisonment wholly suspended with an operational period of two years. There is an automatic suspension of six months for this type of offence. I do not propose to add to that, as a truck driver, a loss of licence for six months will adversely affect your career. In the circumstances of this case that in my view is sufficient."

**The issues on appeal**

[10] It is submitted on behalf of the Attorney-General that the learned sentencing judge erred in his characterization of the respondent's conduct as "momentary inattention". This was said to be unduly generous to the respondent. It was also submitted that the sentence imposed was manifestly inadequate.

[11] The first submission depends largely on the significance of the respondent's failure to stop as an indicator of the extent of the respondent's inattention.

[12] Often a failure to stop in these circumstances might suggest a level of carelessness which cannot properly be characterized as "momentary inattention". The learned sentencing judge did not attach that level of significance to the respondent's failure to stop. Indeed, his Honour did not expressly advert to the point. It would be wrong, however, to infer that his Honour had overlooked the point. In this regard, the evidence suggests that the respondent's truck, a long vehicle consisting of a prime mover and high trailer, was so configured that the respondent had vision rearwards only in his "wing" mirrors. He could have seen the wreck left in his wake only if it was in his line of vision. There is no evidence to suggest that he did see it, and this Court cannot infer that he left the scene with callous disregard for the plight of Mr and Mrs Krop.

[13] In the upshot, it cannot be demonstrated that his Honour erred in describing the respondent's conduct as "momentary inattention". In my view, the appellant has not made good its submission that the learned sentencing judge proceeded on an erroneous view of the facts.

[14] I turn, therefore, to consider whether the sentencing discretion miscarried on the ground of manifest inadequacy.

[15] In this Court in *R v Harris; ex parte A-G*[1] Thomas JA said:

> "In a case such as this it becomes very important to identify the level of seriousness of the actual driving of the offender."[2]

[16] From a consideration of the decisions of this Court in *Harris,*[3] *R v Balfe,*[4] *R v Manners; ex parte A-G (Qld)*[5] and *R v Anderson; ex parte A-G (Qld),*[6] it emerges that in a case of dangerous driving which causes death:

(a) a head sentence of 18 months imprisonment is at the bottom end of the range;

(b) the considerations of deterrence, and of the gravity of the consequences involved in the offence, mean that it will be a rare case that does not attract a custodial term;

(c) the imposition of a custodial sentence is not, however inevitable in every case; and

(d) cases of "momentary inattention" are among rare cases of dangerous driving which may attract a non-custodial sentence because, in such cases, the claims of the consideration of deterrence are less compelling.

[17] In my view his Honour's characterization of the respondent's offence as one of "momentary inattention" was correct. The respondent has a blameless record both as a driver and as a citizen. An impressive body of references vouch for his good character.

[18] In these circumstances, I am not persuaded that the sentence which was imposed was manifestly inadequate.

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1 [1999] QCA 392; CA No 161 of 1999, 21 September 1999 at [42].

2 See also *R v Manahan* [2000] QCA 382; CA No 207 of 2000, 19 September 2000 at [19].

3 [1999] QCA 392; CA No 161 of 1999, 21 September 1999.

4 [1998] QCA 014; CA No 444 of 1997, 20 February 1998.

5 [2002] QCA 301 esp at [11] - [14]; (2002) 132 A Crim R 363 esp at 364.

6 [1998] QCA 355; (1998) 104 A Crim R 489.

[19] In my opinion, the imposition of a head sentence of 18 months was within the proper range although at the lower end of that range. The suspension, in its entirety, of that sentence for an operational period of two years is consistent with the approach reflected in *Manners*, *Harris* and *Anderson*.

**Conclusion**

[20] In my opinion, the appeal should be dismissed.

[21] **FRYBERG J:** I agree with the reasons of Keane JA and with the order proposed by his Honour.