

SUPREME COURT OF QUEENSLAND

CITATION: *R v Cook; ex parte A-G (Qld)* [2007] QCA 100

PARTIES: **R**
v
COOK, Andrew Raymond
(respondent)
EX PARTE ATTORNEY-GENERAL OF QUEENSLAND
(appellant)

FILE NO/S: CA No 5 of 2007
DC No 669 of 2006

DIVISION: Court of Appeal

PROCEEDING: Appeal against Sentence by A-G (Qld)

ORIGINATING COURT: District Court at Cairns

DELIVERED ON: 30 March 2007

DELIVERED AT: Brisbane

HEARING DATE: 20 March 2007

JUDGES: Holmes JA, Cullinane and Jones JJ
Judgment of the Court

ORDER: **Appeal dismissed**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND ENQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN OFFICER – APPLICATIONS TO INCREASE SENTENCE – OTHER OFFENCES – where the respondent was convicted of dangerous operation of a motor vehicle causing death whilst adversely affected by alcohol – where the respondent was sentenced to five years imprisonment with eligibility for parole after two years and disqualified from holding a driver’s license for five years – whether sentence manifestly inadequate

R v Evans [\[2005\] QCA 455](#); CA No 238 of 2005, 8 December 2005, considered
R v Hoad [\[2005\] QCA 92](#); CA No 434 of 2004, 8 April 2005, considered
R v Ibrahim [\[2003\] QCA 386](#); CA No 162 of 2003, 3 September 2003, considered
R v McKinnon [\[1999\] QCA 75](#); CA No 356 of 1998, 17 March 1999, considered

R v Saltmarsh [2007] QCA 25; CA No 267 of 2006, 6 February 2007, applied

R v Stephenson [1999] QCA 519; CA No 295 of 1999, 17 December 1999, considered

R v Wilde; ex parte A-G (Qld) [2002] QCA 501; CA No 283 of 2002, 19 November 2002, considered

COUNSEL: M J Copley for the appellant
J D Henry SC for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
O'Reilly Stevens Bovey Lawyers for the respondent

- [1] **THE COURT:** The Attorney-General appeals against a sentence imposed by the District Court at Cairns on 5 December 2006 on the respondent who was convicted on his guilty plea to the offence of dangerous operation of a motor vehicle causing death whilst adversely affected by intoxicating liquor.
- [2] The respondent was sentenced to five years imprisonment with parole eligibility after two years. He was also disqualified from holding a driver's licence for five years.
- [3] The Attorney-General contends that the sentence is manifestly inadequate because:-
- (a) It fails to reflect adequately the gravity of the offence generally and in this case in particular;
 - (b) It fails to take sufficiently into account the aspect of general deterrence; and
 - (c) The sentencing judge gave too much weight to factors going to mitigation.
- [4] The respondent was born on 9 April 1975 and was thus 29 years of age at the time of the incident and 31 years at the time of sentence.
- [5] The incident occurred on or about 12.45 pm on 3 January 2005 when the respondent was driving a Holden Rodeo utility inbound along the Redlynch Intake Road at Cairns. His vehicle was involved in a head-on collision with a Kia sedan being driven in an outbound direction by a Mr Edwards. Mr Kenneth Webber, a passenger in the sedan, died as a result of the collision.
- [6] The collision occurred on a bend in the road which was marked by parallel white unbroken lines. Mr Edwards observed the respondent's vehicle travelling towards him with its driver's side wheels on the incorrect side of the road. The marks on the road surface indicated that the brakes of both vehicles had been applied but this could not prevent the collision which occurred on the respondent's incorrect side of the road.

- [7] Witnesses at the scene noticed the respondent had the smell of liquor on his breath. Subsequent testing proved a blood alcohol content of 0.285 per cent¹ - more than five times the permissible limit. In addition the testing showed traces of other drugs – Diazepam, Nordiazepam, Tenazepam.² Expert opinion tendered to the Court was to the effect that whilst these other drugs, on their own would result in moderate sedation only, if added to the already sedated alcoholic state, would further impair the driver's mental and motor functions.³ The blood alcohol content alone was sufficient to leave the respondent grossly impaired.
- [8] These drugs were prescribed for the respondent because of ongoing psychological problems from which he had been suffering for a number of years. These are described in the medical report of Mr Wenzel, clinical psychologist, prepared on 22 September 2004 some months prior to this incident.⁴ In short, the report describes the respondent as suffering from a moderate to severe chronic Traumatic Stress Disorder, Substance Abuse Dependency Disorder, and Chronic Pain Disorder with psychological factors. These conditions stem largely from a history of bullying which the respondent was subjected to during his childhood years and a severe criminal assault upon him by a gang in January 2001. He had been prescribed psychiatric medication following that assault which compounded the adverse effects of his lapsing into alcoholism. This combination of factors led to a further inquiry as to the respondent's mental status at the time of the incident by a consultant psychiatrist, Dr Ian Curtis. Dr Curtis opined:-

“The clinical picture presented by this defendant involves the development of a clearly defined Post Traumatic Stress Disorder which was caused by his exposure to and injury in a severe assaultive incident. This occurred against a background where he was already a sensitive, traumatised and vulnerable individual because of the issues and experiences in his personal personality formation. He developed classical compulsive Alcoholic/dependent drinking as part of his PTSD response to trauma.

This proved to be a particularly malignant form of Alcoholism.

It is impossible to say whether he would have developed alcoholism at some stage of his life anyway even without the PTSD.

In my opinion it is fair to say that the PTSD caused him to develop Alcoholism earlier in life and in a more severe and destructive form than he otherwise would have done.

There is, thereby, a causal nexus between the psychopathological illness of Mr Cook and his destructive drink driving and the subject fatal motor vehicle accident.⁵

¹ Appeal record at p 30

² Ibid at p 31

³ Ibid at p 33

⁴ Ibid at pp 55-60

⁵ Ibid at p 40

- [9] The respondent had a prior conviction for drink driving in December 2002 where the reported blood alcohol reading was 0.165 per cent. This offending also has to be seen in the light of the respondent's psychological condition at that time.
- [10] At the time of sentencing, the learned Crown Prosecutor contended that the sentencing range was of five to six years imprisonment with six being the starting point in this case. He relied upon the authorities of *R v Evans* [2005] QCA 455; *R v Wilde; ex parte A-G (Qld)* [2002] QCA 501 and *R v Ibrahim* [2003] QCA 386 to which some later reference will be made. Counsel for the respondent contended for a head sentence range of four to six years imprisonment⁶ and referred additionally to authorities of *R v Stephenson* [1999] QCA 519; *R v Cusak* [2000] QCA 128; and *R v McKinnon* [1999] QCA 75 to support this contention.
- [11] On appeal, Counsel for the appellant argued that such a range was too low and that the correct starting point was seven years.
- [12] He contended that in recent years the Courts have tended to impose higher sentences for this offence. He pointed to the decision of *R v Wilde; ex parte A-G (Qld)* [2002] QCA 501 as indicative of this trend. There the Court of Appeal increased the sentence to one effective level of five years imprisonment with parole recommendation after three years. The offending in that case was significantly worse than the present case because the offender was a disqualified driver, was on bail, drove recklessly over a substantial distance and callously left the scene. The appellant's counsel relies particularly on *McKinnon* [1999] QCA 75 wherein a six years term of imprisonment with parole recommendation after two and half years was imposed on a 29 year old driver who drove dangerously causing death whilst affected with a blood alcohol content of 0.219 per cent. That driver had a previous drink driving offence some eight or nine years earlier. He referred to *R v Evans* [2005] QCA 455 where again, a sentence of six years imprisonment with parole recommendation after two and a half years was upheld by the Court and where the driver hit a pedestrian whilst driving with a blood alcohol content of 0.247 per cent and with a history of one previous drink driving offence. He also referred to *R v Hoad* [2005] QCA 92 where a term of five years imprisonment was upheld by the Court of Appeal for a 24 year old woman who was driving under the influence of drugs amphetamine and MDMA. That sentence of five years had to be considered against the maximum penalty at the time of 10 years imprisonment. He further contended that the respondent's offending was comparable with those cases and that offending was exacerbated by the fact of the earlier conviction for drink driving in 2002.
- [13] Counsel for the respondent maintained his reliance upon the cases he referred to below but also drew attention to a recent decision of the Court of Appeal in *R v Saltmarsh* [2007] QCA 25 in which a 32 year old mother who was an alcoholic, was driving to collect her children from school whilst having a blood alcohol content of 0.281 per cent. Her vehicle mounted the footpath striking an elderly pedestrian causing him grievous bodily harm. The sentence imposed was four years imprisonment suspended after 21 months for an operational period of five years. Though she left the scene without stopping it was accepted that she was genuinely remorseful. She had also undertaken steps towards rehabilitation. The Court of

⁶ Ibid at p 19/40

Appeal there also considered a number of cases which have also been relied upon here; for example, *R v Ibrahim* [2003] QCA 386 where the head sentence was for six years imprisonment, but the circumstances included prolonged dangerous driving at speed.

- [14] That basic comparison of cases does not take into account the impact of the respondent's psychological condition on the criminality of his behaviour. This was a feature to which the learned sentencing judge paid particular attention when she described the respondent as having "an impaired capacity to make appropriate judgments". She found also that to the extent that alcohol played a part in the respondent's reduced capacity that he had taken positive steps to address that problem since this incident.⁷ The point of placing before the Court the extensive details of the respondent's background, his psychological impairments and the impact of the medications he took for them was to see whether he had an impaired capacity to make the judgments about driving a motor vehicle in his then condition. The fact that his capacity was in this way impaired, puts this case in a special category. The circumstances, though properly requiring regard to the need for general deterrence, also allowed the sentencing judge wider discretion in determining an appropriate head sentence. The remarks of the Chief Justice (Williams and Keane JJA concurring) in *R v Saltmarsh* [2007] QCA 25 are appropriate. After considering the differing circumstances in a number of cases and identifying the critical objective of general deterrence, the Chief Justice said:-
- "That being so, sentencing judges should in these cases be accorded appropriate latitude. While an appellate court usefully provides indicative ranges, they must be flexible enough to accommodate varying factual situations and never presented or approached as if prescriptive."
- [15] The learned sentencing judge did, in all the circumstances, pay due regard to the gravity of the offence and the aspect of general deterrence in fixing the head sentence. The level of criminality for the respondent in this case is tempered by the nexus between the crime and the impairment in his psychopathological functioning. The other factors going to mitigation included specifically an early plea of guilty, the expression of genuine remorse and the significant steps taken to bring about rehabilitation and treatment for the respondent's alcoholism and psychological impairment.
- [16] Having regard to the principles applicable to an appeal by the Attorney-General, the sentence has not been shown to be outside the range of punishment applicable to this level of offending. Consequently there is no basis for interference with the decision of the learned sentencing judge. The appeal is therefore dismissed.

⁷ Appeal record at pp 24-25