SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hijazi* [2008] QCA 254
PARTIES:	**R** **v** **HIJAZI, Mohammed Farouk** (applicant)
FILE NO/S:	CA No 122 of 2008 SC No 356 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 August 2008
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2008
JUDGES:	Keane JA, Mackenzie AJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – WHEN REFUSED – where the applicant was convicted of one count of dangerous operation of a motor vehicle causing death – where the applicant was sentenced to five years imprisonment suspended after two years for an operational period of five years – where the applicant pleaded guilty – where the applicant drove the vehicle deliberately at the deceased – where the deceased was the applicant's brother – where the applicant was unlicensed at the time of the offending – where the applicant has an extensive history of traffic offences – whether the sentence imposed was in the circumstances manifestly excessive *R v Conquest; ex parte Attorney-General of Queensland* [1995] QCA 567, distinguished *R v McAnelly; ex parte Attorney-General of Queensland* (1996) 23 MVR 301; [1996] QCA 126, distinguished *R v Wilde; ex parte Attorney-General (Qld)* (2002) 135 A Crim R 538; [2002] QCA 501, distinguished

COUNSEL: A J Glynn SC for the applicant
M B Lehane for the respondent

SOLICITORS: Robertson O'Gorman for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** On 15 April 2008 the applicant was convicted on his own plea of one count of dangerous operation of a motor vehicle causing death. The Crown accepted the applicant's plea in full discharge of the indictment in which he had also been charged with manslaughter. On 18 April 2008 he was sentenced to five years imprisonment suspended after two years for an operational period of five years. A period of pre-sentence custody of 21 days was declared to be time already served under the sentence.

[2] The applicant seeks leave to appeal on the ground that "the sentence was, in all the circumstances, excessive".

The circumstances of the offence

[3] On the morning of 1 August 2006 the applicant became involved in an argument with his brother, Toufik, at their parents' home. The argument started when Toufik insisted that the applicant get out of bed and move his car so that Toufik could use his car. Toufik discovered that the petrol cap of his car was missing, and, apparently in retaliating for this supposed offence, levered open the petrol cap of the applicant's car causing some minor damage.

[4] The dispute escalated to the point where the applicant was in his car at the dead end of a cul-de-sac seeking to drive out of the street, and Toufik was standing in his way on the roadway outside their parents' house and threatening him with a house brick. The applicant accelerated and drove his motor vehicle forward a distance of about 40 metres hitting his brother. At the point of the collision, the roadway was about seven metres wide.

[5] The applicant, after hitting his brother, drove off to a friend's house where he abandoned his motor vehicle and where it was subsequently found by the police the next day.

[6] The applicant voluntarily surrendered himself to the police.

[7] Initially, the applicant told police that he collided with his brother because his windshield had been shattered by a shower of bricks so that his vision was obscured. The applicant did not persist with this false account, but he did persist in a denial that he intended to hit Toufik and said that he expected him to jump out of the way. The applicant was sentenced on this basis.

[8] As a result of the impact, both of Toufik's legs were broken. These injuries caused a fat embolism which resulted in Toufik's death on 5 August 2006.

The applicant's personal circumstances

[9] The applicant was 24 years of age at the date of the offence and 25 years old when he was sentenced.

[10] Toufik had taken out a domestic violence order against the applicant prior to the incident in question. It appears, however, that Toufik had taken steps to have the order revoked.

[11] The applicant has an extensive history of traffic offences which the learned sentencing judge described as "disgraceful". It included seven speeding offences and one offence of careless driving before August 2006. The offence of present concern occurred while the applicant was driving without a licence. On 27 January 2008, ie after the applicant's driving had caused the death of his brother, the applicant committed another speeding offence.

The sentence

[12] The learned sentencing judge accepted that the applicant suffered deep remorse for causing the death of his brother.

[13] His Honour also referred to the applicant's youth, his Honour's "strong hopes for [the applicant's] rehabilitation in due course" and what his Honour was prepared to regard as an early plea of guilty.

[14] Nevertheless, the learned sentencing judge proceeded on the footing that this was a "most serious" case in that the applicant had used his motor vehicle "as a potential weapon … to frighten" his brother. His Honour sentenced the applicant on the basis that the applicant "acted in the most careless way, driving at [his brother] with the acceleration [he] used … probably assuming that [his brother] would get out of [the applicant's] way." His Honour found that the applicant's "intention was to drive at or substantially at [his brother]", and that the incident had occurred because "two young men … had each lost their temper".

[15] The head sentence of five years imprisonment was imposed by reason of the severity of the crime bearing in mind that the maximum penalty was seven years imprisonment.

The application to this Court

[16] The applicant does not challenge the learned sentencing judge's findings of fact in relation to the circumstances of the incident in which the applicant's brother received his fatal injuries. The argument advanced in this Court on the applicant's behalf does not dispute the learned sentencing judge's view that the applicant had deliberately engaged in dangerous conduct. That being so it is, in my respectful opinion, impossible to accept the submission advanced for the applicant that the sentence imposed was excessive.

[17] This case affords a very serious example of the offence of dangerous operation of a motor vehicle causing death. This is not a case of the kind referred to in the decisions of this Court cited on the applicant's behalf.[1] While those cases are readily classified as serious cases of dangerous driving, unlike this case, they did not involve a decision deliberately to drive at a human being. Thus, for example, the case of *R v Conquest; ex parte Attorney-General of Queensland*,[2] upon which particular reliance was placed on behalf of the applicant, concerned "skylarking" by

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1 *R v Wilde; ex parte Attorney-General (Qld)* (2002) 135 A Crim R 538; *R v McAnelly; ex parte Attorney-General of Queensland* [1996] QCA 126; *R v Conquest; ex parte Attorney-General of Queensland* [1995] QCA 567.

2 [1995] QCA 567.

the offender which led him to drive in the wrong lane and a failure to keep a proper lookout. As was explained in that case, the offender's conduct did not involve an actual awareness of the people with whom his vehicle collided.

[18] On the applicant's behalf, no case has been cited which would suggest that a sentence of five years imprisonment is not within the range of a sound exercise of the sentencing discretion in a case where the death of a human being has resulted from the deliberate driving of a motor vehicle at that person. For my part, I have difficulty in imagining a more serious example of this offence. In my respectful opinion, it was open to the learned sentencing judge to impose a longer head sentence.

[19] It was submitted on behalf of the applicant that the learned sentencing judge failed to give proper weight to the circumstance of the personal loss suffered by the applicant and the terrible guilt with which he must live. It was said that the failure to take into account these aspects of the "punishment" suffered by the applicant rendered the sentence manifestly excessive.

[20] In my respectful opinion, it is readily apparent that the learned sentencing judge was alive to these considerations. These considerations and the benefit of the applicant's plea of guilty were reflected both in the head sentence, and, more particularly, in the suspension of the applicant's sentence after two years.

[21] When one bears in mind the circumstance that the applicant was unlicensed at the time of the offence of present concern and the circumstance that the applicant's subsequent speeding offence reveals a disturbing lack of insight on his part, the early suspension of the applicant's sentence reflects a distinctly moderate approach on the part of the learned sentencing judge.

Conclusion and order

[22] I am not persuaded that the sentence imposed on the applicant was manifestly excessive.

[23] I would refuse the application for leave to appeal.

[24] **MACKENZIE AJA:** I am in substantial agreement with the reasons of Keane JA and wish only to add the following comments.

[25] The case involves a very serious example of dangerous driving. Although the death itself was an unusual but foreseeable consequence of the injuries caused by the driving, the cause of the injuries was deliberately driving in a way that could reasonably be expected to cause death or grievous bodily harm if the person in the path of the vehicle did not react in a timely way and avoid being run down.

[26] When the offence was committed, the maximum sentence was seven years. In imposing sentence, the sentencing judge had to balance the inherent seriousness of the offence, the applicant’s history of traffic offences, his cooperation with the justice system, his youth, his prospects for rehabilitation and the demonstrated profound effect, on the applicant’s family and the applicant himself, of the fact that the person he ran down was his brother. I am satisfied that the sentence of five years with suspension after two years for an operational period of five years achieves a balance between those components and is clearly not manifestly excessive.

[27] I agree that the application for leave to appeal against sentence be refused.

[28] **PHILIPPIDES J:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the reasons of his Honour and with the proposed order.