SUPREME COURT OF QUEENSLAND

CITATION:	*R v Clark* [2009] QCA 361
PARTIES:	**R** **v** **CLARK, Tania Winifred Paula** (appellant/applicant)
FILE NO/S:	CA No 162 of 2009 SC No 482 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2009
JUDGES:	Keane and Holmes JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed to the extent of setting aside the sentence of 10 years imprisonment and substituting in its place a sentence of nine years imprisonment, and setting aside the serious violent offence declaration**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant convicted on own plea of two counts of manslaughter – where applicant fatally struck victims with vehicle on footpath – where applicant suffered Bipolar Affective Disorder – where applicant voluntarily intoxicated herself with various prescription drugs in excess of their therapeutic dosage – where applicant entered plea of guilty on day of trial – where applicant claimed trial judge erred by failing to find causal link between Bipolar Affective Disorder and the applicant's conduct – where applicant claimed trial judge erred by failing to recognise her plea of guilty – whether sentence manifestly excessive *R v Dwyer* [2008] QCA 117, cited *R v Kelly* [1999] QCA 296, considered *R v Rosenberger; ex parte Attorney-General* [1995] 1 Qd R 677; [1994] QCA 488, cited

R v Tsiaras [1996] 1 VR 398, cited
R v Verdins (2007) 16 VR 269; [2007] VSCA 102, cited

COUNSEL: C W Heaton for the applicant
M J Copley SC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** On 21 October 2008 the applicant was convicted on her own plea of two counts of manslaughter. The applicant was sentenced on 12 June 2009. On each count she was sentenced to 10 years imprisonment, the sentences to be served concurrently. A serious violent offence declaration was made. A period of 491 days pre-sentence custody was declared as time served under the sentence. The applicant was disqualified from holding or obtaining a driver's licence for life.

[2] The applicant filed an appeal in respect of conviction and sought leave to appeal against her sentence. Shortly before the hearing of this matter, the applicant filed a notice of abandonment of her appeal against conviction.

[3] The sentence is said to be "manifestly excessive in all the circumstances". I will summarise the facts relating to the offence and the sentence before discussing the applicant's contentions.

The circumstances of the offence

[4] The applicant pleaded guilty to having unlawfully killed two young boys, Jye Nicholas Strong (who was 15 years old) and Nathan Colin Sprecak (who was 16 years old).

[5] On 7 February 2008 the applicant left home at about 8.00 am. She took her husband's car. He reported it stolen in the hope that police would locate the applicant. At 11.12 am she was observed at a suburban shopping centre. A short time later, while she was driving in a hurry to keep an appointment with Centrelink, she drove onto the footpath in order to get past the car in front of her which she considered was travelling too slowly. She struck the two teenage boys who were standing on the footpath.

[6] The applicant's blood alcohol concentration was estimated to have been 0.04 per cent at the time of the offences. More significant was her intake of prescription drugs. She had twice the therapeutic dose of valium in her system. She had also ingested oxazepam, temazepam, cannabis, morphine and codeine. All of these, except the oxazepam, were present in concentrations higher than the therapeutic range for those drugs.

[7] After striking the boys with her vehicle the applicant returned to the roadway. After travelling a short distance she turned left and parked the car in a car park. When police took up with her she told a false story to the effect that one of the boys had stepped onto the road and the other had followed in an attempt to rescue his friend. She also claimed to have had her last drink at 2.30 am. She also said that she had not had valium or cannabis or mersyndol for some time. She said she was on "a mission", and was evidently concerned that if she missed her appointment with Centrelink she might lose her benefits.

[8] At the time of the offences the applicant was not licensed to drive a motor vehicle. She had been involved in other accidents while under the influence of prescription drugs. Her husband had attempted to prevent her from driving. On the day in question he had hidden the keys to the car but she found them.

[9] The applicant's trial was set down for 21 October 2008. On that day she pleaded guilty to the offences in question.

The applicant's personal circumstances

[10] The applicant was 35 years old at the time of the offences in question. She is married. Her relationship with her husband remains intact. She has his continuing support as well as the support of his family.

[11] On 21 January 2008 the applicant was convicted of a number of offences including burglary and possession of dangerous drugs. She broke into a pharmacy and stole 425 tablets of temazepam from a pharmacy. She was also found to be in possession of cannabis. The applicant was placed on probation for 18 months and was ordered to perform 80 hours' community service. She was on probation at the time of the offences of present concern.

[12] The applicant has a history of mental health problems including bi-polar disorder. She also exhibits symptoms consistent with benzodiazepine dependency disorder and alcohol abuse.

[13] Dr Paul White, a psychiatrist, provided a report dated 10 June 2009. Dr White was of the opinion that at the time of the offences the applicant was in a manic state involving emotional irritability which would have impaired her decision-making ability. In that report the following appears:

> "In this context it is impossible to separate symptoms of a Bipolar Affective Disorder, Manic Phase and the affects [sic] of polysubstance abuse. Urine tests done at the Gold Coast Hospital show the presence cannabinoids and Benzodiazepines (Valium, Serapax and such drugs). They also show the presence of narcotics although these are likely to be from Panadeine tablets. It has not been possible for the laboratory to provide further detail breakdown on the origin of the substance.
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> Ms Clark has been in a motor vehicle accident prior to the one before the court during which intoxication with prescribed drugs was an issue. Thus there is no doubt that she could have foreseen the possible effects of intoxication.
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> During her time in prison there has been no evidence of Bipolar Disorder although she is currently taking medication that may suppress this.
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> **OPINION**:
> I believe that Ms Clark has a Bipolar Affective Disorder. At the time [of] the offences it is most likely that experiencing a Manic Phase Disorder characterised by elevated mood, poor sleep and emotional irritability. This would represent a disease of the mind for section 27 of the Criminal Code. It would not be sufficient to deprive her of any

of the relevant capacities. In addition it is likely that her intoxication was the major component in the offences.

Ms [Clark's] abuse of Benzodiazepines may be linked to her mental illness. With great respect the court may wish to consider this when issues of sentencing arise. Again with great respect the court may wish to consider issues arising from the prescription of drugs of abuse to Ms Clark by medical practitioners, whom her husband would assert were aware of her dependence."

[14] Mr Luke Hatzipetrou, a psychologist, provided an extensive assessment of the applicant for the purpose of sentencing. Importantly for present purposes, Mr Hatzipetrou considered that the applicant's intoxication "coupled with [her] untreated mental health problems" significantly impaired her capacities to understand the consequences of her actions and to control her actions. Mr Hatzipetrou was of the view that appropriate treatment could significantly reduce the risk of re-offending. His report concluded:

"1. … Under the conditions of a suitable intervention, Mrs Clark's risk of reoffending is likely to be significantly reduced. Subsequently, it is recommended Mrs Clark participate in a drug and alcohol program which involves psychoeducation and development of relapse prevention strategies. Thus, the program should provide opportunities to identify problem behaviours and thinking styles, which may assist in the development of future relapse prevention strategies. The treatment program is to achieve and maintain abstinence. This may be an enduring program which should involve random alcohol screens.

2. The evidence suggests Mrs Clark was likely to be suffering from mental health disorder in the past seven years, namely a mood disorder. The clinical findings suggest Mrs Clark currently experiences a range of clinical symptoms of depression which appear mild in severity and emerged after her committal trial in October 2008 and more recently, in late December. Subsequently, she will require further psychiatric assessment and treatment. Importantly, Mrs Clark was previously treated for bipolar mood disorder and she had described a pattern of symptoms consistent with this major mental health disorder. Given her current detention, the prison mental health service is likely to be the appropriate service to provide assessments and treatment. Along with ongoing access to the psychiatrist, the engagement of clinical psychologists to provide structured psychotherapy and psychoeducation is likely to enhance treatment outcome. Given Mrs Clark's cognitive abilities, she is likely to respond to the strategies encapsulated within psychotherapies such as cognitive behaviour therapy.

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Mrs Clark did present with a cluster of protective factors. Mrs Clark possesses the intellectual capacity to benefit from the recommended

> treatment strategies. Her personal history was largely unremarkable and she possessed a supportive marital relationship. Her work history is sound yet she had been unable to secure meaningful employment over the past seven years. She had no previous criminal convictions prior to 2006 and there is no history of violence. Coupled with her involvement in current programs, these present as significant protective factors.
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> Considering the nature of the offences, it appears she will benefit from supervision and support to ensure her participation in appropriate rehabilitation programs. In light of her learning abilities, clinical presentation and current age, Mrs Clark is likely to benefit from these interventions or similar. Coupled with ongoing participation in the relevant treatment programs, the risk of re-offending is likely to be significantly reduced. Whilst the decision regarding Mrs Clark's sentencing is respectfully in the hands of the court, it is anticipated that these recommendations may assist the court in the current proceedings."

[15] It may be noted here that while Dr White was of the view that the applicant's intoxication was "the major component in the offences", he did acknowledge that her disordered mental state impaired her decision-making ability. He certainly did not contradict Mr Hatzipetrou's view that her bipolar disorder was at work in impairing her capacity to understand the consequences of her actions and her capacity to control her actions.

The sentence

[16] The learned sentencing judge focused his sentencing remarks upon the applicant's appallingly reckless behaviour and its tragic consequences. That was, of course, entirely understandable. His Honour went on to say, however, that there was no reason to conclude that:

> "there is any causal link between the mental health problem you have and the offences you have committed. As Dr White said, 'there is no doubt that she could have foreseen the possible effects of intoxication', and further in his report, 'It is likely that her intoxication was the major component in the offences.'"

[17] It must also be noted that the learned sentencing judge did not refer to the discussion by Mr Hatzipetrou of the applicant's prospects of rehabilitation.

[18] His Honour discussed the applicant's plea of guilty only, it would seem, in the context of a discussion of a submission that the applicant was remorseful. His Honour said:

> "Mr Gundelach, on your behalf, sought a sentence of less than 10 years. In his brief submissions to me, he spoke of your feelings of remorse. I accept that you now feel sorry for what you did but that is in the light of a case which was inevitably going to result in a conviction had you gone to trial. Your behaviour at the time, your lies and deceit at the time and your late plea in the face of overwhelming evidence does not allow me to regard your remorse as amounting to very much at all."

The applicant's submissions in this Court

[19] On the applicant's behalf it is submitted that the sentence imposed on the applicant was manifestly excessive and that a sentence of nine years imprisonment without a serious violent offence declaration should be imposed. In particular, it is argued that the learned sentencing judge:

(a) erred in failing to appreciate that the applicant's mental disorder contributed to a material impairment of her capacity to understand the consequences of her actions and her capacity to control her actions;

(b) erred in failing to take into account the applicant's prospects of rehabilitation; and

(c) erred in failing to give any sufficient recognition to the applicant's plea of guilty.

Discussion

[20] Any consideration of the contention that the applicant's sentence was excessive must begin by recognising that the applicant's conduct caused the loss of two young lives. While the applicant did not intend to kill or to cause grievous bodily harm to either of the boys, her conduct in driving her motor vehicle onto the footpath was extraordinarily reckless. In *R v Kelly*,[1] a sentence of eight years imprisonment was upheld by this Court on appeal in the case of a vehicular manslaughter of one person by a young offender with good prospects of rehabilitation. In that case the killing of the victim resulted from very reckless driving; but that driving occurred on the roadway, not on the footpath. That offender was also entitled to the benefit of a plea of guilty.

[21] It is said on the applicant's behalf that the learned sentencing judge erred in failing to appreciate that the applicant's offences were the result of "a poor choice she made whilst labouring under the symptoms of mental illness and that, as such, her mental illness was relevant to her level of culpability". In particular, it is said that there was uncontroverted evidence, which his Honour did not take into account, of a causal link between her conduct and her mental illness in that her manic behaviour at the time of the killings was a symptom of her Bipolar Affective Disorder. Reference is made in this regard to the opinions of both Dr White and Mr Hatzipetrou.

[22] Dr White's opinion did not exclude a causal link between the applicant's bipolar disorder and the impairment of her capacities. Dr White considered that her intoxication was the "major component in the offences" but he did not suggest that her bipolar disorder did not play a part as well. Importantly, the applicant's problem at the time of the accident was not so much her alcohol level, which was within the legal limit, but her intake of prescription drugs. Her addiction to prescription drugs does seem to be related to her bipolar disorder.

[23] Voluntary intoxication is not a mitigating factor in sentencing an offender;[2] but on the unchallenged evidence, the applicant's irrational behaviour was, in part, a consequence of her bipolar disorder. Her disorder was a component in the irrational behaviour which led to the commission of the offences. Recognition that this is so tends to lessen her moral culpability and the claims of deterrence and denunciation

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1 [1999] QCA 296.

2 *R v Rosenberger; ex parte Attorney-General* [1995] 1 Qd R 677 at 678; *R v Dwyer* [2008] QCA 117 at [6].

as considerations bearing upon the imposition of a proper sentence.[3] In my respectful opinion the learned sentencing judge erred in failing to act upon the evidence that the applicant's behaviour was not solely the consequence of voluntary stupefaction.

[24] On the applicant's behalf it is also argued that the learned sentencing judge gave too little weight to the applicant's prospects of rehabilitation. His Honour did not refer to the passages in Mr Hatzipetrou's evidence which give support for the view that the applicant's mental disorders are amenable to treatment. In fairness to his Honour, it must be said that no attempt was made by the applicant's Counsel below (who was not the same Counsel who represented her in this Court) to draw these passages to his Honour's attention. Nevertheless, it remains the case that his Honour does appear to have approached the question of sentence without taking into account the applicant's prospects of rehabilitation. That was, I respectfully think, an error on his Honour's part. There was sufficient evidence that there was some prospect of rehabilitation to warrant its consideration as a factor relevant to the sentence to be imposed on the applicant.

[25] It must also be accepted that the applicant was entitled to some recognition for her plea of guilty even though it was obviously a late plea with limited utilitarian value. It did serve to save a day or two of hearing time, and it also served to save the victims' families the pain of reliving the incident and the insult of persisting in a denial of responsibility. The courts must be astute to ensure that an offender who pleads guilty receives appropriate recognition for that and that the offender can see that she has received that recognition. It is apparent from the sentencing remarks that the focus of his Honour's consideration of the plea of guilty was upon its value as evidence of remorse on the applicant's part; no mention was made of the utilitarian value of the plea of guilty or of the benefit to which the applicant was entitled as a result. Even if it be granted that the applicant's plea was of little value as evidence of remorse, the utilitarian value of the plea, albeit limited, was required to be considered.

[26] For these reasons I am respectfully of the opinion that the sentencing process was affected by error. While these errors might not of themselves demonstrate that the sentence was manifestly excessive, they are sufficient to require the sentence to be set aside so that it falls to this Court to exercise the sentencing discretion afresh.

[27] The sentence to be imposed on the applicant must recognise that the applicant unlawfully killed two innocent boys. There must nevertheless be recognition that her behaviour was irrational, rather than deliberately anti-social. It must also be recognised that her irrationality was, to some extent, the consequence of her bipolar disorder and that her moral culpability is reduced as a result, as are the claims of general and personal deterrence upon the sentencing discretion of the court.

[28] The applicant's recklessness and the consequences of that recklessness were so grave that, even giving weight to her psychiatric disorder, her plea of guilty and prospects of rehabilitation, a sentence heavier than that imposed in *R v Kelly* is proper. I consider that the appropriate sentence, bearing in mind the applicant's reduced moral culpability, her plea of guilty and her prospects of rehabilitation, is nine years imprisonment.

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[3] Cf *R v Tsiaras* [1996] 1 VR 398 and *R v Verdins* (2007) 16 VR 269.

[29] The applicant must also appreciate that her prospects of release on parole during the term of her sentence depend on her successful rehabilitation. The applicant must understand that if she fails to rehabilitate herself while in detention, the parole authorities may not be satisfied that she can be released into the community without unacceptable risk of harm to innocent people.

Conclusion and order

[30] I do consider that the sentence imposed on the applicant was affected by error.

[31] I would grant the application for leave to appeal against sentence, and allow the appeal but only to the extent of setting aside the sentence of 10 years imprisonment and substituting in its place a sentence of nine years imprisonment, and setting aside the serious violent offence declaration.

[32] **HOLMES JA:** I agree with the reasons of Keane JA and the orders he proposes.

[33] **ATKINSON J:** I agree with the orders proposed by Keane JA and with his Honour's reasons.