SUPREME COURT OF QUEENSLAND

CITATION:	*R v Allison* [2012] QCA 249
PARTIES:	**R** **v** **ALLISON, Louis John Steven** (applicant)
FILE NO/S:	CA No 42 of 2012 DC No 2126 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	17 August 2012
JUDGES:	Fraser and White JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his own plea of guilty of the dangerous operation of a vehicle – where the sentencing judge ordered the applicant to serve 12 months imprisonment but fixed an immediate parole release date – where the sentencing judge disqualified the applicant from holding or obtaining a driver's licence for two years and ordered the applicant to pay $6,400 as compensation to the owner of another vehicle that he damaged – whether the sentence was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 38 *R v Broadbridge* [1994] QCA 278, referred *R v Elliott* [2000] QCA 267, cited *R v Ferrari* [1997] 2 Qd R 472; [1997] QCA 73, cited *R v Matauaina* [2011] QCA 344, cited *R v Obern* [2002] QCA 444, referred *R v Pearce* [2010] QCA 338, referred *R v Theuerkauf & Theuerkauf; ex parte A-G (Qld)* [2003] QCA 94, referred *R v Tufuga & Kepu; ex parte A-G (Qld)* [2003] QCA 171, referred

COUNSEL: S A Lynch for the applicant
P J McCarthy for the respondent

SOLICITORS: Masons Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Douglas J and the order proposed by his Honour.

[2] **WHITE JA:** I have read the reasons for judgment of Douglas J and agree with his Honour's reasons and the order which he proposes.

[3] **DOUGLAS J:** The applicant was convicted on his own plea of guilty of the dangerous operation of a vehicle. The learned sentencing judge ordered that he be imprisoned for 12 months but fixed an immediate parole release date. He also disqualified the applicant from holding or obtaining a driver's licence for two years and ordered him to pay $6,400 as compensation to the owner of another vehicle that he damaged and, in default, two months imprisonment.

[4] The applicant argues that the sentence was manifestly excessive, submitting that a more appropriate sentence would have been two years probation without the recording of a conviction, the payment of $550 compensation to the owner of the other vehicle and a driver's licence disqualification of one year.

[5] When one considers the gravity of the circumstances of the offending as well as the mitigating features, however, I have no doubt that the sentence imposed was appropriate.

Background

[6] The applicant's sister had been murdered in the applicant's parents' family home by her husband. That offence occurred on 18 December 2009. On the date of the offence with which the applicant was charged, 30 September 2010, the husband was still awaiting trial on the charge of murder. He has since been convicted.

[7] It was a brutal example of the crime, the applicant's sister having been stabbed about 30 times, strangled and then burnt to the extent that she could not be identified visually. Her family was naturally grief stricken. The applicant and his mother received grief counselling from a psychologist.

[8] The psychologist had prepared a report in respect of the applicant dated 11 August 2010, before his commission of this offence, in which he described the applicant as "being like a 'time bomb' ready to explode especially in relation to his sister's murderer". He suffered from mood swings and anger outbursts. At the time of the report he was on probation for drug related offences and was about to come back before the Magistrates Court to be dealt with for breach of probation. He had experienced behavioural problems at school and had used marijuana habitually since he was 13 years of age.

[9] The psychologist diagnosed him as suffering a mood disorder. After his sister's murder he began to abuse amphetamines badly but reported to the psychologist on

28 June 2010 that he was not using amphetamines anymore but was taking marijuana "to calm himself down".

[10] He was 20 years of age at the time of the offence and had an interest in breeding and showing cattle, having worked on remote cattle stations as well as in his family's scrap metal business. By the time of the psychologist's report he had returned to work for a few days per week and had shown some control over his emotions.

[11] On the day of this offence, he overhead his mother receiving a telephone call from her sister from which he learned that the complainant, who was then 18 years of age, had posted a comment on Facebook about the murder saying that the applicant's sister "deserved it". The murderer was the complainant's stepfather. The applicant immediately went in search of the complainant, knowing where he worked collecting trolleys at a shopping centre. His mother and others tried to calm him down unsuccessfully before he left the family home.

[12] It took him about 10 minutes to reach the shopping centre, using his deceased sister's car. By then the complainant had been warned that he might be attacked. The applicant drove towards him in the car park, revving his engine loudly and accelerating. The complainant ran out of the way but was pursued by the applicant in the car until it rammed into another vehicle causing damage said to be worth $6,950 to that other vehicle. It was insured and its owner's policy included an excess of $550.

[13] After that collision the applicant left the vehicle and pursued the complainant on foot threatening to kill him. A bystander who knew the complainant tackled and restrained the applicant until he appeared to calm down. The bystander called police whom the applicant told of the murder and the complainant's comments on Facebook. He had been crying since his apprehension.

[14] The prosecution accepted that the applicant's behaviour was a spontaneous reaction to what he had overheard and that, although he threatened to kill the complainant verbally, his real intention was only to hurt him.

The sentence

[15] The plea of guilty was notified at an early stage and taken into account by the learned sentencing judge as he was required to do. Because of the attempted use of violence against the complainant the principle that a sentence of imprisonment should only be imposed as a last resort and that a sentence that allows the offender to stay in the community is preferable did not apply.[1] Nonetheless, the learned sentencing judge imposed a sentence that would not require the applicant to serve actual imprisonment unless he breached his parole or failed to pay the compensation ordered.

[16] In recognising the objectively serious character of the offence, his Honour pointed out to the applicant that he deliberately used the vehicle as a weapon with a view to driving it into the complainant, going on to say:[2]

> "In doing so, you were deliberately seeking to mete out summary justice to the victim. The issue of applying justice to people is something which has to be left to the law enforcement authorities and to the Courts."

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1 See s 9(3) of the *Penalties and Sentences Act* 1992 (Qld).

2 See AR 48 ll.45-55.

[17] He also pointed out that the offence occurred in a public car park when there were other people using the shopping centre so that there was a real prospect not only that the complainant would be injured but that others might be too. He then referred to the damage to the vehicle which belonged to a person who had nothing whatever to do with the circumstances which caused him to act in that way.

[18] His Honour also recognised the "serious emotional effect" on the complainant which was adverted to in a victim impact statement by him while also recognising the applicant's cooperation with the authorities and his contrition, which he accepted was genuine. He did not regard the applicant's criminal and traffic records as particularly significant to the sentencing process in this case, for appropriate reasons. He also considered that the background of the applicant's reaction to the murder of his sister provided a significant aspect of mitigation in the sense that "in a technical, but not legal sense" the applicant was provoked to behave as he did.[3] His Honour also accepted that the conduct was out of character for the applicant, that he was young and that he had received the support of his family. By then the applicant was working in the family business, earning $700 per week and living at home.

[19] His Honour considered that personal deterrence was not an important feature in the sentencing process because of the underlying issues affecting the applicant when he behaved as he did on this occasion. His Honour went on, however, to take into account the need for general deterrence to "send a message to other people in the community that even people who are grieving and depressed as a result of serious incidents which are emotionally upsetting to them and their family, cannot take the law into their own hands".[4]

[20] It is clear that, because of the need for general deterrence of such behaviour, he reached the conclusion that a sentence of imprisonment should be imposed but that the mitigating circumstances would allow him to fix an immediate parole release date.

[21] The applicant's counsel's submission overall was that the combination of the term of imprisonment, the order for payment of compensation, the disqualification for two years and the recording of a conviction rendered the sentence manifestly excessive.

Term of imprisonment

[22] When one looks at decisions such as *R v Pearce*,[5] *R v Tufuga & Kepu; ex parte A-G (Qld)*,[6] *R v Theuerkauf & Theuerkauf; ex parte A-G (Qld)*[7] and *R v Broadbridge*,[8] it is apparent that the use of a vehicle as a means of causing fear to an individual is normally likely to be met with a sentence of imprisonment.

[23] The applicant's counsel sought to distinguish *R v Broadbridge* and *R v Theuerkauf & Theuerkauf; ex parte A-G (Qld)* as involving more serious behaviour and less cooperation in the administration of justice or remorse than in the case of the applicant. He also relied on *R v Obern*[9] where the applicant received the same head

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3 AR 52 ll.20-30.
4 AR 53 l 50-54 l 1.
5 [2010] QCA 338.
6 [2003] QCA 171.
7 [2003] QCA 94.
8 [1994] QCA 278.
9 [2002] QCA 444.

sentence of 12 months but was required to serve actual imprisonment of four months for what appears, objectively speaking, to have been worse conduct.

[24] The submissions included the proposition that the abnormal mental state of an offender, short of insanity, may be a significant mitigating factor particularly in respect of the application of the principles relevant to general deterrence.[10] That is true but it is clear from the record including the reasons that such principles appropriately affected his Honour's conclusions about the sentence, no doubt influencing him to fix an immediate parole release date.[11] In my view there is nothing to suggest that his Honour erred in fixing a sentence of imprisonment with an immediate parole release date.

Compensation order

[25] The amount of the compensation was not put in issue at the hearing. Rather the argument was that all that should be ordered to be paid was the excess of $550 and that the victim of the crime or her insurance company should be left to pursue their civil remedies. There was no reason to reduce the amount of the compensation to be ordered simply because the owner of the car had the sense to have it insured. It was still a real loss to her and her insurer. In fact his Honour only ordered compensation of $6,400 where the evidence of the damage before him was that it amounted to $6,950. It seems likely that he meant to order compensation in the higher figure but mistakenly ordered compensation in the lesser amount. There was no application to increase the amount to be paid.

[26] It was argued that the applicant did not have the present ability, at the time of sentence, to pay the compensation but his Honour, in discussing the issue with counsel, pointed out that he was then earning $700 per week and suggested he would be able to pay it within 12 months. His counsel received instructions that he would require up to 12 months to pay it, not necessarily from his own resources but from those of his parents. He accepted that it would be paid within 12 months by the applicant's parents.[12]

[27] Such orders are not a form of punishment but a summary and inexpensive method of compensating a person, avoiding the need to institute separate proceedings to establish civil liability.[13] The potentially punitive consequences of such an order are relevant in considering the appropriateness of the overall sentence taking into account here that the applicant might be sent to prison for non-payment of the compensation.[14]

[28] In these factual circumstances, given the income earned by the plaintiff, the fact that he was still living at home, the time to pay afforded by his Honour and the ability to apply for an extension of time for payment under s 38 of the *Penalties and Sentences Act* 1992, there is no reason to regard that aspect of the order as one affecting the overall appropriateness of the sentence.

Driving disqualification and recording of a conviction

[29] Nor does the length of the disqualification from driving appear to be unusual for an offence of this nature. There was no suggestion that it would prevent the applicant

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10 See *R v Elliott* [2000] QCA 267.
11 AR 35 and 53.
12 AR 40 ll 25-40.
13 *R v Ferrari* [1997] 2 Qd R 472, 477.
14 *R v Matauaina* [2011] QCA 344 at [35].

from working in his family's business as he has been doing. Nor could it be described as an inappropriate punishment for his behaviour.

[30] The same applies to the recording of the conviction which was a consequence of the sentence of imprisonment imposed on him. It is particularly relevant to that issue that the applicant already had a criminal record which included a conviction for breach of probation. The consequence that a conviction is recorded is no reason in a case of this seriousness to overturn such a sentence in favour of making an order for probation and not recording a conviction.

Conclusion and order

[31] The behaviour of the applicant was objectively very serious and could easily have led to serious injury, if not death, to the complainant or some other person in the vicinity. The individual components of the sentence and their overall effect were an appropriate response to the applicant's conduct and to the mitigating circumstances. In the circumstances it has not been shown that any appellable error occurred. In fact the learned sentencing judge's reasons reflect a careful and fair approach to all the relevant issues canvassed before him.

[32] The application should be refused.