SUPREME COURT OF QUEENSLAND

CITATION:	*R v Barker* [2013] QCA 340
PARTIES:	**R** **v** **BARKER, Joel Wayne** (applicant)
FILE NO/S:	CA No 61 of 2013 DC No 239 of 2013 DC No 1526 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2013
JUDGES:	Fraser and Gotterson JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Leave to appeal is 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 pleas of guilty of one count of dangerous operation of a vehicle causing grievous bodily harm before leaving the scene, one count of failing to stop a vehicle as directed by a police officer, and a breach of a suspended sentence order – where the applicant drove towards a police officer who required the applicant to stop for a random breath test – where the applicant continued to drive dangerously and erratically at speed despite the complainant asking him to stop, until he lost control of the vehicle – where the applicant fled the accident leaving the complainant injured in the vehicle – where the applicant had an extensive criminal and traffic history – where the applicant was on parole and subject to a suspended sentence at the time of the commission of these offences – where the primary judge ordered the head sentence be served cumulatively on the existing sentence – whether the sentence imposed was manifestly excessive in all the circumstances *R v Grabovica* [2012] QCA 180, distinguished *R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175, cited

R v Nuttall; Ex parte Attorney-General (Qld) [2011] 2 Qd R 328; [2011] QCA 120, cited
R v Wilde; ex parte Attorney-General (Qld) (2002) 135 A Crim R 538; [2002] QCA 501, cited

COUNSEL: P D Kelly for the applicant (pro bono)
S P Vasta for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **GOTTERSON JA:** I agree with the order proposed by Boddice J and with the reasons given by his Honour.

[3] **BODDICE J:** On 21 February 2013, the applicant was convicted, on pleas of guilty, of one count of dangerous operation of a vehicle causing grievous bodily harm before leaving the scene, one count of failing to stop a vehicle as directed by a police officer, and a breach of a suspended sentence order. The applicant was sentenced to an effective period of four years imprisonment, to be served cumulatively upon a sentence currently being served by the applicant. A parole eligibility date for the cumulative sentence was set at 16 April 2015, being 18 months after his release date for the earlier sentence.

[4] The applicant seeks leave to appeal the sentence of imprisonment on the grounds it was manifestly excessive in all the circumstances. The applicant contends that whilst a sentence of four years imprisonment was within range for the most serious of the offences, its imposition cumulatively on his existing sentence rendered the sentence manifestly excessive in all the circumstances.

Background

[5] The applicant was born on 21 February 1984. He was 27 years of age when he committed the offences on 10 March 2011. He has extensive traffic and criminal histories. He has previously been sentenced to a range of orders, including community based orders and suspended sentences. He has breached those orders in the past. He was on parole and subject to a suspended sentence at the time of the commission of these offences.

Offences

[6] The offences to which the applicant pleaded guilty on 21 February 2013 were extremely serious. They involved driving towards a police officer who had required the applicant to stop so that he could perform a random breath test. The police officer only avoided injury by taking evasive action. Thereafter, the applicant drove erratically, over a distance of approximately 700 metres, reaching speeds of an estimated 100 kms per hour. At times, he travelled on the wrong side of the road and overtook other vehicles, swerving around vehicles approaching from the opposite direction.

[7] The applicant had the complainant as a passenger in his vehicle at the time. She was a 17 year old woman he had met the previous day. The complainant asked the applicant to stop and let her out when she realised he was not going to stop for

a random breath test. He refused to do so, despite continued requests that he let her out of the vehicle. At one point, the applicant started screaming and jumping about inside the car, putting his feet on the dashboard. The complainant described the applicant's actions as "crazy".

[8] At the end of this 700 metre journey, the applicant lost control of his vehicle and struck a stationary truck, extensively damaging the vehicle. The applicant immediately left the vehicle, saying "good luck" to the complainant who remained in the vehicle. He expressed no apparent concern for, and made no inquiry as to, her wellbeing.

[9] The complainant suffered a severe injury to her ankle. She required three surgical procedures, and a skin graft. She was hospitalised for approximately three weeks. She is likely to require further surgery in the future. Without medical treatment, it is likely the complainant would have been left with a very debilitating injury. There was the possibility she may have lost her foot.

[10] The vehicle the applicant was driving was not his own. It was written off in the accident. It was uninsured. The sentencing judge found there was little prospect of the owner being compensated for the loss of that vehicle.

Sentence below

[11] The applicant pleaded guilty approximately six weeks prior to what was the second date set for the trial of those offences. The sentencing judge rightly took the view that was a late plea that was not indicative of remorse but an acknowledgement of the reality of the overwhelming case against the applicant. The sentencing judge, however, properly recorded that the plea of guilty was an indication of co-operation with the administration of justice, and was to be taken into account on sentence.

[12] In determining the appropriate sentence, the sentencing judge had regard to the deliberate behaviour of the applicant, the very dangerous nature of the driving, including driving directly at a police officer who was simply undertaking random breath tests as part of his normal duties, and the fact that he had left his female passenger in an injured state without any concern for her welfare.

[13] The sentencing judge also had regard to the fact the applicant had a bad driving history, a shocking criminal history, and was at the time of the commission of the offences subject to a suspended sentence of six months imprisonment, which had been suspended for an operational period of 12 months. The applicant was approximately nine months into that operational period at the time of the commission of the offences.

[14] The sentencing judge also took into account the applicant's age and personal circumstances. The sentencing judge noted the applicant had a longstanding dependence on illicit drugs which he had attempted to overcome on a number of occasions without success. The sentencing judge also noted the applicant had been given a number of opportunities by the courts in the past. In those circumstances, rehabilitation was considered pale when considered against issues of general and personal deterrence.

[15] At sentence, the prosecution submitted the appropriate head sentence for the most serious of the offences was a sentence of four to five years imprisonment. It also submitted it was appropriate any sentence imposed be cumulative on the sentence then being served by the applicant.

[16] The applicant's counsel conceded a sentence of four years imprisonment for the most serious offence was within range, but contended any sentence should be served concurrently with the present sentence.

Consideration

[17] On appeal, the applicant's counsel, who appeared pro bono, submitted both the effective head sentence, and the parole eligibility date were excessive having regard to the order that the head sentence be served cumulatively. He referred the Court to a number of authorities said to support the imposition of a lesser sentence in the instant case. However, care must be taken when considering earlier decisions of this Court having regard to the marked upward trend in the penalties imposed in cases of dangerous driving causing death or grievous bodily harm since *R v Wilde; ex parte Attorney-General (Qld)*.[1]

[18] Whilst the number of comparable cases are therefore limited, a consideration of the recent authority of *R v Grabovica*[2] supports the range of four to five years contended for before the sentencing judge. There, a sentence of five years imprisonment for an offence of dangerous operation of a motor vehicle causing grievous bodily harm with a circumstance of aggravation, imposed after a plea of guilty, was not disturbed on appeal.

[19] Grabovica was 17 years of age when he committed the offence and 18 at the time of sentence. He had no prior convictions but a poor traffic history for his youth. The driving whilst described as "of the most serious kind", involved driving at speed near a primary school in an effort to elude police. The applicant drove on the wrong side of the road, at speeds in excess of 140 kms per hour, before colliding with a vehicle turning at an intersection. The driver of the other vehicle and her daughter, together with the applicant's two passengers, suffered grievous bodily harm. The injuries to two of those persons were extremely severe.

[20] Whilst the driving, and its consequences, in *Grabovica* can properly be described as being more serious than the applicant's driving, and a sentence of five years was considered to be "perhaps at the upper end of sentencing discretion", *Grabovica* concerned a much younger offender who had no prior criminal convictions and a significantly lesser traffic history. By contrast, the applicant is significantly older, had a bad traffic history, a significant criminal history and committed the offences when subject to parole and a suspended sentence.

[21] The sentencing judge carefully considered the extremely serious nature of the applicant's criminal conduct, against a background of an extensive traffic and criminal history, whilst acknowledging the applicant's personal circumstances. The sentencing judge concluded the prospects of rehabilitation were far outweighed by the need for deterrence, both general and personal. Notwithstanding that conclusion, the sentencing judge set a parole eligibility date earlier than may otherwise be the case. No error of principle, or misapplication of any fact of law by the sentencing judge has been identified by the applicant in the imposition of those sentences.

[22] The imposition of a sentence, on a cumulative basis, requires careful consideration of its overall effect so as to avoid the imposition of a crushing sentence.[3] Any

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1 (2002) 135 A Crim R 538; [2002] QCA 501; See *R v Murphy* [2009] QCA 93 at [22] adopting the observations of McPherson JA in *R v Price* [2005] QCA 52.

2 [2012] QCA 180.

3 *R v Nagy* [2003] QCA 175 at [65].

sentence imposed must bear a proper relationship to the criminality of the particular offender.[4] However, the sentencing judge acknowledged that circumstance, and allowed for it. The sentencing judge observed that but for the imposition of a cumulative sentence he would have sentenced the applicant to an effective sentence of four and a half to five years imprisonment. The sentence was reduced to four years imprisonment having regard to the cumulative nature of the sentence.

Conclusion

[23] A sentence of four years imprisonment, to be served cumulatively on the sentence presently being served by the applicant, with a parole eligibility date set at 18 months from the commencement of the sentence was not outside the proper sentencing range.

[24] I would refuse leave to appeal.

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4 *R v Nuttall; Ex parte Attorney-General (Qld)* [2011] QCA 120 at [75].