

SUPREME COURT OF QUEENSLAND

CITATION: *R v Huxtable* [2014] QCA 249

PARTIES: **R**
v
HUXTABLE, Murray John
(applicant)

FILE NO/S: CA No 48 of 2014
DC No 244 of 2013

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Rockhampton

DELIVERED ON: 3 October 2014

DELIVERED AT: Brisbane

HEARING DATE: 29 August 2014

JUDGES: Margaret McMurdo P and Fraser JA and Alan Wilson J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. The application for leave to appeal against sentence is granted.**
2. The appeal against sentence is allowed.
3. The sentence imposed at first instance is varied by vacating the sentence of five years imprisonment suspended after 15 months with an operational period of five years, and instead imposing a sentence of three and a half years imprisonment suspended after 14 months with an operational period of three and a half years.
4. The sentence imposed at first instance is otherwise confirmed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to dangerous operation of a motor vehicle causing death and grievous bodily harm – where the applicant was a professional driver – where the applicant was driving an unladen tip truck towing a trailer – where the applicant was travelling behind a Holden Commodore – where the driver of the Commodore stopped at an intersection – where the applicant did not brake in time to avoid colliding with the rear of the Commodore – where the applicant's truck forced the Commodore across the

centre line into the path of a Hyundai – where the driver of the Commodore died instantaneously – where the driver of the Hyundai sustained grievous bodily harm – where the applicant was not speeding – where the applicant was not under the influence of alcohol or drugs – where the applicant was sentenced to five years imprisonment suspended after 15 months with an operational period of five years – where the applicant was disqualified from holding or obtaining a driver's licence for two years – whether the applicant's conduct was momentary inattention or prolonged inattention – whether the sentence imposed was manifestly excessive

R v Allen [2012] QCA 259, cited

R v Maher [2012] QCA 7, cited

R v McGuigan [2004] QCA 381, cited

R v Murphy [2009] QCA 93, cited

R v Price [2005] QCA 52, cited

R v Wilde; ex parte A-G (Qld) (2002) 135 A Crim R 538; [2002] QCA 501, cited

COUNSEL: J P Benjamin for the applicant
B J Power for the respondent

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

- [1] **MARGARET McMURDO P:** The applicant, Murray Huxtable, pleaded guilty on 1 November 2013 to dangerous operation of a vehicle causing death and grievous bodily harm on 27 July 2011. On 14 March 2014 he was sentenced in the Rockhampton District Court to five years imprisonment suspended after 15 months with an operational period of five years. He was disqualified from holding or obtaining a driver's licence for two years. He has applied for leave to appeal against his sentence contending it was manifestly excessive.

Antecedents

- [2] He was 56 years old at the time of the offence and 59 at sentence. He had some minor street offending in New South Wales and New Zealand but not for many years. Of more relevance was his traffic history. In 1999 in New Zealand he was convicted and sentenced to non-residential periodic detention for five months for driving with excess breath alcohol after a third or subsequent reading. He had previously been convicted of like offences in 1987 and 1997. Alcohol, however, was not a factor in the present offence. In Queensland he was fined for speeding in 2008. In 2010 he was fined for possession of false or misleading documents and making false or misleading entries in work records. After the commission of this offence in August 2011, he was sent a demerit points warning letter and in February 2012 he was fined again for speeding.

The circumstances of the offending

- [3] An agreed schedule of facts was tendered at sentence.¹ On the morning of the offence the applicant was driving an unladen tip truck towing a trailer south along

¹ Ex 4.

the Ipswich-Boonah Road to a quarry. He was travelling behind a Holden Commodore driven by Ms Roslyn Calder. Ms Margaret Schumacher, accompanied by her son David Schumacher who was in grade 11, was travelling north in a silver Hyundai Getz. Ms Calder slowed her car and stopped at the intersection with Milbong Road, waiting to turn right. David Schumacher noticed that the Commodore had stopped and its indicator was flashing immediately before the collision. The applicant braked hard but it was too late to avoid colliding with the rear of the Commodore, forcing it across the centre line and into the path of the Hyundai.

- [4] The resulting collision between the Commodore and the Hyundai caused Ms Calder's instantaneous death through head injuries. Ms Schumacher sustained multiple spinal fractures; fractures to both femurs, tibia and fibula and to one hip; a 100 per cent left patella tendon laceration; a scalp laceration; subdural bleeding requiring the insertion of an intracranial pressure monitor; a right haemothorax; a left pneumothorax; and multiple rib fractures. She required surgery including fused vertebrae and the insertion of a titanium plate and bone graft; and the insertion of plates, wires, screws and femoral nails in her limbs. She was hospitalised for five months and at sentence had only recently begun to walk without aids. David Schumacher suffered a laceration to his eyebrow, a dislocated thumb and a broken nose.
- [5] The road at the point of impact was four lanes wide, two in each direction. The Commodore was in the right hand south bound lane waiting to turn right. There was a left lane allowing south bound vehicles to safely pass a turning vehicle. The speed limit was 100 kph and the road was level and straight, with yellow warning signs to alert drivers of the approaching intersection. The weather was fine and the visibility good.
- [6] The Engine Control Module in the applicant's truck recorded that it was travelling at 84 kph prior to moderate to heavy braking applied three seconds prior to impact. The truck had slowed to 79 kph at impact. The Airbag Control Module in the Commodore recorded that it had slowed under moderate to heavy braking and stopped for up to half a second prior to impact.

The prosecutor's submissions

- [7] The prosecution alleged that on the agreed facts the applicant operated his truck dangerously by failing to keep a proper lookout; and/or failing to maintain a safe distance between his vehicle and the Commodore; and/or failing to slow and/or come to a stop to avoid colliding with the Commodore; and/or failing to move his vehicle into the left lane to avoid colliding with the Commodore.
- [8] The applicant, the prosecutor submitted, was an experienced truck driver who had driven trucks intermittently for 40 years and consistently for the previous eight years. This, she submitted, was not a case of momentary inattention. Had he been keeping a proper lookout he would have seen the Commodore for almost seven seconds prior to impact. Members of the deceased's family were in court. The victim impact statements of the deceased's husband² and daughters³ were tendered. These showed that the deceased was a much-loved wife and mother. Even after more than two years and three months, Ms Calder's death has left an unfillable void in the lives of those who knew and loved her. One daughter had undertaken counselling to help her cope with the grief and loss.

² Ex 9.

³ Ex 10 and Ex 11.

- [9] Ms Schumacher's victim impact statement was also tendered.⁴ She explained the dreadful impact of her injuries on the lives of her husband and five children. Prior to the accident she worked fulltime as a registered nurse and was a busy and fit wife and mother. After her lengthy stay in hospital, her rehabilitation at home was difficult. Her husband had to close his business of 25 years and become her carer and they have relied on Centrelink for assistance. Her son, David, was in year 11 at the time of the accident which affected his concentration and focus in his senior school years. He still does not like thinking about the accident. Her youngest son was only four at the time and has missed his mother's ability to participate in physical activities with him. Her career has been seriously affected and her dreams of becoming a midwife dashed.
- [10] The prosecutor submitted that the applicant was a professional driver with attendant responsibilities. He was under a special duty to exercise care when driving: *R v Price*.⁵ His traffic history was concerning. The fact that he committed a subsequent offence was of concern. As complainants had been physically harmed, imprisonment was not a last resort. There had been significant and far-reaching effects on the victims, namely, death and grievous injury. General and personal deterrence was relevant. The applicant's failure to drive responsibly was significant, not momentary. The matter was listed for trial but was ultimately resolved by a guilty plea in the week of the trial listing. The prosecutor referred to *R v Allen*⁶ and *R v Maher*⁷ and stated that the maximum penalty for the offence was 10 years imprisonment.

Defence counsel's submissions

- [11] Defence counsel began his submissions by tendering a psychological report from Dr Michael John⁸ which contained the following information. The applicant was born in New Zealand but was not raised by his biological parents. He had an unhappy upbringing in a foster family where he felt he was used as "child labour" and often physically punished. He left home when he was about 14 years old. He failed in an apprenticeship and drifted from job to job before joining the navy for about three and a half years, including one tour to Vietnam. Following his discharge, he has been employed largely as a truck driver. He considered himself a "workaholic" who enjoyed his employment and willingly undertook overtime. When he was 27 he married. The marriage has been stable and he and his wife have two adult sons. The family moved to Australia for better employment opportunities in 2009. As an adult, he established contact with his biological mother but found she was dependent on alcohol. His biological father did not return his correspondence and he attended his funeral without having met him. The applicant frankly admitted his traffic and offending history, stating that he was "no angel" but he saw himself as a law-abiding family man who enjoyed his work. Following the accident he has experienced frequent flashbacks and bad dreams and was anxious when driving. A general practitioner referred him to a psychologist who treated him for post-traumatic stress disorder. He now felt he had substantially improved but remained hyper-vigilant when driving and was determined to avoid further accidents. He had been off work for 14 months due to orthopaedic procedures on his left knee and hip. He was awaiting a right knee replacement and after his recuperation hoped to return

⁴ Ex 12.

⁵ [2005] QCA 52, 4.

⁶ [2012] QCA 259.

⁷ [2012] QCA 7.

⁸ Ex 13.

to the trucking business in an administrative role. He planned to work until age 70, retiring to New Zealand to live near his adult sons.

- [12] After testing the applicant, Dr John was confident that he did not pose a significant risk of future violence. He understood that this serious offence was due to his lack of concentration while driving his truck. He freely acknowledged his guilt and was sincerely remorseful. He was now especially cautious when driving as he felt the full weight of his grievous behaviour.

- [13] Defence counsel stated that the applicant was supported in court by his wife and his sons, aged 33 and 30, who had travelled from New Zealand. His traffic history was explicable by the fact that he was a professional driver. He was genuinely emotional and remorseful about his offending and its impact on the victims and their families. He had never sought to shift the blame. He could not fully explain what happened in the accident. He suffered from severe arthritis and used a walking stick. He was not a drug user and for a long time had been a modest drinker. Drugs and alcohol in no way contributed to this offending. His arthritis meant that he had been unable to work pending surgery and for the moment was supported by his wife. Defence counsel sought to distinguish *Maher*, a more serious case. He referred to a recent case in the District Court at Mackay before his Honour Judge Harrison, where a sentence of two years imprisonment suspended after four months with an operational period of two years was imposed. In light of Dr John's report, defence counsel submitted that personal deterrence was not a significant consideration. The applicant pleaded guilty and although the charge was serious and the consequences grave he did not deliberately offend. His poor health meant that any period of incarceration would be more difficult for him than for others.

The sentencing judge's remarks

- [14] In sentencing the applicant, the sentencing judge noted the following. The applicant had pleaded guilty and cooperated with the administration of justice. After referring to the applicant's antecedents the judge noted that the applicant had committed a speeding offence in February 2012, after the commission of this offence. The applicant interrupted and explained that he paid the fine but his wife was driving the vehicle when she was caught on a speed camera. The judge told the applicant that he was admitting that he had wrongly allowed the fine to be attributed to him. The applicant apologised, explaining he did not know the law. The judge then outlined the circumstances of the offending and the horrific outcome of the accident on the victims and their families.

- [15] His Honour noted the applicant's remorse, difficult childhood, and physical ailments and complimented him on his hard work and good family life. His Honour also observed that neither alcohol nor drugs was involved. Had the applicant been paying proper attention he would have been able to stop in time to avoid the accident. He was not following at a safe distance and should have been able to swerve to the left to avoid the accident. Citing *Price*, his Honour noted that as a professional driver of a heavy vehicle the applicant was under a special duty to exercise care when driving and to obey traffic rules. His Honour also cited *Maher*, noting that driving a vehicle is a privilege not a right, and drivers must be careful to protect other users of the road. Prolonged inattention resulting in dangerous driving causing death or serious injury required a punishment to strongly denounce that conduct. General deterrence was also a significant factor. Whilst the applicant's

criminal and traffic histories were not serious, he seemed to be a person who had not complied with the law at times. He had not engaged in a lengthy deliberate period of dangerous driving but his driving was objectively dangerous and had serious consequences. The proper sentence was five years imprisonment suspended after 15 months with an operational period of five years.

The contentions of the parties in this appeal

- [16] The applicant contended that *Allen* and *Maher* and the cases cited in them do not support a sentence as high as five years imprisonment. Whilst the applicant's driving was not momentary inattention, it was certainly not "prolonged" inattention. A sentence of three to four years was appropriate with parole eligibility after one quarter, reflecting the approach of the sentencing judge.
- [17] The respondent conceded that there is very little support for the sentence in comparable decisions of this Court but nevertheless contended the sentence as a whole was not manifestly excessive. The applicant's criminal conduct caused the death of one person and severe grievous bodily harm to another. The imposition of a sentence which required him to serve 15 months in actual custody and to be of good conduct for five years under a partially suspended sentence was not manifestly excessive. The sentencing judge was not constrained by the maximum penalty imposed in other roughly comparable cases: *R v Wilde*; *ex parte A-G*.⁹ The sentence imposed was supported by *R v McGuigan*¹⁰ and *R v Murphy*.¹¹

Conclusion

- [18] It is helpful to begin my discussion of the parties' contentions by reviewing the cases they relied on. In *McGuigan*, the applicant pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm with the circumstance of aggravation of having twice previously been convicted of offences of driving under the influence of liquor. He was sentenced to five years imprisonment with a recommendation for parole after 20 months. The maximum penalty was then seven years imprisonment. He was 49 at the time of the offending and had a serious traffic history. He drove with a blood alcohol content of 0.203 per cent on 4 May 1996 and with a blood alcohol content of 0.251 per cent on 5 May 1996. In 1997 he was fined for disqualified driving and disqualified absolutely. In 1999 he failed to provide a breath test and gave a false name and address when driving whilst disqualified.

The circumstances of his offending were as follows. He ran down a 75 year old man on a pedestrian crossing in a 40 kph zone. A vehicle had stopped for the victim, blocking the applicant's view of him. The applicant failed to stop. The impact broke his vehicle's side mirror. The victim underwent a tracheostomy and fixation of his nasal and other facial fractures. He developed pneumonia and was in intensive care for some weeks. His cognitive functions were impaired. He required long term rehabilitation and may never again live independently. The accident had an enormous detrimental impact on his quality of life. Police found McGuigan the following morning at 4.20 am. He had been drinking, his speech was slurred and his blood alcohol content was 0.2 per cent. He was arrested for being in charge of

⁹ [2002] QCA 501, [26].

¹⁰ [2004] QCA 381.

¹¹ [2009] QCA 93.

a motor vehicle whilst adversely affected by alcohol. He claimed he was in the vehicle when police spoke to him only to charge the battery because it had not been driven for some time. He stated that he earlier lent the vehicle to someone else and did not know about the accident. He gave a false alibi but later admitted he was the driver. He claimed he had not consumed any alcohol at the time of the accident. He did not stop because he panicked as he should not have been using his work vehicle after hours. He denied the evidence of eyewitnesses that he was travelling in excess of 70 kph; he claimed to be travelling at 40 kph. He also claimed to be unaware of the accident when he drove off.

This Court considered that the comparable cases established that the sentence was outside the range. Although McGuigan had a serious traffic history including for driving whilst grossly affected by alcohol, neither alcohol nor excessive speed were aggravating aspects of this offending. He failed to observe due care at a pedestrian crossing when he ought to have been alert to the stationary vehicle. He lied to police to conceal his involvement and tried to blame others, but he eventually cooperated and pleaded guilty. The victim had suffered grave consequences. The Court substituted a sentence of three and a half years imprisonment with a recommendation for parole after 18 months and an absolute disqualification from driving.

- [19] The maximum penalty in *McGuigan* was seven, not ten years as here, and his dangerous driving caused one victim grievous bodily harm whereas the present offender additionally caused a death. On the other hand, the present applicant did not leave the scene or attempt to avoid responsibility and had many more mitigating features. *McGuigan* suggests that the five year sentence is outside the range.
- [20] In *Murphy* the applicant pleaded guilty to dangerous operation of a motor vehicle causing two deaths and grievous bodily harm to a third person. He was sentenced to three and a half years imprisonment suspended after 12 months for an operational period of four years. He was driving on a learner's permit on the Mt Lindsay Highway within the 90 kph speed limit. His car drifted to the outside of the lane as the highway curved right. When he attempted to correct the vehicle he oversteered, crossing a double unbroken centre line and driving into an oncoming vehicle. The driver of the other vehicle and the applicant's passenger died. The passenger in the other vehicle sustained grievous bodily harm leaving her with significant disabilities.

He was 21 at the time and 22 at sentence. He had no prior criminal record or traffic history and had promising rehabilitative prospects. He cooperated fully with the authorities and pleaded guilty at an early time. He was shattered by the horrendous consequences of his offending and wrote a letter to the court expressing deep remorse. He was traumatised at having killed his passenger who was his cousin and closest friend. The judge considered the case was neither momentary inattention, nor recklessness nor deliberateness; it was momentary misjudgment. This Court concluded that the sentence was severe but not manifestly excessive. Despite the applicant's compelling personal circumstances, his dangerous driving had led to two deaths and grievous bodily harm to a third person so that the general deterrence sentencing principle supported the sentence.

- [21] In *Murphy*, the maximum penalty was seven years, not 10 years as in the present case, and Murphy was youthful at the time of his offending, a mitigating circumstance absent in the present case. On the other hand, this Court noted that the three and a half year sentence with parole after 12 months was "severe", suggesting that it was

at the high end of the range and Murphy's driving resulted in grievous bodily harm to one person and the death of *two* people. *Murphy* also suggests that the five year sentence in the present case was manifestly excessive.

- [22] In *Allen*, the applicant was convicted after trial of dangerous operation of a motor vehicle causing death. He turned his car at an intersection against a red arrow and collided with a motor cyclist, killing him. His failure to keep a proper lookout was more than momentary inattention. He was 24 years old and had no criminal history but his traffic history included driving under the influence of alcohol and speeding. As in the present case, he committed a speeding offence after the dangerous operation offence. Unsurprisingly, this Court considered that his sentence of 18 months imprisonment with parole after nine months and his disqualification from holding or obtaining a driver's licence for two and a half years was not manifestly excessive.
- [23] The present offence is more serious than Allen's in that this applicant's driving not only caused a death but also grave injuries to another. This applicant was also more mature than Allen and was a professional truck driver. The maximum penalty in *Allen*, as here, was 10 years imprisonment. Even accepting that the head sentence in *Allen* must have been towards the low end of the appropriate range, it does not support the five year sentence in the present case.
- [24] In *Maher*, the applicant, who was 44 at the time of his offending and 46 at sentence, pleaded guilty to dangerous operation of a motor vehicle causing death. He was sentenced to three years imprisonment suspended after nine months with an operational period of three years. Like Allen, he turned his car across the path of an oncoming motor cycle, killing the rider. He had just completed a 16 hour working day and his 10th consecutive working day as a concrete driller. He had previous criminal and traffic convictions which were relatively old, but included a conviction for dangerous driving resulting in a fine. The sentencing judge considered that Maher had been inattentive for a prolonged period, attributable to his fatigue as a result of his long working hours. This Court determined the sentence was not manifestly excessive.
- [25] The dangerous driving in *Maher* was more serious than the present case in the sense that Maher drove knowing that he was fatigued after working long hours for many days. The maximum penalty, as here, was 10 years imprisonment. Maher, like the present applicant, was a mature man but he had a directly relevant prior conviction for dangerous driving and fewer mitigating features. Although *Maher* concerned one victim, not two as here, it does not support the five year sentence imposed here.
- [26] Despite the valiant efforts of counsel for the respondent, I remain unconvinced that the cases to which the Court has been referred support the head sentence of five years imprisonment imposed in the present case, even when moderated by suspension after 15 months. The head sentence of five years imprisonment was manifestly excessive. It is no answer to say that suspension after 15 months means the sentence overall is not manifestly excessive. The cases to which counsel have referred the Court demonstrate that a sentence making the applicant liable to serve five years imprisonment if he reoffends, even in a minor, unrelated way in the next five years, is manifestly excessive. The application for leave to appeal must be granted, the appeal allowed, the sentence set aside and this Court must re-exercise the sentencing discretion.

- [27] The applicant's dangerous driving was serious as it had such a dreadful result, gravely injuring Ms Schumacher and killing Ms Calder. Ms Schumacher and both victims' families will be detrimentally affected for the rest of their lives. The applicant's dangerous driving was more than momentary but it was not as serious as those cases where the dangerous driving involved alcohol or drugs, speed, fatigue or a lengthy period of reckless driving. It was, however, an aggravating feature that the applicant was a professional driver of a large truck with the commensurate heavy responsibility to take proper care and to keep a careful lookout for other more vulnerable road users. His criminal conduct was reprehensible. The evidence was that he should have seen Ms Calder's Commodore turning almost seven seconds before impact. He did not brake until about three seconds before impact and did not steer around the Commodore. His inattention was more than momentary but it could not be described as prolonged. General and personal deterrence remained significant factors despite his deep and genuine remorse, early plea, rehabilitative prospects, and the detrimental psychological impact of the accident on him.
- [28] I consider a head sentence of three and a half years imprisonment appropriately maintains consistency with previous decisions of this Court. Such a sentence also provides a strong deterrent to otherwise generally law-abiding truck drivers whose more than momentary inattention causes catastrophic consequences to other innocent road users and their families. The many mitigating features, including the applicant's plea of guilty, cooperation with the authorities, genuine remorse, good work history including three and a half years military service, his present ill health and sound rehabilitative prospects, warrant suspension after about one-third of the sentence. I would suspend the sentence after 14 months, with an operational period of three and a half years. I would not interfere with the primary judge's licence suspension.

ORDERS:

1. The application for leave to appeal against sentence is granted.
 2. The appeal against sentence is allowed.
 3. The sentence imposed at first instance is varied by vacating the sentence of five years imprisonment suspended after 15 months with an operational period of five years, and instead imposing a sentence of three and a half years imprisonment suspended after 14 months with an operational period of three and a half years.
 4. The sentence imposed at first instance is otherwise confirmed.
- [29] **FRASER JA:** I agree with the reasons for judgment of the President and the orders proposed by her Honour.
- [30] **ALAN WILSON J:** I agree with the reasons of the President and with her Honour's proposed orders.