[2019] QCA 168

COURT OF APPEAL

MORRISON JA
PHILIPPIDES JA
BODDICE J

CA No 1 of 2019
DC No 2339 of 2018

THE QUEEN

v

ITSHAKY, Omer Shmuel **Applicant**

BRISBANE

FRIDAY, 30 AUGUST 2019

JUDGMENT

MORRISON JA: I will ask Justice Boddice to give his reasons first.

BODDICE J: The applicant seeks leave to appeal a sentence of five years imprisonment, suspended after serving 18 months for an operational period of five years, imposed in the District Court on 7 December 2018 for one count of dangerous operation of a motor vehicle causing death while adversely affected by an intoxicating substance. The applicant had pleaded guilty to that offence on 12 October 2018.

The sole ground of appeal, should leave be given, is that the sentence was manifestly excessive in all of the circumstances. The manifest excess is said to arise not from the head

sentence of five years imprisonment but from the requirement that the applicant serve 18 months of actual imprisonment before suspension of that sentence.

The offence was committed on 5 November 2017. The applicant, an Israeli citizen, was aged 23 years at the time of the offence, having been born on 7 May 1994. He had no prior criminal history and a very limited traffic history.

The victim was a pedestrian who was walking along the side of a road in central Queensland in the early hours of the morning. He died after being struck by the applicant's vehicle, which failed to negotiate a bend, drifting off the roadway and striking the deceased before travelling across a traffic island into a culvert on the side of the road.

The agreed statement of facts recorded that the applicant had completed a shift at work between 10 and 10.30 pm on the previous evening. He commenced drinking at a bar before attending a nightclub with friends. The applicant then decided to drive his van home. A breath analysis undertaken after the incident recorded the applicant as having a blood alcohol content of 0.12 per cent.

Sentencing remarks

The sentencing judge acknowledged the applicant had cooperated with the administration of justice, saving the cost of a trial. The sentencing judge also acknowledged that the applicant was a young man with a very minor traffic history who had intended to return to Israel to commence university studies. At the time of the offence, the applicant was undertaking a gap year in Australia, having completed compulsory military service in Israel.

The sentencing judge noted that the deceased was struck after the applicant's vehicle failed to negotiate a gentle right-hand curve in the road. There was no evidence of braking prior to the incident. Witnesses had observed that the applicant's vehicle had not been driving straight, was swerving across the road prior to the incident and that the applicant smelt of alcohol. The applicant told those witnesses he had fallen asleep and had had "a couple of drinks".

The sentencing judge noted that the applicant initially lied to police about whether he had been driving his vehicle. The applicant also declined to supply a specimen of breath for analysis. At that stage, police were unaware the applicant had struck the deceased. His body was not discovered by police who first attended the scene. The sentencing judge accepted that it was most likely the applicant did not know he had hit the deceased.

The sentencing judge sentenced the applicant on the basis that his ability to safely control his motor vehicle had been at least moderately impaired as a consequence of his alcohol intake. The dangerous driving involved failing to negotiate the curve in the road and allowing his vehicle to depart from the lane to collide with the deceased which was as a combination of fatigue, intoxication and the early hour of the morning. The sentencing judge accepted the incident occurred "by reason of fatigue and alcohol intoxication".

The sentencing judge accepted that the deceased's death had profoundly affected members of the deceased's family. It was also accepted that the incident had a significant effect on the applicant and on his family and that, as the applicant had no relatives in Australia, incarceration would be a particular hardship.

In determining the appropriate sentence, the sentencing judge expressly took into account the applicant's plea of guilty, although noting it was not early, as well as the applicant's lack of criminal history and the very limited period of dangerous driving in the context of there being no allegation of any deliberately dangerous manoeuvre. The sentencing judge observed, however, that a person had been killed in circumstances where the applicant made a conscious decision, affected by alcohol, to drive his motor vehicle. Such circumstances rendered deterrence very relevant.

After considering a number of authorities, the consequences of a substantial period of imprisonment, namely, the automatic cancellation of the applicant's visa, and the substantial matters in the applicant's favour, including his previous good conduct, his military service and his expressed remorse. The sentencing judge imposed the sentence of five years

imprisonment, suspended for an operational period of five years after serving 18 months of imprisonment.

The applicant submits that the requirement that he serve 18 months in custody was manifestly excessive, having regard to the applicant's prior good character, his remorse and the significant negative impacts a period of initial incarceration had had on the applicant. The applicant had served 17 days in pre-sentence custody, which was declared as time served for the sentence of imprisonment.

In support of the applicant's submission, the applicant relied on three previous decisions of this Court; *R v Chmieluk; Ex parte Attorney-General (Qld)* [2018] QCA 271, *R v Blackaby* [2010] QCA 84 and *R v Armstrong* [2007] QCA 146. The applicant submits that those authorities demonstrate that offenders with poor traffic histories, who engaged in more serious circumstances of dangerous driving, received lesser periods of actual custody, supporting a conclusion that the requirement that the applicant serve 18 months in custody was manifestly excessive, in that it evidences a failure to properly exercise the sentencing discretion.

Whilst the dangerous driving in *Chmieluk* was objectively more serious and was committed by an offender with a significant traffic history, a particular circumstance in that offence was found to warrant the dismissal of the Attorney-General's appeal against a sentence of five years imprisonment, suspended after serving only three months in custody, for an operational period of five years. That circumstance was that the deceased in that case was the offender's own sister, and there was evidence of genuine remorse and guilt experienced by the offender as a consequence of her actions. That feature explains the very limited period of actual custody. That authority does not support the applicant's contention.

In *Armstrong*, a more serious example of dangerous driving perpetrated by an offender with a poor traffic history initially attracted a sentence of five years imprisonment suspended after serving a period of 26 months in custody. On appeal, the period of actual custody was reduced to 20 months, having regard to that offender's cooperation with the administration of

justice by a timely plea of guilty, indicated well before trial, and his genuine remorse, which included staying at the scene and attempting to help the deceased, despite the offender's own injuries. That latter feature distinguishes *Armstrong* from the present circumstances.

Blackaby also involved a more serious example of dangerous driving by an offender with a poor traffic history. That seriousness was, however, reflected in the substantially higher head sentence of seven years imprisonment. The fixing of a parole eligibility date at 18 months was affected by that offender's particular circumstances, including exposure to violence, alcohol and sexual abuse and other traumatic events during childhood. That feature distinguishes *Blackaby* from the present circumstances.

In any event, comparable cases do not set a range of permissible sentences or mark the outer bounds of a sentencing judge's permissible discretion. Comparable cases assist a sentencing judge to understand how factors in common should be treated, but do not determine the sentence.

A consideration of the circumstances of this offence, of the applicant's personal circumstances and of the comparable authorities does not support a conclusion that the sentence imposed in the present case was manifestly excessive.

Manifest excess is not established unless the sentence is "unreasonable or plainly unjust", such as to justify the conclusion "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.": *R v McConnell* [2018] QCA 107 at [15].

Appellate intervention on the ground of manifest excess is not warranted "unless having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.": *R v Pham* (2015) 256 CLR 550 at [28].

Here, the applicant does not point to any specific error on the part of the sentencing judge. Indeed, the applicant accepts that the head sentence of five years imprisonment was an appropriate exercise of the sentencing discretion.

Against that background, the requirement that the applicant serve slightly less than one third of that sentence in actual custody, in circumstances where his plea of guilty was not early and his offending involved driving with a significant quantity of alcohol in his system, whilst fatigued, does not constitute an unreasonable or plainly unjust sentence. It also does not found a basis to conclude there was some misapplication of principle. It may well be that another judge may have imposed a lesser period of actual imprisonment. That factor, however, does not make this sentence manifestly excessive.

The applicant's youth, past good behaviour, military service and the consequences of incarceration were factors expressly acknowledged by the sentencing judge. The requirement that the applicant serve 18 months in actual custody appropriately reflected those significant factors in the applicant's favour, in the context of a sentence of five years imprisonment. The sentence imposed was not manifestly excessive. I would refuse leave to appeal.

MORRISON JA: I agree.

PHILIPPIDES JA: I also agree.

MORRISON JA: The order of the Court is that the application for leave to appeal against sentence is refused.