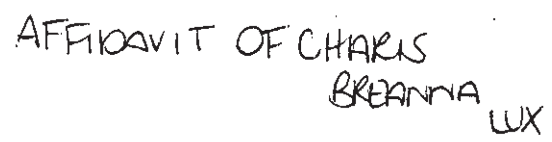
DECISION

RTI 151229 :File 1 : Page no 20

LICANT'S OUTLINE OF
SUBMISSIONS +COPY

RTI 151229 :File 1 : Page no 44


AFFIDAVIT OF CHARIS BREANNA LUX

DEFENCE MATERIAL RELIED ON
AT SENTENCE

RTI 151229 :File 1 : Page no 95

He is currently fit to drive.

He has a " Medical Restriction" on his licence to have examinations / blood tests every 6 months.

Regards,

Dr BI Bennett
Provider No: 0375944K

RTI 151229 :File 1 : Page no 102

Australian Government

TAX PRACTITIONERS BOARD

Information sheet

Fit and proper person

This document is intended to provide an overview of the fit and proper person requirement in the *Tax Agent Services Act 2009* (TASA). This document is for information only, and may be changed from time to time. It is not a formal Board guideline. Refer to the TASA for the precise content of the legislative requirements.

Fit and proper person

To be eligible for registration, an applicant must satisfy a fit and proper person requirement. The fit and proper person requirement applies to individual applicants and each partner and director in respect of partnership and company applicants.

In deciding whether an individual is a fit and proper person, the Board must have regard to the following:

- whether the individual is of good fame, integrity and character, and
- whether any of the following events have occurred during the previous five years:

  (a) the individual has been convicted of a serious taxation offence
  (b) the individual has been convicted of an offence involving fraud or dishonesty
  (c) the individual has been penalised for being a promoter of a tax exploitation scheme
  (d) the individual has been penalised for implementing a scheme that has been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling
  (e) the individual has had the status of an undischarged bankrupt, and/or
  (f) the individual has been sentenced to a term of imprisonment, or served a term of imprisonment in whole or in part.

A serious taxation offence

A 'serious taxation offence' is:
(i) an offence against any one of the following specified offences in the *Criminal Code* if the offence relates to a tax liability within the meaning of the *Taxation Administration Act 1953*:

- section 134.1 of the *Criminal Code* (obtaining property by deception)
- section 134.2 of the *Criminal Code* (obtaining a financial advantage by deception)
- section 135.1 of the *Criminal Code* (general dishonesty with respect to obtaining a gain, causing a loss or influencing a Commonwealth public official)
- section 135.2 of the *Criminal Code* (obtaining a financial advantage), or
- section 135.4 of the *Criminal Code* (conspiracy to defraud with respect to obtaining a gain, causing a loss or influencing a Commonwealth public official), or

RTI 151229 :File 1 : Page no 117

21

(ii) a 'taxation offence' that is punishable on conviction by a fine exceeding 40 penalty units, or imprisonment, or both.

Note: 1 penalty unit = $170.

'Taxation offence' means:

- an offence against a taxation law, or
- an offence against
  - section 6 of the *Crimes Act 1914* (being an accessory after the fact)
  - section 11.1 of the *Criminal Code* (attempting to commit an offence)
  - section 11.4 of the *Criminal Code* (incitement to the commission of an offence), or
  - section 11.5 of the *Criminal Code* (conspiring with another person to commit an offence)

being an offence that relates to an offence against a taxation law.

An offence involving fraud or dishonesty

'Fraud' and 'dishonesty' take their ordinary meaning, and are determined by reference to community standards.

The *Criminal Code* defines 'dishonest' as dishonest according to the standards of ordinary people in circumstances where the defendant is aware of these standards.

Example

Patricia was convicted of theft and was fined $1,500. To convict an individual for theft, a court must find that the individual has dishonestly appropriated property belonging to another with the intention of permanently depriving the other person of the property. Consequently, theft is an offence of dishonesty and the Board must consider this in determining whether Patricia satisfies the fit and proper person test for registration.

Penalised for being a promoter of a tax exploitation scheme

An individual is considered to have been penalised for being a promoter of a tax exploitation scheme if that individual has been ordered to pay a civil penalty for engaging in conduct that results in that individual, or another entity, being a promoter of a tax exploitation scheme, within the meaning of Division 290 of Schedule 1 to the *Taxation Administration Act 1953*.

Penalised for implementing a scheme that has been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling

An individual is considered to have been penalised for implementing a scheme that has been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling if that individual has been ordered to pay a civil penalty for engaging in such conduct as defined within Division 290 of Schedule 1 to the *Taxation Administration Act 1953*.

RTI 151229 :File 1 : Page no 118

22

Undischarged bankrupt

An undischarged bankrupt is an individual who has been declared bankrupt under the *Bankruptcy Act 1966* and has not been discharged from the bankruptcy.

> **Example**
> Seven years ago, William became bankrupt and was not discharged until three years ago. Although William became bankrupt more than five years ago, having the status of an undischarged bankrupt at any time during the past five years is a factor the Board must consider in deciding whether William is a fit and proper person for registration purposes.

Served or sentenced to a term of imprisonment

An individual has served a term of imprisonment if that individual has served all or part of a term of imprisonment.

An individual has been sentenced to a term of imprisonment if a sentence is imposed on that individual in relation to an offence and that sentence includes a term of imprisonment.

> **Example**
> Three years ago, Melissa was convicted of dangerous driving causing serious injury under section 319 of the *Crimes Act 1958* (Vic) and received a two-year suspended prison sentence. Being sentenced to a term of imprisonment in the previous five years is an event the Board must consider in deciding whether Melissa is a fit and proper person for registration purposes.

Need more information?

For further information about the fit and proper person requirement, refer to the Explanatory paper TPB(EP) 02/2010 Fit and proper person.

RTI 151229 :File 1 : Page no 119

R. *v*. NOBLE and VERHEYDEN

[C.A. 191, 194/1994]

Court of Appeal (Davies J.A., Pincus J.A., Williams J.)

2, 10 August 1994

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Factors to be taken into account – Circumstances of offence – Injury during commission of offence – Relevant in some circumstances. (A.Dig. 3rd [830]).

While an injury suffered in the course of committing an offence is not necessarily a factor in sentencing, an injury suffered by a robber as a result of the victim's defence of the property may, in appropriate circumstances, go in mitigation of penalty.

Decision of Hall D.C.J. varied.

CASES CITED

No cases are cited in the judgment.

The following cases were cited in argument:

Lowe v. The Queen (1984) 154 C.L.R. 606.

R. v. Baragwanath (C.A. 371/1990; Court of Criminal Appeal, 27 March 1991, unreported).

R. v. Bryant and Hargreaves (C.A. 243, 248/1984; Court of Criminal Appeal, 29 November 1984, unreported).

R. v. Carrell (C.A. 105/1992; Court of Appeal, 16 July 1992, unreported).

R. v. Courtney (C.A. 173/1988; Court of Criminal Appeal, 15 August 1988, unreported).

R. v. Ilic (C.A. 38/1993; Court of Appeal, 16 March 1993, unreported).

R. v. Mackay (C.A. 139/1992; Court of Appeal, 15 July 1992, unreported).

R. v. Mallett (C.A. 333/1985; Court of Criminal Appeal, 5 March 1986, unreported).

R. v. Massey (C.A. 313/1989; Court of Criminal Appeal, 30 November 1989, unreported).

R. v. Moffitt (1990) 49 A.Crim.R. 20.

R. v. Scarborough (C.A. 172/1987; Court of Criminal Appeal, 19 August 1987, unreported).

R. v. Voysey (C.A. 145/1992; Court of Appeal, 14 August 1992, unreported).

CRIMINAL APPEAL

R. W. Morgan for the applicant, Mark Thomas Noble.

D. J. Barakin for the applicant, Paul Francis Verheyden.

P. Callaghan for the Crown.

C.A.V.

THE COURT: These are applications for leave to appeal against sentence. Each of the applicants pleaded guilty to a charge of attempted armed robbery in company and a related charge of unlawful use of a motor vehicle. The District Court judge ordered that Noble, who had been in custody for 4½ months, be imprisoned for three years and three months; Verheyden was sentenced to imprisonment for four years. There was no recommendation for early parole in either case.

An unusual feature of the case is that a member of the family which ran the business the subject of the attempted robbery shot at the applicants during the attempt, hitting each of them; Verheyden was seriously injured by the shotgun pellets, Noble only slightly injured. A question was raised with respect to the relevance of these injuries to fixation of penalty.

The business the subject of the robbery attempt was run by a middle-aged couple and their 20 year old son. In the afternoon of 18 November 1993 the husband as away from the premises leaving his wife and son in charge; the applicants entered the shop and spoke to the wife who was in the front area of the premises. This was observed by the son, who was watching the applicants from the office on a security monitor. Noble produced what appeared to be a hand gun, aimed it at the wife and walked towards her saying "Don't fucking move"; she ran towards the rear of the store. Noble, in pursuit of her, said "On the ground, get on the fucking

RTI 151229 :File 1 : Page no 120

ground". Verheyden went to the front door and appeared to be trying to lock it. The son got the shotgun and went towards the applicants; he shot each of them, as has been mentioned. Noble ran away, Verheyden, badly injured, remained lying on the ground. When the police came they found lying next to him a sheathed knife and a knapsack, inside which were a hammer and a pair of gloves. 5

Verheyden was taken to hospital. Having been given some information, the police obtained a warrant to search Noble's premises and he admitted his involvement in the robbery, but declined to identify his co-offender. He told the police that he was the person holding the pistol in the shop and he said, when asked if it was loaded, that to his knowledge it was. 10

The evidence was that the members of the family who ran the antique shop the subject of the attempted robbery had suffered in a number of ways as a result of it, although no property was taken.

Verheyden was 27 years and Noble 28 years of age when sentenced on 6 May 1994. There was a considerable amount of information before the Court about the personal background of the applicants and some details of that should be given. Noble was an adopted child of a couple of whom the husband was a public servant and the wife a telephonist. His relationship with the adoptive father was good, but that with the wife less so. He does not appear to have had a deprived childhood, but was unhappy when he went to secondary school. At the age of 16 he committed his first offence, unlawful use of a motor vehicle, and was a persistent offender in his teens; there were numerous breaking and entering offences and stealing offences. As an adult, Noble was convicted in 1989 of eight offences of unlawful use of a motor vehicle. At the age of 23 there were also some stealing offences and, then and later, some relatively minor drug offences. The 1989 offences produced a term of imprisonment of 20 months. 15 20 25

Verheyden appears to have had a much less satisfactory background than Noble. His parents separated when he was an infant; it is said that the father behaved very badly towards his family. After the parents separated, Verheyden's upbringing was, according to the evidence before the primary judge, quite unsettled and unsatisfactory. His criminal history is short but serious. In 1989 he was convicted of armed robbery and associated offences; this produced a sentence of seven years imprisonment. The offences in question here were committed while he was on parole. 30 35

The judge said he proposed to treat the two applicants equally, finding no reason for distinguishing between them. He took into account their early pleas of guilty, but expressed the view that no other course than pleading guilty was open to them. His Honour said that the appropriate term of imprisonment was one of four years, but as Noble had been in custody for 4½ months he reduced that to three years and three months. He ordered that Verheyden be imprisoned for four years. 40

The argument advanced in favour of Verheyden concentrated on the fact that the offence was not completed, that the applicant suffered injuries in the commission of the offence, and that no account was taken of a period during which he was, it was said, in custody. 45

As to the first point, that there was an attempt only, that is plainly a factor in favour of reduction of sentence. The second point, the injury, is more debatable. We were referred to no authority on the question whether an offender who was injured in the course of committing an offence should have that taken into account in his favour. The point is discussed in a note 50

RTI 151229 :File 1 : Page no 121

hospital Verheyden was being treated for his injuries and there is no reason to think that the conditions on which he was held differed substantially from those he would have experienced if he had not been arrested. We see no reason to give Verheyden credit for any period of pre-sentence custody.

As we have explained, the primary judge took Verheyden's injuries into account as being relevant only to the effect they might have as a deterrent; we think that his Honour should simply have treated them as a mitigating factor. Nevertheless, we are of opinion that the sentence imposed on Verheyden was a proper one. This was his second armed robbery, he was on parole from the first and was 27 years of age when sentenced. We are firmly of the view that four years imprisonment to be served concurrently with any balance of his existing sentence was not too heavy a penalty.

As for Noble, the principal argument advanced by Mr Morgan was that he should have been treated more leniently than was Verheyden and the basis of that was the absence of any offence of robbery or any other violence from Noble's record. Further, it was pointed out that Noble had committed no offences of dishonesty for some years before the present offences.

The two offenders may be compared with respect to a number of criteria. Noble's childhood background was superior to that of Verheyden and he suffered substantially less injury; it appears that pellets were embedded in the back of his head, but this seems to have caused no permanent injury. Noble carried the gun at the robbery and his co-operation with the police was limited; as has been mentioned, he would not tell the police who he was with during the robbery. There is in Noble's favour, in comparing his culpability with that of Verheyden, that Noble had committed no previous robbery. On the whole, we are of opinion that the judge made no error in treating the two as equally deserving of punishment.

The orders his Honour made require some consideration. No specific reference was made in the orders to the fact that there were two offences and the proper inference is that his Honour intended the penalties imposed to apply to each of the two offences, although this is implicit rather than explicit. It may be rather an academic point, but a suggestion was made during the hearing that a four year term of imprisonment for unlawful use of the motor vehicle in the robbery seems disproportionately high compared with the four year penalty for the attempted robbery itself. It is our view that that is so and that the penalty in relation to the motor vehicle offence should be reduced to 18 months. Then, as to Noble, it is pointed out by counsel that there is no order under s. 161(1) of the *Penalties and Sentences Act* 1992 having the effect that the time he spent in custody is not taken to be imprisonment served under the sentence imposed on him, namely three years and three months. To achieve the result his Honour intended, he should have expressly so ordered; for the sake of certainty such an order should be made as to Verheyden also.

The orders of the Court will therefore be:

1. In each case:

(a) Application granted and appeal allowed to the extent indicated below.

(b) A sentence of 18 months imprisonment in respect of the offence of unlawful use of a motor vehicle, commencing from 6 May 1994, is imposed in lieu of that imposed by the primary judge.

(c) Any time spent in custody before 6 May 1994 is not to be taken to be imprisonment already served under the sentence.

RTI 151229 :File 1 : Page no 122

2. The sentences begin to run from 6 May 1994.
3. Sentences imposed below otherwise confirmed.

Appeals allowed in part.

Solicitors: *Legal Aid Office* (applicants); *Director of Prosecutions* (Crown).

J. D. BRIGGS
Barrister

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RTI 151229 :File 1 : Page no 123

27

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

RTI 151229 :File 1 : Page no 124

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

RTI 151229 :File 1 : Page no 125

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.

RTI 151229 :File 1 : Page no 126

[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.

RTI 151229 :File 1 : Page no 127

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 Mataraina* [2011] QCA 344 at [35].

RTI 151229 .File 1 : Page no 128

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.

RTI 151229 :File 1 : Page no 129

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bawden* [2004] QCA 285
PARTIES:	**R** **v** **BAWDEN, Benjamin Charles** (appellant/applicant)
FILE NO/S:	CA No 59 of 2004 DC No 2847 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	6 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2004
JUDGES:	McMurdo P, McPherson JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application to adduce further evidence refused** **2. Appeal against conviction refused** **3. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant convicted of dangerous operation of a motor vehicle whilst adversely affected by an intoxicating substance – where appellant claimed inconsistencies in evidence of police against him – whether the jury's verdict was unreasonable and could not be supported having regard to the whole of the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – FRESH EVIDENCE – GENERAL PRINCIPLES – where appellant sought to introduce material available to his legal representatives at trial – whether such material should be admitted on appeal CRIMINAL LAW – APPEAL AND NEW TRIAL AND

RTI 151229 :File 1 : Page no 150

INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEALS AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – OTHER OFFENCES – where applicant fined $1000 and disqualified from holding a driver's licence for 18 months – where applicant lived several hundred kilometres from home town – whether sentence was manifestly excessive

Gallagher v The Queen (1986) 160 CLR 392, cited
Mickelberg v The Queen (1989) 167 CLR 259, cited
TKWJ v The Queen (2002) 212 CLR 124, cited

COUNSEL: The appellant/applicant appeared on his own behalf
B G Campbell for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** Benjamin Charles Bawden was convicted of dangerously operating a vehicle whilst adversely affected by an intoxicating substance in the District Court at Brisbane on 13 February 2004. A conviction was recorded; he was fined $1,000 to be paid within nine months and disqualified from holding a driver's licence for 18 months. He represents himself on this appeal against conviction and application for leave to appeal against sentence.

[2] He contends that the verdict of guilty is unreasonable and cannot be supported having regard to the whole of the evidence and seeks leave to adduce evidence not called at the trial.

The evidence

[3] The prosecution case turned on the evidence of two police officers, Smedley and Collins, who were patrolling the Caboolture area in a marked police car, driven by police officer Smedley, in the early hours of the morning of 19 October 2002. At 2.00 am they observed Mr Bawden's white Holden Commodore in Matthew Terrace turn right onto Beerburrum Road through a red light at the intersection. They heard the Commodore's wheels spin as it accelerated north on Beerburrum Road and followed it. Police officer Smedley had to accelerate heavily to maintain a constant distance. He estimated that the car was travelling at about 140 kph in a 60 kph zone. In the area where Henzell Road meets Beerburrum Road, the car moved sideways across the centre line markings. It veered onto the incorrect side of the road whilst travelling at about 140 kph through a blind bend just after the intersection with Pumicestone Road. The police activated their siren and flashing lights and the car stopped after turning left into Porter Road. Mr Bawden was driving and had a blood alcohol reading of 0.149. The distance from Matthew Terrace where police first saw the car to Porter Road where it stopped was 3.1 kilometres.

[4] Police officer Smedley could smell alcohol on Mr Bawden's breath but did not observe his eyes. He did not notice any other physical signs of the effect of alcohol. Police officer Collins noted that Mr Bawden was unsteady on his feet, his eyes were quite bloodshot and he smelled of alcohol.

RTI 151229 :File 1 : Page no 151

[5] Mr Bawden's experienced counsel at trial extensively cross-examined the police officers about minor inconsistencies between their evidence at trial and that at committal and about minor inconsistencies between each officer's evidence. He also suggested that their accounts as to Mr Bawden's driving were exaggerated and implausible, especially in the light of their evidence as to the alleged speed of his car.

[6] Dr Robert Hoskins, the Acting Director of the Government Medical Office, gave evidence of the effect of a blood alcohol level of .149 on the body of an average 20 year old male, namely the slowing of reflexes, responses and coordination.

[7] Mr Bawden gave evidence that he had consumed between five and ten XXXX Gold stubbies and about three Sambucca shots between 8.30 or 9.00 pm and midnight or 1.00 am with friends, including Darren Barnes and Russell Hartley. Darren, Russell and he left Darren's home at about 1.45 am in his car. He drove along Matthew Terrace and into Beerburrum Road, Caboolture. He was playing loud music in the car. He did not see any other vehicles. He did not drive onto the wrong side of the road at any time. He may have exceeded the speed limit but by no more than 15 kph. He noticed a vehicle with its lights on high beam approaching him from behind very quickly. He initially thought it was an inconsiderate driver and sped away to avoid the glare of the headlights. His speed would not have exceeded 110 kph. When he realised he was being followed by a police car, he was angry but looked for an appropriate spot to pull over. He did so after turning left into Porter Road.

[8] Darren Barnes gave evidence that he had a couple of VB stubbies during the evening (three at the most). Towards the end of the night (11.00 pm or midnight) Ben Bawden drove Russell and him along Matthew Terrace where he stopped at a red traffic light. Mr Barnes had been driving cars for about four years. Mr Bawden was driving "perfectly fine and stable". He "had no need to talk to Ben about his driving, look at the speedometer or to feel nervous within [his] own personal self". He did not notice the car cross onto the incorrect side of the roadway. It was ridiculous to suggest that Mr Bawden was driving at 145 kph. He noticed a car with its lights on high beam following close behind them for some distance. When this car activated its siren, Ben slowed down to find a suitable place to pull over and did so shortly afterwards by turning left into Porter Road. The police took Ben to the police station and he and Russell were left with their dog to make their own way to a friend's place.

The application to adduce further evidence

[9] Mr Bawden seeks leave to call evidence in this appeal of a QP9 form which, he says, is inconsistent with the evidence of the police officers as to where they were parked when they first saw his vehicle. Mr Bawden concedes the QP9 form was available at his trial and was in the possession of his lawyers, who obviously decided not to further investigate this alleged inconsistency. There may have been a very good reason for this tactical decision, for example, someone other than police officers Smedley and Collins may have prepared the QP9 form and made a mistake, or the inconsistency, if established, may have been explicable in many other ways. In any case, it was of little consequence. Mr Bawden has not demonstrated any proper reason why this Court should now receive that evidence in accordance with

RTI 151229 :File 1 : Page no 152

the well established principles set out in *Gallagher v The Queen*[1] and *Mickelberg v The Queen*.[2]

[10] Mr Bawden next seeks leave to call evidence from senior police officers to the effect that Redcliffe District Police and Communications Centre operators comply with service procedures which ensure contact is maintained with all individual patrol units, even when a second patrol unit makes a radio call to the Redcliffe District Communications Centre. This evidence was capable of being ascertained at the time of the trial although it was not then in the possession of Mr Bawden or his lawyers. He contends the evidence is inconsistent with the evidence of police officer Smedley at trial about his radio communication whilst he followed Mr Bawden's car. A reading of the relevant portion of the transcript of police officer Smedley's evidence does not support that contention. Mr Bawden has not established that this evidence is relevant to the essential issue at trial, whether he drove dangerously. He has not established under the principles discussed above any basis for this Court to receive that evidence.

[11] He also seeks leave to tender at this appeal photographs taken by his father on 20 October 2002. These, too, were available at trial and were in the possession of his lawyers but they were not tendered in the defence case. Mr Bawden contends that the photographs demonstrate that the aerial photograph of the area where the driving occurred (ex 6) was inaccurate and that the police officer's evidence that he took such a steep bend at high speed was implausible. The photographs which he wishes this Court to receive are not helpful to his case in that they show, much more clearly than the aerial photograph, the blind bend around which the police officer said he drove at speed and partially on the wrong side of the road. No doubt his lawyers did not tender the photographs at trial because they thought they would not advance his case. Again, Mr Bawden has not shown any reason for this Court to receive that evidence.

Appeal against conviction

[12] Mr Bawden raises many points which he contends show that the verdict of guilty was unreasonable. His primary contention is that the evidence of the two police officers was conflicting with each other, with other accounts given by them at committal and was implausible so that the jury should have preferred his evidence and that of Mr Barnes. I will not deal with every other one but they include matters such as police officer Collins giving evidence that her enquiries showed that his vehicle was registered to him at Murgon when in fact at that time it was registered to an address in Cairns. This and other inconsistencies he raises relate to peripheral matters. He also emphasises that the police version as to the high speeds they claimed he was travelling was implausible; he could not have taken the steep bend at 140 kph and the police could not have seen what they claimed to have seen had he been travelling at that speed. These and other matters were canvassed fully at his trial before the jury and were extensively discussed by his counsel in addressing the jury. They did not, either alone or in combination, require the jury to reject the evidence of the police officers.

[13] He next contends that the aerial photograph (ex 6) does not represent a true indication of the road at the time of the offence and he was not examined or cross-

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1 (1986) 160 CLR 392, 397, 399, 407.
2 (1989) 167 CLR 259, 273, 275, 292.

RTI 151229 :File 1 : Page no 153

examined in respect of it. For reasons already given on the unsuccessful application for fresh evidence, it is difficult to see how an attack on the aerial photograph could have assisted Mr Bawden in his trial. He was, of course, able to give evidence of any matters he considered relevant, at least until an objection was taken.

[14] Mr Bawden next emphasises that the tape recording and the transcript of his record of interview with police was indistinct so that the jury may have formed the impression that he did not want to answer questions and inferred that he had something to hide. The difficulty for Mr Bawden is that that was the state of the evidence and his tape recorded conversation with police was admissible even though portions of it may have been indistinct. His Honour told the jury the transcript was only an aid and the tape recording was the evidence. When Mr Bawden gave evidence he had the opportunity to clarify what he said to police if the tape and transcript did not accurately record it.

[15] Mr Bawden has referred us to the evidence of Dr Hoskins as to the effects of an alcohol reading of .149 on a 20 year old male and claims that this was inconsistent with the evidence of the police officers. The evidence set out earlier does not support that contention. The evidence of Dr Hoskins, combined with the evidence of the police officers, was sufficient to enable the jury to conclude beyond reasonable doubt that Mr Bawden was adversely affected by an intoxicating substance when he dangerously operated his vehicle that evening.

[16] Mr Bawden now contends for the first time, and not on oath, that when the court had a view of the scene, police officer Smedley mingled with the jurors and at Porter Road directed traffic around and in the presence of the jury in a way that was detrimental to the defence case. He also contends that because the jury travelled in a bus which was higher and bigger than a police vehicle they had an unrealistic perspective of the scene which they inspected in the middle of a sunny day instead of at 2 am on a dark night. In addition, he points out that the scene had changed markedly from the time of the offence. The learned primary judge directed the jury that the view of the scene was not evidence and it was only to assist them in understanding the evidence and that the present scene was different from its condition at the time of the offence. There is no material before this Court to establish that police officer Smedley behaved inappropriately during the view. These contentions are without substance.

[17] Mr Bawden alleges that the learned primary judge:

> "confused the jury by misnaming one of the prosecution witnesses, and failed to fully explain or clarify to the jury what was required of them when deliberating [sic] the evidence and/or failed to adequately explain the proper and/or legal meaning and legal effect of certain words or phrases and the implications thereof, including:
> a) beyond reasonable doubt
> b) inferences
> c) credibility of witnesses
> d) consistency of evidence
> e) being objective
> f) benefit of doubt
> g) three times over the limit".

RTI 151229 :File 1 : Page no 154

[18] A perusal of the learned primary judge's careful and fair summing-up shows that the learned primary judge gave the customary balanced directions as to the onus and standard of proof. It was of no significance that his Honour mistakenly referred to police officer Collins as police officer Cassidy; he later corrected this. His Honour was not required to explain to the jury how to apply their common sense or to say any more than he did on the drawing of inferences or on the other matters raised. These and the other nit picking complaints in Mr Bawden's written submissions as to the learned primary judge's directions to the jury are baseless.

[19] Mr Bawden next contends that the prosecution case did not exclude the possibility that the police saw another vehicle, not his, being driven in a dangerous manner that evening. There is no evidence to support that contention, even though police officer Smedley agreed that they may have been looking for a VS Commodore earlier that evening in respect of another matter. No witnesses recalled seeing any other vehicles in the area at the time Mr Bawden was driving there and the police officers said that they sighted Mr Bawden's vehicle and followed it until it stopped and Mr Bawden was apprehended.

[20] Mr Bawden has not forgotten the increasingly popular claim in appeals against conviction: "My defence did not present all my case and/or evidence in their possession to the jury or present my defence in such a manner as to be understood and absorbed by the jury". Mr Bawden was represented by an experienced counsel who cross-examined the prosecution witnesses thoroughly and effectively and gave an equally effective and thorough address to the jury. He has certainly not established that any miscarriage of justice has resulted from defence counsel's conduct of the case: *TKWJ v The Queen*.[3] Unfortunately for Mr Bawden, the jury preferred the evidence of the police officers to the defence witnesses. They were entitled to reach that conclusion on the evidence before them.

[21] The many points raised by Mr Bawden, alone or collectively, do not show that on the whole of the evidence it was not open to the jury to conclude beyond reasonable doubt that Mr Bawden drove dangerously at Caboolture on 19 October 2002. The appeal against conviction must be dismissed.

The application for leave to appeal against sentence

[22] Mr Bawden contends the sentence was excessive because of the 18 month disqualification from driving. He argues that a 12 month disqualification was appropriate because he lives at Murgon, 230 kilometres from his home town, Caboolture and the absence of a licence makes it difficult for him to easily visit his family and friends.

[23] As the primary judge noted, Mr Bawden tendered excellent references and is still a young man; he was only 20 when he committed this foolish offence. He has no criminal history, is in good employment and has a promising future. On the other hand, his conduct was potentially dangerous to himself, his passengers and others who might be on or near the road, he has a concerning traffic history, has shown no remorse and does not have the mitigating benefit of an early plea of guilty. A 12 month disqualification period could have been imposed but disqualification from driving for 18 months cannot be said to have been excessive. The sentence imposed

[3] (2002) 212 CLR 124; (2002) 76 ALJR 1579, [13]-[17], [101]-[112].

RTI 151229 :File 1 : Page no 155

was plainly within a sound exercise of discretion. The application for leave to appeal against sentence must also be dismissed.

ORDERS:

1. Application to adduce further evidence refused.

2. Appeal against conviction refused.

3. Application for leave to appeal against sentence dismissed.

[24] **McPHERSON JA:** I agree with the reasons of the President, which deal in detail with, and effectively dispose of, the complaints made by the appellant on his appeal before us. Most of those complaints are directed to challenging the accuracy of minor points of fact in the prosecution evidence which, even if established, would go only and in oblique fashion to the credibility of the police witnesses at trial. Some of them were the subject of address to the jury by the appellant's counsel. As to others, prudence no doubt dictated that any effort to make something of them would be unproductive, and possibly even counter-productive, in the minds of 12 persons using their good sense to decide the case before them. They were all matters which fell essentially within the province of that area of skill and judgment that counsel is expected to bring to the defence of his client at the trial of a criminal charge.

[25] Nothing has been said on appeal to persuade me that the experienced counsel who appeared for the appellant at his trial failed in any respect to draw the attention of the jury to such inconsistencies as there were in the prosecution case, or that the jury would have been influenced in their verdict by other matters now relied on here. This court does not sit to revise jury verdicts based on findings of credibility or fact except in those cases where it can be seen that no reasonable jury properly instructed could have formed the view of the evidence that they did. This is far from being an example of that kind.

[26] Some of those as well as other matters relied on by the appellant could have been, but were not, raised on the material available to the appellant at his trial. Having considered them, I am left with the firm impression that none of them satisfy the requirements for introducing new evidence on appeal, and that none would have had, or if a new trial were to take place, would have, a material influence on the outcome.

[27] The appeal against conviction should be dismissed and, also for the reasons given by the President, the application for leave to appeal against sentence.

[28] **MACKENZIE J:** I agree with the orders proposed by the President for the reasons given by her.

RTI 151229 :File 1 : Page no 156

Special rule about pre-1988 tax agents

(4) An individual is eligible for registration as a *registered tax agent even if the Board is not satisfied that the individual satisfies the requirements mentioned in paragraph (1)(b) if:

- (a) the individual was registered as a tax agent or as a nominee for the purposes of Part VIIA of the *Income Tax Assessment Act 1936* (as in force immediately before the commencement of item 7 of Schedule 1 to the *Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009*) at both of the following times:
  - (i) immediately before the commencement of this Act;
  - (ii) immediately before the commencement of section 39 of the *Taxation Laws Amendment Act (No. 2) 1988*; and
- (b) the individual is otherwise eligible for registration as a registered tax agent.

20-10 Regulations may prescribe system regarding professional associations

The regulations may provide for a system to allow the Board to accredit professional associations for the purposes of recognising professional qualifications and experience that are relevant to the registration of individuals as *registered tax agents and BAS agents.

20-15 Criteria for determining whether an individual is a fit and proper person

In deciding whether it is satisfied that an individual is a fit and proper person, the Board must have regard to:

- (a) whether the individual is of good fame, integrity and character; and
- (b) without limiting paragraph (a):
  - (i) whether an event described in section 20-45 has occurred during the previous 5 years; and
  - (ii) whether the individual had the status of an undischarged bankrupt at any time during the previous 5 years; and

*To find definitions of asterisked terms, see the Dictionary, starting at section 90-1.

RTI 151229 :File 1 : Page no 157

ComLaw Authoritative Act C2013C00651

61

(iii) whether the individual served a term of imprisonment, in whole or in part, at any time during the previous 5 years.

Subdivision 20-B—Applying for registration

Table of sections

20-20 Application for registration
20-25 Registration
20-30 Board to notify you of grant of registration
20-35 Commencement and duration of registration
20-40 Variation of conditions of registration
20-45 Certain events may affect your continued registration

20-20 Application for registration

(1) You may apply to the Board for registration, including renewal of registration, as a *registered tax agent or BAS agent.

(2) An application must be in a form approved by the Board and must be accompanied by:

(a) any documents that are required by the Board; and

(b) the prescribed application fee.

(3) The Board must give the application fee to the Commissioner, who receives the fee on behalf of the Commonwealth.

(4) If you withdraw your application:

(a) within 30 days after the day on which the application was made; and

(b) before the application has been granted or refused;

the Commissioner must refund the application fee to you.

20-25 Registration

Grant of application for registration

(1) If you have applied to the Board for a type of registration, the Board must grant your application if you are eligible for

*To find definitions of asterisked terms, see the Dictionary, starting at section 90-1.

RTI 151229 :File 1 : Page no 158

ComLaw Authoritative Act C2013C00651

62