



Summary of Judgment

DIRECTOR OF PUBLIC PROSECUTIONS v JOSHUA LOMBARDO

[2022] VSCA 204

21 September 2022

Today, the Court of Appeal (McLeish, Niall and Kennedy JJA) dismissed a Crown appeal against a sentence imposed for dangerous driving causing death which concerned the State's mandatory imprisonment laws.

In March 2020, Joshua Lombardo turned right on to a rural highway before daybreak. His side window was fogged and he could see a headlight approaching from his right. He wrongly judged that he had time to turn safely, and motorcyclist Aaron Flack was killed in the ensuing collision. Mr Lombardo pleaded guilty to one count of dangerous driving causing death and the sentencing judge imposed a three-year community correction order with an unpaid community work condition.

The *Sentencing Act 1991* requires that a custodial sentence be imposed for certain offences, including dangerous driving causing death, unless an exception applies. The Court clarified the operation of two of these exceptions.

One exception applies where the offender proves that they have 'impaired mental functioning' that would result in them being subject to 'substantially and materially greater than the ordinary burden or risks of imprisonment'. The Court ruled that, where the form of 'impaired mental functioning' relied on is mental illness, the offender must prove they have a diagnosed mental illness at the time of sentence. Symptoms of mental illness falling short of a formal diagnosis will not suffice, even if those symptoms are likely to worsen in custody.

Another exception applies where there are 'substantial and compelling circumstances that are exceptional and rare'. This two-stage test requires that the circumstances, in combination, be:

- (a) 'substantial and compelling', meaning that they forcefully or powerfully justify not imposing a custodial sentence; and
- (b) 'exceptional and rare', meaning that they are 'wholly outside the ordinary factors' typical of the relevant kind of offending.

The Court accepted the Director of Public Prosecutions' arguments that the sentencing judge erred in finding that the two exceptions applied to this case.

First, it was not open to have found that the respondent had 'impaired mental functioning' because, at the time of sentence, he had only mild symptoms falling short of a diagnosis of mental illness.

Secondly, it was not open to have found that there were ‘substantial and compelling circumstances that are exceptional and rare’. The respondent’s circumstances relevantly included his low moral culpability for the offending — which involved a momentary lapse of judgment — youth, lack of criminal history, immediate acceptance of responsibility, guilty plea, strong family and vocational support, and symptoms of anxiety and post-traumatic stress; he was also reminded of the collision by a memorial to the victim at the site. The Court considered that it was open to have found these circumstances ‘substantial and compelling’, but not ‘exceptional and rare’. In combination, they were not wholly outside the factors typical of the ‘ordinary tragic case’ of this offence.

Having clarified the governing principles, the Court exercised its residual discretion to decline to interfere with the sentence — partly because the rehabilitative progress the respondent had made under the community correction order would be undone by now imposing a custodial sentence.

The Court noted that applying the mandatory sentencing provisions to dangerous driving causing death has given rise to ‘potentially unintended consequences’. Custodial sentences for dangerous driving causing death must now be imposed in ‘unexceptional’ cases involving low moral culpability — typically, cases of momentary inattention or misjudgement. The Court said:

the effect of the ‘exceptional and rare’ requirement is to target those very cases as ones calling for imprisonment. That places this offence in the same position as the significantly more serious offence of culpable driving causing death, whereas cases of this kind are in truth closer to cases of mere carelessness. On one view, this introduces an unfortunate anomaly into the law governing sentencing for these offences, and warrants reconsideration.

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NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the Court’s reasons or to be used in any later consideration of the Court’s reasons. The only authoritative pronouncement of the Court’s reasons and conclusions is that contained in the published reasons for judgment.