Summary of Judgment

DIRECTOR OF PUBLIC PROSECUTIONS v CHRISTOPHER BROWNE

[2023] VSCA 13

10 February 2023

The Court of Appeal (Kyrou, T Forrest and Kennedy JJA) today allowed an appeal by the Director of Public Prosecutions against the sentence imposed upon the respondent, Christopher Browne, by the County Court on 11 August 2022, namely, a community correction order ('CCO') of 3 years with a condition that he perform 250 hours of unpaid community work.

On Christmas Day 2020, the respondent's two year old son died when he was thrown from the respondent's two-seater buggy in the course of the respondent attempting to perform a 'burnout' in a rural paddock. The respondent deliberately disregarded several safety precautions, including by holding his son in an unrestrained position on his knee and overriding the buggy's seatbelt interlock mechanism which limited the buggy's speed when the seatbelt was not engaged. The respondent's sister, who occupied the second seat in the buggy, suffered minor injuries.

The respondent was initially charged with the offence of culpable driving causing death, which carries a maximum penalty of 20 years' imprisonment. Prior to his trial on that charge in the County Court, he made an application to the judge under s 208 of the *Criminal Procedure Act 2009* for a sentence indication in the event that he pleaded guilty to a charge of dangerous driving causing death (maximum penalty of 10 years' imprisonment) and a charge of reckless conduct placing a person in danger of serious injury (maximum penalty of 5 years' imprisonment).

Section 5(2H) of the *Sentencing Act 1991* precluded the judge from imposing a CCO (either alone or in combination with a term of imprisonment) for the proposed charges unless the respondent satisfied one of the exceptions in the section. The prosecutor accepted that, due to the post-traumatic stress disorder ('PTSD') that the respondent suffered following his son's death, the respondent satisfied one of the exceptions, namely that he 'has impaired mental functioning that would result in [him] being subject to substantially and materially greater than the ordinary burden or risks of imprisonment'. However, the prosecutor submitted that, due to the seriousness of the offending and the respondent's high moral culpability, only an immediate term of imprisonment was appropriate.

On 22 June 2022, the judge gave an indication that, if the respondent pleaded guilty to the two proposed charges, a custodial sentence would not be imposed. On the same day, the Director filed a new indictment which substituted the two proposed charges for the charge of culpable driving causing death, and the respondent pleaded guilty to those charges.

The judge found that the respondent's offending was 'objectively serious' and that his moral culpability was 'high'. Notwithstanding these findings, on 11 August 2022, he sentenced the respondent to a CCO of 3 years.

The Director appealed against the sentence on the ground that it is manifestly inadequate. The Director submitted that, in the light of the judge's findings regarding the objective seriousness of the offending and the respondent's high moral culpability, it was not open to the judge to impose a CCO. The Director contended that the judge's sentence was contrary to a number of decisions of the Court of Appeal which have consistently held that, ordinarily, persons convicted of dangerous driving causing death should be sentenced to a term of imprisonment rather than a CCO unless there are exceptional circumstances such as low moral culpability. In particular, the Director relied upon the case of *Stephens v The Queen* (2016) 50 VR 740 where the offender, who killed his 9 year old daughter when the buggy he was driving rolled over in circumstances strikingly similar to the present case, was sentenced to 3 years and 3 months' imprisonment for a charge of dangerous driving causing death.

The Court of Appeal accepted the Director's submissions, allowed the appeal, set aside the CCO and resentenced the respondent to 15 months' imprisonment with a non-parole period of 6 months. In arriving at this decision, the Court made the following observations at paragraphs 99 to 101 of its judgment.

> We agree with the Director's submission that only a sentence of a term of imprisonment with a non-parole period is open in the present case. The respondent's offending was objectively serious and his moral culpability was high because, being aware of the warnings about the dangers involved and the safety measures that were available to address them, he deliberately did not heed the warnings, disregarded the safety measures and embarked on inherently dangerous conduct. The respondent: exceeded the passenger limit; placed [his son] in an unrestrained position in the buggy; overrode the seatbelt safety interlock system; drove in a manner deliberately calculated to cause the buggy to lose traction; and deliberately set out to drive in a manner designed to scare his sister, who was a passenger in the buggy.
>
> Of course, the determination of an appropriate sentence by this Court requires consideration of not only the gravity of the respondent's offending and his moral culpability, but also all relevant sentencing considerations as illuminated by the evidence before this Court. As conceded by senior counsel for the Director, the respondent is able to call in aid very powerful mitigating circumstances which warrant considerable leniency in both the head sentence and non-parole period. The mitigating circumstances include:

a) The respondent's plea of guilty and its additional utilitarian value due to its timing during the COVID-19 pandemic.
b) The respondent's immediate cooperation with police, his overwhelming remorse and his excellent prospects of rehabilitation.
c) The respondent's PTSD, which would result in the burden of imprisonment being substantially and materially greater for him than other prisoners who did not suffer from this condition, and his willingness to seek treatment for his mental health problems.
d) The fact that the respondent not only does not have a criminal record but he is a person of good character who has an impressive work history and makes valuable contributions to his local community.
e) The family support enjoyed by the respondent.
f) The additional anxiety that the respondent will experience having regard to the fact that his wife is expecting another child.
g) The absence of any risk that the respondent will reoffend, resulting in protection of the community and specific deterrence requiring little, if any, weight as part of the intuitive synthesis.
h) Importantly, the fact that six months have elapsed since the respondent was sentenced to a CCO and that, during that period, he has complied with the CCO and completed 64 per cent of the unpaid community work component of the CCO.

When the above mitigating circumstances are considered in combination and in the context of the gravity of the respondent's offending, his moral culpability and the important consideration of general deterrence, they warrant a sentence that is merciful.

The Court of Appeal stressed that the present case has unique features which limit the extent, if any, to which the sentence it imposed is capable of providing assistance in future cases.

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.