DPP v Browne [2023] VSCA 13

Emma Strugnell & Cameron Gauld, Barristers

A decision of the Court of Appeal determining a Director's appeal against sentence imposed following a sentence indication.

Facts

In June 2020, the respondent, Browne purchased a new two-seater Polaris buggy. The salesperson explained the rollover risks informed him of buggy's safety features. The salesperson also suggested the wearing of helmets, although not a legal requirement. The safety features are of particular note. Critically, the buggy included a safety feature attached to the seat belt interlock, which flashed a warning light and reduced the vehicle speed to a maximum of 24 km/hr when the seat belts were not locked correctly. There were additional warning stickers inside the vehicle notifying of the risk of serious injury from a rollover and another warning stating that that two-person occupant capacity must not be exceeded.

On Christmas Day 2020, the respondent chose to drive the buggy. He had driven it on approximately 20 occasions previously. As Browne got into the vehicle, he saw that the seatbelt was already clipped in. Rather than unclipping it, he sat on top of it, thereby overriding the interlock safety feature. The respondent placed his young son on his left knee, using his left hand to keep his son in place and his right hand to steer the vehicle. The respondent's sister got into the passenger seat of the vehicle and placed her seat belt on correctly. None of the parties were wearing helmets.

The respondent performed several "doughnuts" in a paddock, then tried to perform another doughnut on the gravel driveway to the property. The buggy flipped and ejected the respondent's son, who was crushed by the rollbars of the buggy. Upon police arrival, the respondent admitted performing 'burnouts' and having bypassed the seatbelt safety mechanism for his own seat, while insisting that his sister wear hers. He admitted that it was easy to become complacent with the safety warnings.

The matter proceeded as a Sentence Indication before the County Court. Of note, the defence tendered reports indicating the respondent had been diagnosed with Post Traumatic Stress Disorder as a result of the incident. The respondent had no prior criminal history, a good employment history, and maintained the support of his family including his wife. There were

no drug or alcohol issues. The defence argued that the diagnosis of PTSD enlivened s5(2H), such that the court could impose a Community Corrections Order ('CCO') in isolation.

The Prosecution accepted that the respondent suffered from PTSD, and that the condition would result in the respondent being subject to a 'substantially and materially greater than the ordinary burden of imprisonment,' such that the exception in 5(2H) (c) was satisfied. The prosecution nevertheless submitted the seriousness of the offending- and the respondent's moral culpability - was such that only an immediate term of imprisonment was appropriate. Prosecution Counsel drew the court's attention to the case of Stephens v R[1], which sets out applicable principles and has some factual similarities.

The Judge assessed the respondent's moral culpability as 'high' and the objective seriousness as 'mid-level' for the offence. He found the respondent's driving to involve a "serious degree of irresponsible behaviour." He nevertheless felt that CCO could meet the objectives of punishment. The Judge considered that the sentencing objectives of just punishment and specific deterrence were moderated by the respondent's diagnosis of PTSD. The respondent did not submit that his incarceration would amount to exceptional hardship to others.

The Director appealed. The Crown argued the that in assessing the respondent's moral culpability as high, and finding that the offending was objectively serious, it was not open to the court to impose a CCO. It submitted a non-custodial sentence was not open. It submitted that the sentence was manifestly inadequate, arguing that where there is a fatality, a sentence of imprisonment to be actually served is to be expected. The Crown relied upon the decisions of Stephens v R; Peers[2]; Neethling[3] and Lombardo.[4] In Neethling, the court stated that a non-custodial sentence for the offence should exceptional. The Court in Lombardo went further in indicating that the exception only applies where the offender's moral culpability is low, such as where there has been momentary inattention or misjudgement. That was not the case here. It was, in the Crown submission, the wrong form of sentence.

Determination of Appeal.

The Court of Appeal agreed with the Crown, affirming the line of authority that the offence of dangerous driving causing death should ordinarily result in a term of imprisonment.[5] A non-custodial disposition is only available where the offenders' moral culpability is assessed as low. It considered that the factors in mitigation advanced by defence were insufficient either

[1] *Stephens v R* (2016) 50 VR 740
[2] *Peers v R* [2021] VSCA 264
[3] *DPP v Neethling* (2009) 22 VR 466
[4] *DPP v Lombardo* [2022] VSCA 204
[5] *DPP v Browne* [2023] VSCA 13 [56]

individually or in combination to warrant a non-custodial disposition. As Peers noted, it is the necessary reality of this offending that people with unblemished records, undoubted remorse, and with little or no prospects of re-offending will receive an immediate term of imprisonment.

The Court was critical of the failure of the Sentencing Judge to articulate how a CCO might address the relevant sentencing purposes in the circumstances of the particular case. It criticised the Sentencing Judge for his apparent failure to engage with Stephens by reference to its principles factual matrix, such would justify such a departure from the expected range of sentences. Such an examination, the Court of Appeal noted, would have revealed that only a sentence of imprisonment could meet the needs of general deterrence, adequate punishment, and denunciation. It stressed that where a particular case is relied upon, it is incumbent on the sentencing judge to explain the extent to which that decision informed the exercise of that sentencing discretion.

Key principles

There was extensive discussion at the Court of Appeal about what parties should do at a sentencing indication hearing. Although the Court did not determine this issue, defence counsel should advise their clients that a plea in reliance of a sentence indication does not affect the Crown's statutory right of appeal. It would be expected that prosecution counsel are in future more vociferous at sentencing indication hearings. Where the Crown considers that a sentence indication is inadequate in the particular circumstances of the case, Prosecution Counsel are likely to state this on record and indicate the Crown's intention to appeal.

It would appear that as a consequence of the decision, the appropriate Order made by the Court of Appeal following a sentence indication in the County Court is for the Court of Appeal to set aside the sentence of the lower court, and to substitute its own sentence.

This would, however, place the defence in a difficult position, such as where an accused may have a proper and appropriate defence to the charges but seeks a sentence indication for pragmatic reasons.

If the defence become aware of a Crown appeal, it may be preferable to seek that the conviction and sentence be set aside, and the matter be remitted for determination consistent with the policy of protecting an accused's rights. This is particularly important where the judicial officer is legislatively prohibited from imposing a higher sentence than the indication given, and the defence have acted in reliance of that indication.

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Emma has extensive experience as an advocate in summary and indictable crime. She practices in all areas of criminal law and appears in all jurisdictions. Emma read with Megan Tittensor and her Senior Mentor was Peter Morrissey SC.

Prior to coming to the Bar, Emma worked as a Senior Criminal Lawyer at Victoria Legal Aid. She has worked at the Broadmeadows, Dandenong and Ringwood offices, as well as appearing in indictable matters at Magistrates' and County Courts. Prior to joining Victoria Legal Aid, Emma volunteered at James Dowsley and Associates, Victoria Legal Aid, and the Peninsula Community Legal Centre.

Emma regularly appears in the County Court for indictable bail applications, plea hearings, appeals against conviction, and appeals against conviction and sentence. She has also appeared in the Court of Appeal and Coroners Court.

Emma holds an Indictable Crime Certificate and is on the VLA Preferred Trial Barrister List. She was previously selected to participate in VLA's Trial Counsel Development Program (2020/2021).

Emma also holds undergraduate degrees in Arts (First Class Hons) and Science, where she majored in History, Classics and Pharmacology. In addition, she holds a Doctorate in History.

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Cameron's practice is generally focused on all facets of the Magistrates Court for criminal and intervention order matters.

Cameron came to the Bar after 8 years as a prosecutor with Victoria Police. In this role he ran matters in the Magistrates' Court and Children's Court on a daily basis ranging from mention court to contested hearings, including family violence intervention orders and bail applications – and brings these skills to his practice at the Bar. He was also the manager of the Sex Offence Team and regularly appeared in matters in summary stream.

Admitted to the Supreme Court of Victoria in 2013, Cameron worked in the Civil Litigation Unit, Commissions, and Inquiries Division and the VGSO (Police Branch). These units gave him experience in civil trials relating to torts, coronial inquests, royal commissions, and the provision of complex legal advice. He was also the manager of Supreme Court bail applications that were on appeal from the Magistrates' Court. As such, he was regularly appearing in that jurisdiction on bail matters.

Cameron spent almost a year, briefed by Victoria Police, for the Royal Commission into the Management of Police Informants (Lawyer X).

Cameron read with Mr Pardeep Tiwana (now County Court Judge Tiwana) and his senior mentor is Mr Patrick Tehan KC.

Practice Areas:

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