48/1980

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v BAKER

Lush, Anderson and Marks JJ

10 April 1980

SENTENCING - CULPABLE DRIVING - ACCUSED DROVE ON TO INCORRECT SIDE OF ROAD AND COLLIDED WITH ANOTHER VEHICLE KILLING A PASSENGER - ACCUSED PLEADED GUILTY - SENTENCING JUDGE SENTENCED HIM TO SERVE 3½ YEARS WITH A MINIMUM OF 21 MONTHS - WHETHER SENTENCE MANIFESTLY EXCESSIVE.

HELD: Application for leave to appeal dismissed.
It is not difficult to imagine that a lesser sentence could have been imposed without giving rise to criticism. On the other hand, if one looks at the maximum sentence for this offence, seven years, the placing of this particular offence in the middle range of offences does not appear to be inappropriate. The Judge was pressed at one stage to reflect the mitigating factors in the case in his determination of the minimum term and it appears by comparison with the term of imprisonment and the minimum term that he has done this. The Court is unable to say that the combination of the sentence of imprisonment and minimum term which the learned judge fixed on in this case is inappropriate to the offence which he was considering committed in the circumstances which he also considered and being assessed in the light of the other factors, some of them supervening, to which he referred.

LUSH J: (with whom Anderson and Marks JJ agreed) The applicant, was presented in the County Court on 1st February 1980 upon one charge that on 27th August 1977, by the culpable driving of a motor car he caused the death of Anne Marie Bennington in that he, the said Robert Bruce Baker, drove the said motor car (a) negligently; further or in the alternative (b) whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the said motor car.

The applicant left a hotel in Doncaster Road and was driving eastward. The distance which he travelled before the accident was no great distance at all. His vehicle came into collision with a car travelling in the opposite direction in which there were the driver and three passengers. The collision was right side to right side and the passenger in the right rear seat of the west bound car was killed. The collision occurred on that side of the road on which the applicant should not have been travelling. After the accident the applicant's car moved on some thirty or thirty-five yards and turned into a side street to the right where it struck a fire hydrant and a tree and came to a stop. The applicant left the scene of the accident and walked to his parents' house, where he lived, some two miles away. About two hours later he was found to have a blood alcohol content of .215, though there was evidence that on his arrival at home his father had given him some brandy. He admitted to having had six to seven pots of beer at the hotel while he had been there.

In 1968 he had been convicted three times within a period of six weeks on charges of exceeding the speed limit in a thirty-five miles per hour zone. In 1970 he had been convicted of driving a motor vehicle while having a blood alcohol content exceeding .05 per cent and with failing to comply with a traffic control signal, and was fined, his licence was cancelled, and he was disqualified from obtaining a licence for a period of three months. After hearing a plea in which witnesses were called to give evidence of his good character and of changes in his attitude in the interval between the date of the accident and the date of the court hearing, and his father was also called to give evidence relating to the administration of brandy to him on his return home, the learned Judge sentenced the applicant to imprisonment for a term of three and a half years and fixed a minimum term of one year and nine months to be served before the applicant became eligible for parole. Mr Danos, who appeared for the applicant, informed us that his researches by enquiry from Crown authorities showed that in the years 1978 and 1979 sentences up to four years had been imposed for this offence, but that four years was the maximum sentence which had been imposed in either of those years, the most common sentence being three years and the middle fifty per cent being somewhere between two years and three years.

The mitigating matters which the learned Judge referred to in pronouncing sentence can be summarised in this way. He found that the applicant was of general good character. He thought that the 1968 convictions should not exert a powerful influence on the problem which he had under consideration. On the other hand, he considered that the 1970 conviction for a blood alcohol offence should have taught the applicant a lesson which apparently he had not learned. He said that he was prepared to take into consideration, and did take into consideration, the applicant's overseas service with the Australian Military Forces. (The applicant is now aged thirty-four and had served in Vietnam.) He accepted evidence that the applicant had been subjected to some personal emotional disturbance not long before the incident out of which the charge arose, and evidence that there had been a change in the applicant's outlook and attitude since the date of the accident. He took into consideration also the fact that the plea of guilty had spared the relatives of the dead girl, who had been in the car at the time of the accident, the ordeal of giving evidence, and he referred, though he indicated that he was not prepared to give very great weight to it, to the length of time which had passed between the date of the offence and the date of the hearing.

On the other hand, he emphasised that it was necessary to bring home to the applicant himself that this sort of conduct was not acceptable, though he expressed himself as not regarding that aspect of the matter as very important by the time the case reached him. But he stressed strongly the need for sentences which would have a generally deterring effect in these particular offences. Mr Danos' submission was that despite his setting out of these matters, the final result showed that the learned Judge had not given real weight to the matters and certainly had not given adequate weight to them.

The definition of the offence constituted by s318 makes the task of assessing an individual offence or sentence one which has its own difficulties. The difficulties which I have in mind arise from the fact that the offence does not depend on the subjective intention or the subjective attitude of the alleged offender. Culpability depends on objective fact regardless of the state of mind of the offender. Relevantly to this charge, it may be found in conduct which is negligent in the sense defined in s318(2)(b), that is a failure unjustifiably and to a gross degree to observe the proper standard of care. Culpability in sub-paragraph (c) of that sub-section may also lie in driving while under the influence of alcohol to such an extent as to be incapable of having proper control; again a matter to be objectively assessed. It follows that there can be cases in which the offence created by the section is committed in circumstances in which it must be reckoned a gross offence but in which it is impossible to detect any of the duality usually described as moral turpitude in the offender. What I have just said has, I think, a particular relevance to the double task which a sentencing Judge faces of fixing a sentence of imprisonment and fixing a minimum term. The nature of the offence, the mind of the offender being irrelevant, may make it appropriate in a given case to impose a severe sentence as the term of imprisonment and to take the mitigating factors into consideration in fixing a minimum term.

There are limits, of course, beyond which this process cannot be taken, and, as this Court has made clear in the case of *Kortum* in which judgment was given on 23rd September 1977, a minimum term should not be imposed which is such as to destroy the deterrent effect of the sentence. Compared with the range of sentences of which Mr Danos spoke to us, the sentence imposed here is a substantial one, and while I would not be disposed to apply the word heavy to it myself, it is not difficult to imagine that a lesser sentence could have been imposed without giving rise to criticism. On the other hand, if one looks at the maximum sentence for this offence, seven years, the placing of this particular offence in the middle range of offences does not appear to me to be inappropriate. The learned Judge was pressed at one stage to reflect the mitigating factors in the case in his determination of the minimum term and to me it appears by comparison with the term of imprisonment and the minimum term that he has done this. For my part I am unable to say that the combination of the sentence of imprisonment and minimum term which the learned judge fixed on in this case is inappropriate to the offence which he was considering committed in the circumstances which he also considered and being assessed in the light of the other factors, some of them supervening, to which he referred. Accordingly, my opinion is that the sentence should stand and that the application should be dismissed.