IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M129 of 2011

ON APPEAL FROM THE COURT OF APPEAL, SUPREME COURT OF VICTORIA

BETWEEN:

TRENT NATHAN KING

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S REPLY ON THE NOTICE OF CONTENTION

PART I: SUITABILITY FOR PUBLICATION

1. The Respondent certifies that this submission is in a form suitable for publication on the internet.

Part VII: RESPONDENT'S ARGUMENT ON THE NOTICE OF CONTENTION

Creation of new offence

7.50 The Respondent accepts that the offence of dangerous driving causing death was introduced by the legislature to fill a gap between the offence of culpable driving causing death (which carried a maximum penalty of 20 years imprisonment) and the offence of dangerous driving (which carried a maximum penalty of 2 years imprisonment).

7.51 However, in doing so, the legislature did not intend to create a new driving offence with elements different to that of the existing offences. But rather, the legislature simply sought to fill the gap by taking the offence of dangerous driving and dividing it into two categories – that of dangerous driving *simpliciter* and dangerous driving causing death or serious injury. In short, the issue was perceived to be a sentencing problem (inadequate maximum penalty) rather than any problem with the respective content of the existing offences.

7.52 Section 64(1) of the ***Road Safety Act 1986*** provides for dangerous driving *simpliciter* –

> A person must not drive a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case.

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7.53 The provision applied to all examples of dangerous driving; which could range from one extreme of driving a vehicle at excessive speed with a passenger on the rooftop[1] to the other extreme where the driving results in a collision causing the death of multiple victims.[2] A maximum penalty of only 2 years imprisonment was deemed incapable of providing appropriate punishment for the very broad range of offences captured by the provision.

7.54 Section 319(1) of the ***Crimes Act 1958*** was introduced on 13 October 2004.[3] That section, before its later amendment in 2008, provided as follows –

> A person who, by driving a motor vehicle at a speed or in a manner that is dangerous to the public having regard to all the circumstances of the case, causes the death of, or serious injury to, another person is guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum).

7.55 Thus, in its original form, section 319(1) is indistinguishable in substance from section 64(1) apart from the requirement that the driving in question causes death or serious injury. In short, the amendments to the offence of dangerous driving are "consequences" driven – where the maximum penalty increases as consequences become more serious.

7.56 For example, in ***DPP v Oates***,[4] Neave JA observed –

> I note that the consequences of dangerous driving determine whether a person can be convicted of the offence of dangerous driving or of dangerous driving causing death or serious injury. The maximum term of imprisonment for a person convicted of dangerous driving, is two years, even in circumstances where the offender has a very high level of moral culpability. By contrast, the maximum term of imprisonment which may be imposed on a person who kills or seriously injures another person while driving dangerously is five years. This is the case even though a person convicted of this offence may be less morally culpable than a person who has driven dangerously, but has been fortunate enough to avoid harming someone else.

7.57 That the creation of the offence of dangerous driving causing death or serious injury is in response to a perceived sentencing issue rather than an "offence content" issue can be best demonstrated by the amendments made to section 319(1) in 2008.

7.58 In introducing the amendment, the Attorney-General stated in the Second Reading Speech[5] -

> The offence of dangerous driving causing death or serious injury involves a lower degree of fault than the related offences of culpable driving causing death and negligently causing serious injury.
>
> In order to clarify the hierarchy of these offences, the bill will split the offence of dangerous driving causing death or serious injury into two offences. The penalty for the offence of dangerous driving causing death will be increased from 5 to 10 years. The maximum penalty for the offence of dangerous driving causing serious injury will remain at 5 years.

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[1] See, for example, *R v Zukankovic*, unreported, County Court, 8/9/2010
[2] See, for example, *R v Towle* [2008] VSC 101
[3] See section 6, *Crimes (Dangerous Driving) Act* 2004
[4] [2007] VSCA 59, at [21]
[5] See VicHansard, *Crimes Amendment (Child Homicide) Bill*, Hulls, 6/12/2007, at page 4413

This change places greater emphasis on the harm that is caused by the offence and is consistent with the policy behind the creation of the child homicide offence and the increase to the penalty for negligently causing serious injury.

7.59 Section 319(1) of the ***Crimes Act 1958*** was then amended to divide into two further categories – dangerous driving causing death and dangerous driving causing serious injury.[6] Section 319 now reads in its current form –

> (1) A person who, by driving a motor vehicle at a speed or in a manner that is dangerous to the public having regard to all the circumstances of the case, causes the death of another person is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).
>
> (1A) A person who, by driving a motor vehicle at a speed or in a manner that is dangerous to the public having regard to all the circumstances of the case, causes serious injury to another person is guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum).

7.60 Thus, the legislature has again reacted to the perceived inadequate maximum penalty where the dangerous driving in question causes death. However, in doing so, the provisions again reflect the substance of dangerous driving *simpliciter* as contained in section 64(1).

Similar approach adopted by legislature in respect of other offences

7.61 The approach adopted by the legislature in respect of dangerous driving offences is hardly novel.

7.62 For example, the offence of arson contrary to section 197(6) of the ***Crimes Act 1958*** carries a maximum penalty of 15 years; whereas arson causing death contrary to section 197A of the same Act carries a maximum penalty of 25 years imprisonment. In respect of the offence of arson casing death, the prosecution does not need to prove that an accused intended to cause the death, or was reckless as to that result; it is sufficient to prove that an accused had the mental state necessary for the offence of arson, and that death resulted. Thus, in this way, the additional requirement in section 197A of proving the relevant act in fact caused death does not colour the content of what is required to prove the constituent act of arson.

Tiers of driving offences in other jurisdictions

7.63 Whilst criminal liability for driving offence differs amongst other Australian jurisdictions, it is not correct to say that offences of dangerous driving causing death sit on the same rung as culpable driving causing death in all other jurisdictions. For example, in Western Australia, there are multiple tiers of liability –

- careless driving contrary to section 62
- dangerous driving contrary to section 61
- reckless driving contrary to section 60
- dangerous driving causing bodily harm contrary to section 59A
- dangerous driving causing death or grievous bodily harm contrary to section 59.

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[6] See section 5, *Crimes Amendment (Child Homicide) Act* 2008

7.64 Section 59 offences are divided into two categories – section 59(1)(a) offences which relate to driving while under the influence of alcohol or drugs to such an extent as to be incapable of having proper control of the vehicle; and section 59(1)(b) offences which relate to driving in a manner that is dangerous to the public. In respect of section 59(1)(a) offences, the maximum penalty is 20 years imprisonment where the relevant driving has caused the death of another person – see section 59(3)(a)(i). It is to be noted that section 59(1)(a) corresponds to the Victorian sections 318(c) and (d) of the ***Crimes Act 1958***, that is specified forms of culpable driving with the same maximum penalty. In respect of section 59(1)(b) offences, the maximum penalty is 10 years imprisonment where the driving has caused the death of another (and not committed in circumstances of aggravation) – see section 59(3)(b)(i). Again, section 59(1)(b) corresponds to the Victorian section 319(1) of the ***Crimes Act 1958.***

Application of decisions of *McBride v The Queen* and *Jiminez v The Queen*

7.65 The Respondent joins issue with the general contention that the above decisions can be distinguished because section 319(1) requires proof that the dangerous driving in question caused the death of a person whereas the New South Wales section 52A provisions allow absence of causation as a statutory defence.

7.66 In short, the issue of causation does not inform the content of what is "dangerous" for the purposes of liability; the only difference between the two regimes is as to which party bears the burden of proving causation. The Respondent rejects the proposition that simply because the prosecution is required to prove causation,[7] it follows that the element of "dangerous" should import some fault element.

Fault element

7.67 The Respondent joins issue with the proposition that the offence of dangerous driving causing death must have as a constituent element a requirement that "the driving merits criminal punishment". Such a requirement is necessary in negligence-based criminal offences as it enables a jury to grapple with the important distinction between civil-based negligence and criminal-based negligence; but where an offence does not possess that quality, such a requirement is unhelpful to a jury.

7.68 In the circumstances of this case where the jury were directed that the offence of culpable driving causing death required proof of "gross negligence", but that the alternative of dangerous driving causing death did not, the jury would have understood the need for the requirement in respect of the former offence but not the latter. Furthermore, the absence of such a requirement in respect of the latter offence would not have led a jury to reject it as a viable offence, for the very reason that it was in fact being left by the trial judge as a statutory alternative. In short, the inherent quality of the statutory alternative makes plain the gravity of the offence.

Correlation between moral culpability and legal responsibility

7.69 The Appellant contends that the Court of Appeal decision in ***R v De Montero*** more appropriately aligns the level of culpability for dangerous driving causing death between the indictable offence of culpable driving causing death and the summary offence of dangerous

[7] See, generally, *Royall v The Queen* (1991) 172 CLR 378

driving *simpliciter*; with such alignment said to be necessary because the legislature has increased the maximum penalty for the offence in question.

7.70 With respect, such an argument is difficult to maintain – for the simple answer is that the legislature has belatedly recognised that the offence of dangerous driving which, by its definition encompasses bad examples of driving behaviour on the roads, did not have a sufficiently adequate maximum penalty to capture all forms of offending.

7.71 That this is so is borne out by the offences the subject of appeal in ***McBride v The Queen*** – as long ago as 1964, the maximum penalty for a New South Wales section 52A(1)(a) offence which involved driving at a speed or in a manner dangerous to the public occasioning the death of a person was one of 5 years imprisonment. Such a high maximum penalty for a driving offence some 50 years ago lends strong support to the Respondent's general contention that no alignment by the Victorian Court of Appeal is necessary.

No demonstrated need for change

7.72 Neither the Appellant, nor the Court below, has pointed to any examples of offending which were captured by the pre-***De Montero*** test but in all the circumstances should not have been (and would not have been had the matter proceeded under the ***De Montero*** test). And this is despite the statutory provision operating for some 5 years before the Court of Appeal handed down the decision in ***R v De Montero*** in November 2009, a judgment taking over 11 months to deliver.

General importance of precedent

7.73 The test laid down by this Court in ***McBride v The Queen*** and ***Jiminez v The Queen*** in relation to dangerous driving occasioning death is fundamentally different from the test laid down by the Court of Appeal in ***R v De Montero*** in relation to dangerous driving causing death.

7.74 This departure raises the importance of precedent within court hierarchies in Australia. Putting to one side the question of whether this Court's interpretation of the statutory meaning of dangerous driving occasioning death constitutes binding precedent,[8] there can be little doubt that the interpretation by this Court of a similar provision is of strong persuasive authority on the interpretation to be given to similar provisions by Victorian courts. The general approach adopted by courts in such circumstances is that a departure is only warranted where a court is satisfied the earlier interpretation is plainly wrong;[9] and the Respondent submits that position is simply not open to the Victorian Court of Appeal.

Dated: this 16th day of November 2011

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[8] See, for example, *Ogden Industries Pty Ltd v Lucas* [1970] AC 113, at 127, per Lord Upjohn; *Brennan v Comcare* (1994) 50 FCR 555, at 572-573; 122 ALR 615, at 634, per Gummow J
[9] See, for example, *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1