

KING v THE QUEEN (M129/2011)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2011] VSCA 69

Date of judgment: 17 March 2011

Date special leave granted: 2 September 2011

Following trial in 2008, the appellant was found guilty of 2 counts of culpable driving causing death, contrary to s 318 of the *Crimes Act 1958 (Vic)* (the Act). He was sentenced to a total of 7½ years' imprisonment with a non-parole period of 4½ years.

In 2005 the appellant, then aged 19, was driving two friends home to Oakleigh, having already dropped off a third friend in Cranbourne. He was unfamiliar with the area and drove past a *Give Way* sign on Evans Road into the intersection with Thompsons Road. A truck coming down Thompsons Road and driven by one Grayson, was unable to brake in time; the truck collided with the left hand side of the appellant's car. The appellant's two friends were killed.

Although familiar with the intersection, Grayson was not aware until after the accident that there was a *Give Way* sign on Evans Road. The intersection was a "black spot" because of the number of collisions involving injuries or fatalities that had occurred previously. After this accident, a roundabout was installed and no further fatal accidents had occurred. Expert evidence indicated that the appellant was travelling well within the speed limit of 80 kph. There was no evidence that the appellant had driven irresponsibly leading up to the collision and it was not disputed that he had not had any alcohol prior to driving. There was a dispute as to whether the appellant had consumed cannabis prior to driving. The appellant admitted he had used cannabis the day before, but not on the day of the accident. Analysis of the appellant's blood taken after the collision indicated a level of cannabis such as to impair his driving skills. Analysis of the deceased men's blood showed a high level of cannabis. It was suggested at trial that passive smoking may have explained the appellant's cannabis reading.

The Crown case on culpable driving causing death was put on two bases: first that the appellant drove negligently and second that he drove whilst under the influence of cannabis. The appellant was found guilty on the basis of gross negligence but not of driving under the influence. The trial judge had also left to the jury the statutory alternative (and lesser) charge of dangerous driving causing death contrary to s 319(1) of the Act. The trial judge directed the jury that on that alternative charge, the way the Crown case was put was the same analysis as with the culpable driving charge.

The appellant sought to appeal against conviction and sentence. He submitted that in relation to the dangerous driving charge, the trial judge ought to have directed the jury that the Crown had to prove that the accused created a "considerable risk of serious injury or death" whereas the direction given was "a real risk of harming or hurting others". This submission was made following the Court of Appeal decision in *R v De Montero* (2009) 25 VR 694, (*Montero*), which was decided after the appellant's trial but before his appeal was heard. Further it was submitted that the trial judge was in error in directing that the Crown did not have to satisfy the jury that the driving was deserving of criminal punishment. The Court of Appeal took the view that the substance of the trial judge's directions on

dangerous driving conveyed the necessary elements of the offence as required by *Montero*. The Court of Appeal (Buchanan, Redlich and Mandie JJA) refused leave to appeal against conviction but allowed the appeal against sentence, reducing it to 6 ½ years with a non parole period of 3 ½ years.

The respondent has filed a notice of contention.

The ground of appeal is:

- The Court of Appeal erred in failing to hold that the directions on the alternative counts of dangerous driving causing death - by specifying (a) that the driving need only have significantly increased the risk of hurting or harming others and (b) that the driving need not be deserving of criminal punishment - amounted to misdirections giving rise to a substantial miscarriage of justice such that the verdicts on the counts of culpable driving causing death had to be set aside.