SUPREME COURT OF QUEENSLAND

CITATION:	*R v Schoner* [2015] QCA 190
PARTIES:	**R** **v** **SCHONER, Bronya** (applicant)
FILE NO/S:	CA No 135 of 2015 DC No 31 of 2014 DC No 10 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Warwick – Unreported, 19 February 2015
DELIVERED ON:	9 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	2 October 2015
JUDGES:	Gotterson JA and Philip McMurdo and Peter Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the applicant's application for an extension of time within which to apply for leave to appeal against sentence.** **2. Treat the hearing as the hearing of the application for leave to appeal against sentence, and the appeal.** **3. Grant the application for leave to appeal.** **4. Allow the appeal against sentence.** **5. For the term of five years' imprisonment, suspended after two years, with an operational period of five years, for the offence of dangerous operation of a motor vehicle causing death and grievous bodily harm, substitute a sentence of four years' imprisonment, suspended forthwith, with an operational period of four years.** **6. Otherwise not vary the sentences imposed at first instance.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to, amongst other things, dangerous operation of a motor vehicle causing death and grievous bodily harm – where, as a result of the collision, one

person died, another was seriously injured, and a third was injured – where, prior to the collision, the applicant had driven about 1,600 kilometres in a little less than 18 hours with some breaks – where, in the course of giving the applicant a speeding ticket about an hour and a quarter before the collision, a police officer noted that the applicant was tired – where the sentencing judge was not prepared to sentence the applicant on the basis that she was then in such a state of fatigue that she ought to have known that she should stop driving – where, at the time of the collision, the applicant was disqualified from driving – where, for the dangerous operation of a vehicle offence, the applicant was sentenced to five years' imprisonment, suspended after two years – where the applicant applied for an extension of time within which to appeal against her sentence – whether a demonstrable miscarriage of justice could be perpetuated by the refusal of the extension – whether the sentence was manifestly excessive

R v Blanch [2008] QCA 253, discussed
R v CBI [2013] QCA 186, cited
R v Evans [2005] QCA 455, discussed
R v Gallaher [2004] QCA 240, discussed
R v Gruenert; Ex parte Attorney-General (Qld) [2005] QCA 154, cited
R v Harris; Ex parte Attorney-General of Queensland [1999] QCA 392, discussed
R v Hart [2008] QCA 199, cited
R v Hoad [2005] QCA 92, discussed
R v Hopper [2011] QCA 296, discussed
R v Huxtable [2014] QCA 249, discussed
R v MacDonald [2014] QCA 9, cited
R v Maher [2012] QCA 7, discussed
R v Manahan [2000] QCA 382, cited
R v Murphy [2009] QCA 93, discussed
R v Murray [2014] QCA 250, cited
R v Nhu Ly [1996] 1 Qd R 543; [1995] QCA 139, cited
R v Nikora [2014] QCA 192, discussed
R v Osborne [2014] QCA 291, cited
R v Ruka [2009] QCA 113, discussed
R v Sheedy; Ex parte Attorney-General (Qld) [2007] QCA 183, discussed
R v Vance; Ex parte Attorney-General (Qld) [2007] QCA 269, discussed
R v Wilde; Ex parte Attorney-General (Qld) (2002) 135 A Crim R 538; [2002] QCA 501, discussed

COUNSEL: The applicant appeared on her own behalf
S J Farnden for the respondent

SOLICITORS: The applicant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Peter Lyons J and with the reasons given by his Honour.

[2] **PHILIP McMURDO J**: I agree with Peter Lyons J.

[3] **PETER LYONS J:** On 19 February 2015, the fourth day of her trial and near the end of the prosecution case, the applicant pleaded guilty to a charge of dangerous operation of a motor vehicle causing death and grievous bodily harm, and to a number of other charges. For the dangerous operation offence she was sentenced to a term of imprisonment of five years, suspended after two years; and to substantially lesser sentences for the other offences.

[4] The applicant has now applied for an extension of time within which to appeal against her sentence. She wishes to contend that it is manifestly excessive. She is self-represented.

[5] For the respondent it was accepted that the extension might be granted, even without satisfactory explanation of delay, if a demonstrable miscarriage of justice could be perpetuated by the refusal of the extension. However the respondent submitted that the application should be refused.

Background and offending

[6] The applicant was born on 29 October 1976. She was thus 37 years of age at the time of the offences; and was 38 years of age at sentence.

[7] The applicant had a criminal history. On 14 June 2000 she was sentenced to terms of 18 months' imprisonment on charges of armed robbery, in Victoria. She was also sentenced for an attempted theft. The sentences were suspended, and were apparently completed without complication.

[8] The applicant's Victorian traffic history includes charges, apparently not very serious, of speeding in September 2011 and July 2013. She had also been convicted twice for using a hand-held telephone while driving.

[9] In Queensland, the applicant's criminal history was described by the learned sentencing judge as relating to "nuisance charges" and some other minor matters of little relevance. More significantly, her Queensland traffic history records that on 20 January 2014 she was fined and disqualified from driving for three months for driving with a blood alcohol level which was above the general, but not over the mid alcohol limit. That offence was committed on 12 October 2013, and between the latter date and the date of the offences the subject of the present application, she had committed three more speeding offences. It is of particular relevance for the present proceedings that at the time of the offending to which it relates, the applicant's period of disqualification had not expired.

[10] The offences were committed on the afternoon of 1 February 2014. The applicant had driven from Melbourne, travelling a distance of about 1,600 kilometres, in a period of a little under 18 hours. The learned sentencing judge recorded an occasion at about 8.00 am on the morning of the offending when the applicant had telephoned her family from Sydney. That was consistent with a break at that time. He inferred there must have been other breaks for petrol. There was no other information available about breaks in this trip.

[11] The offending occurred at about 3.15 pm. About an hour and a quarter earlier the applicant had been stopped by a police officer just south of Tenterfield, and given a speeding ticket. The police officer noticed that the applicant was tired. However the learned sentencing judge (who had heard the police officer give evidence) was not prepared to sentence the applicant on the basis that she was then in such a state of fatigue that she ought to have known that she should stop driving.

[12] The offences were committed on the New England Highway, not far from its intersection with Whiskey Gully Road, south of Stanthorpe. A little earlier, the applicant overtook a vehicle in which people by the name of Turner were travelling, which was also headed north on the New England Highway. To do this, the applicant made use of an overtaking lane, and after passing the Turners' vehicle, resumed driving in the left-hand lane. The learned sentencing judge described this as occurring "in an orderly fashion". It seems to have occurred quite shortly before the accident which gave rise to the charges.

[13] The applicant then approached a left-hand bend. Just prior to the road sweeping to the left, and in a place where there were double unbroken lines, the applicant's vehicle (a Toyota Camry) veered out on to the incorrect side of the highway and travelled around the bend on the wrong side of the road. That resulted in a collision with a car (a Toyota Echo) being driven in the opposite direction. The driver of the Echo, seeing the applicant's vehicle, and thinking there was a gulley on the left side of the road, swung her vehicle to the right immediately before the collision.

[14] As a result of the collision, a passenger in the Echo, Dianne Holley, died. The other two people in that car were Mrs Holley's daughters, Katie Holley and Samantha Holley. Samantha suffered quite serious injuries, and Katie also suffered injuries, though these were far less significant than Samantha's.

[15] The applicant's car, immediately after this collision, also collided with another southbound vehicle, in which two people of Japanese nationality were travelling. The material does not record them as suffering injuries.

[16] Apart from the fact that she was then disqualified from driving, at the time of these events the applicant was also on bail for some offences in Victoria, apparently not described to the learned sentencing judge; and was also subject to a good behaviour bond.

[17] I do not propose to set out in detail all of the injuries suffered by Samantha. From the available material, the most significant appears to have been a traumatic brain injury; though there were also fractures of the left femur, left tibia, left fibula, and left pubic ramus. Some appreciation of their significance may be derived from the fact that she was in a coma for a lengthy period, hospitalised for over 10 months, and left without any memory of events for the period commencing 12 months prior to the accident, and ending nine months after it. At the time of sentence she remained unable to walk and was confined to a wheelchair. She was 20 years of age at the time of the accident.

[18] The injuries and condition of Katie Holley were described as being neck pain and tenderness due to a sprain or strain injury; contusion and bruising to the ribs, chest abdomen and left elbow; and severe emotional distress. The doctor who examined her at the time of the accident expected the physical symptoms to improve over a period of "days to weeks".

[19] A victim impact statement from Karen Holley (the daughter-in-law of Mrs Dianne Holley) graphically described many of the significant emotional and other consequences for the Holley family, resulting from these events.

The sentence

[20] In addition to the dangerous operation charge, the applicant pleaded guilty to charges of driving whilst disqualified, driving having consumed drugs, failing to use care in respect of a syringe, and possessing things used in the commission of an offence. A medical certificate showed that amphetamine and methylamphetamine were present in the applicant's blood on the date of the accident. The things used in the commission of an offence were a spoon and scales. At sentence, the level of drugs present in the system was acknowledged to be "quite low"[1]; and the prosecutor pointed out that the allegation did not extend to the applicant having been adversely affected by those drugs, nor could their presence be relied upon as a circumstance of aggravation of the dangerous driving offence. It was acknowledged that the applicant had not left the scene of the accident (although it might not have been realistic for her to attempt to do so); and there was no excessive speed involved.[2] It was submitted that this was a "prolonged case of reckless driving".[3] The applicant had not shown remorse, her plea of guilty simply being a response to the strength of the case against her.[4]

[21] The prosecutor referred to *R v Sheedy; Ex parte Attorney-General (Qld)*[5]; *R v Hoad*[6]; *R v Wilde; Ex parte Attorney-General (Qld)*[7] and *R v Evans*.[8]

[22] For the applicant it was submitted that there was no evidence that the applicant was fatigued, until she was in the vicinity of Tenterfield; and that the fatigue only started to have an impact on her driving shortly before the accident. It was inevitable that she had a number of breaks during the trip from Melbourne.[9] Driving whilst tired is not an offence, until the tiredness manifests itself in driving which is dangerous[10]. That occurred some 300 metres before the collision.[11] Shortly prior to that, when the applicant had overtaken the Turners' vehicle, they were travelling at 95 kilometres per hour, and she was travelling only one or two kilometres per hour faster.[12] At this time she was driving in a very ordinary, sensible way. The applicant appeared to be in a state of shock after the accident, which would account for her conduct at that time.[13]

[23] The applicant had been educated to Grade 12, and had had a strong interest in music. She had worked for her father for some six years, but then suffered some injuries, and was on a disability pension. She had undertaken studies in massage and natural therapy. She had two children aged 10 and eight years of age, who lived with her parents in Melbourne.[14] Her serious offences occurred 15 years ago. Of the three speeding offences in 2013, two were for speeds less than 13 kilometres an hour above the speed limit; and the third was for exceeding the speed limit by more than 13 but not more than 20 kilometres per hour.[15] She had no offences similar to the dangerous operation

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1 Sentencing Transcript (*T*) 1-4.
2 T1-17.
3 T1-23.
4 T1-15.
5 [2007] QCA 183.
6 [2005] QCA 92.
7 [2002] QCA 501.
8 [2005] QCA 455.
9 T1-27.
10 T1-24.
11 T1-25.
12 T1-25.
13 T1-25.
14 T1-30.
15 T1-31.

of a motor vehicle. It was not a case where she was "skylarking".[16] Although she was on bail, that was of less relevance in the case of the dangerous operation charge, there being no intent to break the law. The cases relied upon by the prosecution were all cases involving more significant aggravating features. The relevant cases, in particular *R v Ruka*[17] and *R v Maher*,[18] supported a head sentence of four years.[19] In considering sentences imposed in other cases where the defendant was youthful, it should not be assumed that age was a significant mitigating factor. In *R v Blanch*,[20] Keane JA (as his Honour then was) had pointed out that the strong need for deterrence in cases of this kind is not lessened by the circumstance that the offender is young; rather it is to deter precisely this category of offender that condign punishments are imposed.[21]

[24] It is apparent from the sentencing remarks that the learned sentencing judge placed considerable weight on the fact that the applicant was disqualified from driving at the time of the offending.[22] With respect to the offending, his Honour concluded that the applicant had driven around the bend in the highway on the wrong side of the road "for an appreciable period of time",[23] the explanation being that she was fatigued.[24] He referred to authorities which established the relevance of the consequences of the offending but noted that in sentencing, the judge is not to be overwhelmed by tragic consequences.[25] He gave the applicant "some credit for the plea of guilty … as demonstrating a willingness to accept responsibility"; but considered it "difficult to evince remorse" from the plea.[26] He did not consider the case to be one of "momentary inattention", which he regarded as a "very unhelpful label"; rather, the applicant continued driving for an appreciable period of time, while she was obviously too tired to drive, and "drove on the wrong side of the road with horrendous results".[27] His Honour referred to the need both for general and personal deterrence. The sentence imposed for the dangerous operation count was intended to represent the total criminality of all charges. Otherwise, his Honour set out matters relating to the offending and the applicant's background, referred to earlier in these reasons.

[25] The learned sentencing judge referred to evidence that, five minutes before the collision, at a close location on the highway, a car was seen to drift on to the wrong side of the road. Of that evidence, his Honour said, "I can't be completely sure it was you".[28] On two subsequent occasions, his Honour said that the period of driving relevant for the sentence was after the applicant had overtaken the Turners, when she drove on the wrong side of the road as she went around the bend.[29] As I read the sentencing remarks, his Honour did not sentence the applicant on the basis that, some five minutes earlier, she had drifted onto the incorrect side of the road.

[26] His Honour also stated that he inferred that the applicant had certain "personality difficulties".[30] These were not better identified; but it might be noted that on a number

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16 T1-32.
17 [2011] QCA 113.
18 [2012] QCA 7.
19 T1-36.
20 [2008] QCA 253 at [22]; cited in *R v Nikora* [2014] QCA 192.
21 T1-37.
22 Sentencing Remarks (*S*) 3.
23 S4.
24 S4.
25 S5.
26 S7.
27 S8.
28 S4.
29 S 4 lines 24, 36.
30 S2.

of occasions in the course of the sentencing remarks the applicant interrupted, notwithstanding that she was then represented by Counsel.

[27] In addition to the sentence for the dangerous operation of the motor vehicle, his Honour imposed a sentence of one year's imprisonment for the offence of driving whilst disqualified; and for the other charges two months' imprisonment; all sentences to be concurrent. The suspension after two years reflected some mitigation, for the plea of guilty.[31] The applicant was disqualified absolutely from holding or obtaining a driver's licence.[32] His Honour declared that the period of 383 days (from 1 February 2014 to 18 February 2015) was to be taken as time served under the sentence.[33]

The application and submissions

[28] No formal record was prepared for the application. No doubt that is because the applicant is without legal representation. The Court has had the benefit of the transcript of the sentencing submissions, as well as the sentencing remarks; and an affidavit exhibiting some of the exhibits from the trial. Delaying the proceedings to enable the Court to have a more complete record would deprive the applicant of any practical benefit, should she be successful on the application and the ultimate appeal. The respondent was content for the proceedings to continue, notwithstanding the limitations on the available material.

[29] In her oral submissions, the applicant referred to a number of factual matters not referred to before the learned sentencing judge, and of which the respondent had been given no notice. As the respondent pointed out, there was no application to adduce fresh evidence on the hearing of the application (or the appeal), a fact which is again not surprising, given that the applicant was self-represented. Nevertheless, in view of the way in which the application has proceeded, it seems to me inappropriate to have regard to these matters; and they are unnecessary for the applicant's success.

[30] The applicant had provided a handwritten note setting out her submissions. In essence, she contended that the sentences were manifestly excessive. In view of the fact that the head sentence reflected the applicant's overall criminality, it was inappropriate to impose separate sentences for the lesser offences. This being a case where neither speeding, drugs nor alcohol were a factor, the sentence for the dangerous driving offence was excessive. It is particularly harsh because the applicant is a mother of two young children who reside in Victoria, and they have not been able to see their mother for 20 months. She has not previously driven whilst disqualified, and the absolute loss of licence is unwarranted. She will be left with the police record of "this days horrible tradgedy for the rest of my life, along with the memories (sic)". She submitted that fines should be imposed where possible, and no conviction recorded, for example for the offence relating to the syringe.

[31] In her oral submissions, the applicant contended that there were more serious features in a number of other cases where lesser head sentences were imposed for dangerous driving offences. She submitted that the fact that she was disqualified whilst driving played no material role in the accident.

[32] Ultimately, the applicant contended that she should be required to serve a period of one year in prison; with an absolute disqualification from holding a driver's licence, and accordingly that she should be immediately released.

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31 S8.
32 S9.
33 S9.

[33] The submissions for the respondent pointed out that there was no explanation for the delay in making the application. The period at which the sentence was suspended was generous to the applicant. The head sentence was supported by the authorities, lower sentences being imposed in cases with less serious features.

The cases

[34] It is convenient to start with some relevant statements of principle. In *R v Harris; Ex parte Attorney-General of Queensland*[34] Thomas JA referred to the need, in a case where an offence had been committed against s 328A of the Criminal Code, "to identify the level of seriousness of the actual driving of the offender."[35] In *R v Manahan*,[36] White J (as she then was) pointed out that it is important for a sentencing judge not to be overwhelmed by the consequences of an offence under s 328A when considering the appropriate sentence. Nevertheless, as Fraser JA said in *R v Murphy*,[37] the consequences of such offending can matter a great deal in the determination of the appropriate punishment, notwithstanding that they are typically unforeseen, and both unintended and outside the control of the offender.

[35] The maximum penalty for this offence was increased from seven years' to 10 years' imprisonment on 20 March 2007.[38] Cases relating to offending prior to that date are of limited assistance. While an increase in penalty might be expected to produce a general increase in the severity of sentences, that increase is not necessarily proportionate to the change in the maximum penalty; and in some cases the penalty may even be the same whether the offence was committed before or after the change.[39] Nevertheless I propose to refer to some of the earlier cases.

[36] *Wilde*[40] was referred to both in the submissions at first instance, and on this application. There, at a time when the maximum penalty for the offence was seven years, the effective head sentence imposed was six years (before allowances for time in custody not declared, and the application of the totality principle[41]). The high level of sentence in that case is explained by the following passage from the judgment of the Court[42]

> "The case approaches the category of the worst examples of the offence, when one fully acknowledges the aggregation of the respondent's reckless inattention over a substantial distance, her reduced alertness through fatigue, her callous flight from the scene, her lengthy criminal and traffic history, her being unlicensed at the time, her then being on bail for other charges …, and her driving a stolen vehicle."

[37] In *Wilde*, a cyclist was killed as a result of the driving, and another injured, it would appear not particularly seriously. The benefit of the applicant's pleas of guilty were specifically allocated to the determination of the parole eligibility date.[43]

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34 [1999] QCA 392.

35 *Harris* at [42]; See also *R v Hart* [2008] QCA 199 at [17]; *R v Gruenert; ex parte A-G (Qld)* [2005] QCA 154 at [15]; *R v MacDonald* [2014] QCA 9 at[8], [70]; *R v Osborne* [2014] QCA 291 at [37].

36 [2000] QCA 382 at [20].

37 [2009] QCA 93 at [20].

38 *Criminal Code and Civil Liability Amendment Act* 2007 (Qld) s 4.

39 *R v CBI* [2013] QCA 186 at [19]; *R v Murray* [2014] QCA 250 at [16]; in each case per Fraser JA.

40 [2002] QCA 501.

41 See *Wilde* at [29].

42 *Wilde* at [27]; see also [8]-[14].

43 *Wilde* at [30].

[38] Although not directly referred to by the parties, *R v Gallaher*[44] was referred to in *Murphy*,[45] a case which was relied upon at the sentence and on this application. The defendant in *Gallaher* was convicted after a trial of dangerous operation of a motor vehicle causing death. He had driven his vehicle over what was described as a "blind crest" and then travelled onto the incorrect side of the road, for no apparent reason. His vehicle then collided head-on with a motor vehicle in which the deceased was a passenger. Although the defendant was not exceeding the speed limit of 80 kilometres per hour, it was said that to drive at that speed at that location "was in itself extremely dangerous".[46] The defendant had a bad traffic history for unlicensed driving and driving unaccompanied on a learner's permit. He had a criminal history which included a conviction for assault occasioning bodily harm whilst in company, for which he was imprisoned for 12 months. Alcohol was not a factor in the driving. The defendant was said to have suffered from quite significant intellectual defects; though he was described as "capable of being quite cunning."[47] He had shown no remorse up to the date of the sentence, and in fact challenged at the trial, despite "overwhelming evidence against the applicant",[48] the reliability and truthfulness of the evidence of the deceased's husband, who had been driving the on-coming vehicle. The sentence of three and a half years was held not to be manifestly excessive.

[39] The learned sentencing judge was also referred to *Hoad*,[49] although the offending preceded the increase in the penalty. Ms Hoad was sentenced to a term of imprisonment of five years, suspended after she had served 18 months, with an operational period of five years; and she was disqualified from holding or obtaining a driver's licence for five years. On appeal, the period of suspension of the term of imprisonment was reduced to nine months.

[40] Ms Hoad was 24 years of age at the time of the offence. She had not slept in the preceding four days (said to be comparable to a blood alcohol reading of .235 per cent[50]). At the time of the accident, she was affected by methylamphetamine, at a level of .14 milligrams per litre, which could be associated with poor concentration, anxiety and restlessness. The consequences of the drug-taking could increase with withdrawal.[51] The Court considered that her capacity to drive a motor vehicle had been dangerously impaired before she began her journey.[52] She drove a distance of 10 kilometres before the accident. Ms Hoad stated that she remembered that when she was driving, she kept nodding off;[53] that she had been feeling tired well before the collision, for about 15 minutes; and that she had fallen asleep while she was driving and then asked "if everybody was alright".[54] She had no criminal history; and had four speeding offences over a period of five years.[55] The very significant mitigating factors were held to have the consequence that the period of time to be served prior to suspension was manifestly excessive, resulting in the alteration previously mentioned.[56]

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44 [2004] QCA 240.
45 [2009] QCA 93 at [25].
46 *Gallaher* at [2].
47 *Gallaher* at [4].
48 *Gallaher* at [8].
49 [2005] QCA 92.
50 *Hoad* at [17].
51 *Hoad* at [7].
52 *Hoad* at [10].
53 *Hoad* at [4].
54 *Hoad* at [6].
55 *Hoad* at [17].
56 *Hoad* at [36].

[41] *R v Evans*[57] was also relied upon at first instance, though the offending pre-dated the increase in penalty. The head sentence of six years, with a recommendation for eligibility for post-prison community based release after two and a half years, was not disturbed on appeal. The utility of the case is affected by the fact that Ms Evans had a blood alcohol reading of .247. The vehicle she was driving was unregistered and uninsured, and had a flat left rear tyre. She had been driving erratically at speed prior to the accident, crossed the gutter and mounted the footpath "a number of times", narrowly missed a parked car, and drove into group of pedestrians on the footpath. Her vehicle travelled another 124 metres before she came to a stop. She had previously been convicted for driving under the influence of alcohol.

[42] Another case relied at first instance was *Sheedy*.[58] That defendant had pleaded guilty to dangerous operation of a motor vehicle causing death, whilst adversely affected by an intoxicating substance. At the time, this offence carried a maximum penalty of 10 years' imprisonment. The defendant was 25 years of age when the offending occurred. His criminal history was described as "unimpressive".[59] It involved property, drug and street offences, some of which had resulted in community based orders, and on one occasion 18 months' probation without a conviction being entered. He had not previously been sentenced to a term of imprisonment.

[43] This defendant's traffic history was described as "even less impressive".[60] He had been convicted of unlicensed driving on four occasions. He had a further 12 convictions for being an unaccompanied learner driver, the most recent being less than four months before the dangerous driving offence. He had a conviction for driving whilst disqualified. He also had two convictions for driving under the influence of liquor (on each occasion the reading was less than .03, but because he was a learner driver, any measureable blood alcohol concentration resulted in an offence).[61]

[44] The relevant offending occurred on 15 July 2006 at a round-about intersection in Toowoomba. There was a heavy winter fog, and the road surface was wet. Other drivers were travelling at speeds between 40 and 50 kilometres per hour, because of the low visibility and wet conditions.

[45] The respondent was driving unaccompanied, although he had only a learner's permit. He approached the roundabout at about 60 kilometres per hour. He was not seen to slow down or to deviate. His vehicle collided with the kerb, causing his car to launch into the air, entirely cross the roundabout, and directly hit another vehicle which had entered the roundabout from another street, and to which the defendant was required to give way. The collision resulted in the death of the 36 year old driver of the other vehicle, and her young daughter.

[46] A sample was taken from the defendant's blood shortly after the accident. The level of THC detected in the defendant's blood was described as "quite high", indicating the recent use of cannabis, at a concentration which produced risks of a car crash similar to that from a blood alcohol concentration of .10 per cent to .15 per cent.[62]

[47] The defendant committed further cannabis offences while subsequently on bail.

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57 [2005] QCA 455.
58 [2007] QCA 183.
59 *Sheedy* at [2].
60 *Sheedy* at [3].
61 *Sheedy* at [3].
62 *Sheedy* at [9].

[48] Notwithstanding his early plea, remorse, and later efforts of rehabilitation, the sentence of five and a half years was held to be within, though at the very lower end, of the sentencing range.[63] The Attorney-General's appeal was allowed, but only in respect of the parole eligibility date, which should have been at about one third of the head sentence, and was accordingly altered[64].

[49] Another case where the offending occurred prior to the increase in penalty is *R v Vance; Ex parte Attorney-General (Queensland)*.[65] Though not relied upon at first instance or on this application, it is referred to in both *Maher*[66] and *Murphy*.[67] At first instance, the defendant was sentenced to a term of two years' imprisonment suspended after six months for an operational period of two years, having pleaded guilty to a charge of dangerous operation of a motor vehicle causing death.

[50] The defendant was 20 years of age at the time of the offending. He had been drinking with friends the night before, having drunk four or five full strengths beers by 7.00 pm. He then ceased drinking alcohol, but continued to visit establishments with friends until 4.30 am. He then drove to a friend's house; and then decided to drive home. Between 5.15 am and 5.30 am, the defendant was driving along a main arterial road at Burleigh Waters. There was little traffic, the streets were illuminated, and the weather was fine. At a point where the road started to curve to the right, the defendant's vehicle crossed into an emergency lane on the left-hand side of the road, and collided with the guard rail. He then ran into the rear of a cycle, throwing the 54 year old cyclist some 37 metres forward. The cyclist died. No tyre marks which would have indicated substantial braking, were seen. The defendant did not stop when the collision occurred but did so some distance further away, and looked to the damage to his vehicle. The damage was described as extensive, the windshield being substantially damaged, and the rear vision mirror had detached, being found in the back seat of the vehicle. There was broken glass on both front seats. Nevertheless, the defendant then drove home with the vehicle in that condition, a distance of some five kilometres.

[51] The defendant surrendered himself to the authorities a few days later. He claimed to have no recollection of the collision, and surmised that he must have fallen asleep. He had a minor and irrelevant criminal and traffic history. He was sentenced on the basis that the accident was the result of fatigue, his neglect surpassing "momentary inattention", and it was said on appeal that he had driven "over an appreciable period while grossly fatigued".[68] Notwithstanding his age and his early plea, on appeal, the sentence was increased to a sentence of imprisonment for a term of three years, suspended after 12 months for an operational period of three years; and he was disqualified from holding or obtaining a driver's licence for a period of five years. The fact that he left the scene without investigating the fate of any victim, and his delay in reporting to the authorities, were taken into account.

[52] On the present application, the respondent referred to *Murphy*.[69] The offence was committed in February 2007, shortly before the maximum penalty was increased. This defendant was sentenced to a term of three and a half years' imprisonment, suspended after 12 months, for an operational period of four years.

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63 *Sheedy* at [25].
64 *Sheedy* at [25]-[26].
65 [2007] QCA 269.
66 *Maher* at [38].
67 *Murphy* at [23].
68 *Vance* at p 9.
69 [2009] QCA 93.

[53] The defendant was an unlicensed driver, and did not have a licenced driver next to him. The accident occurred on the Mt Lindsay Highway, where the speed limit was 90 kilometres per hour. The defendant was not exceeding the speed limit. The road was a dual carriage way, with double unbroken centre lines. As the defendant approached the place where the accident occurred, the road curved to his right. He allowed his car to drive to the outside of his lane, and then over-steered to the right, crossing the centre line and driving into the path of an oncoming vehicle. The collision resulted in the death of two people; and a third, a passenger in the oncoming vehicle, sustained life threatening multiple injuries, and was left with significant disabilities. The defendant was of good character, with no prior criminal record or traffic history. He showed deep remorse, and was traumatised by having caused the death of his cousin and closest friend. He was 21 years of age at the time of the accident.

[54] The defendant was sentenced on the basis that he drove at a speed which was clearly excessive. The sentencing judge did not accept that this was a case of momentary inattention; but did accept that it was a case of momentary misjudgement. The sentence was imposed at a higher level than it would otherwise have been, by reason of the fact that two people were killed.[70] The sentence was described as "a severe sentence" but was not manifestly excessive.[71]

[55] *Ruka*,[72] although not referred to at first instance or in this application, was discussed in *Maher*,[73] to which reference was made both before the learned sentencing judge and in this Court. In that case, the defendant pleaded guilty to a charge of dangerous operation of a motor vehicle causing death. He was sentenced to a term of two years' imprisonment, with a parole release date after six months. His driver's licence was automatically suspended for six months. The offending occurred on 12 May 2007, after the maximum penalty had been increased. The defendant fell asleep while driving along the Mt Lindsay Highway. His vehicle drifted onto the wrong side of the road, into the path of an oncoming vehicle, resulting in a collision. The driver of the oncoming vehicle was killed. There was no suggestion that the defendant had been speeding, or that he had been affected by alcohol. However, he had conceded that he ought to have appreciated that he was fatigued, and should have pulled over before falling asleep. It was the tenth consecutive day on which he had worked a 12 hour shift finishing at 6.00 am. It was held not to be a case of momentary inattention, but one where the defendant failed to respond to increasing signs that he was in danger of becoming unable to control his vehicle.[74]

[56] The defendant was 37 years of age at the time of the offending. He had five previous speeding offences over a period of 10 years. He was of good character with a solid work history. He was deeply remorseful, and his plea was described as timely. The sentence was held not to be manifestly excessive.

[57] *R v Hopper*[75] was referred to before the learned sentencing judge. There the defendant was sentenced to a term of eight years' imprisonment, with parole eligibility set at three years. It is sufficient to note some features of this case. That defendant had been drinking for some four hours in the period leading up to the offending, consuming

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70 *Murphy* at [15], [19].
71 *Murphy* at [27].
72 [2009] QCA 113.
73 *Maher* at [36].
74 *Ruka* at [9]-[10].
75 [2011] QCA 296.

between six and 12 stubbies of beer. Then, although recognising that he was "a bit pissed", he rejected a friend's offer to drive. He drove at very high speeds, reaching 120 to 130 kilometres per hour within 300 metres of departure from the place where he and his friends had been drinking, and in a location where the speed limit was 60 kilometres per hour. Subsequently he drove very fast on a rough dirt track, before returning to a bitumen sealed roadway where he reached a speed of 120 kilometres per hour before losing control of his vehicle, resulting in a collision in which a passenger died. This case is of no assistance on the present application.

[58] *Maher*[76] was referred to both before the learned sentencing judge and on this application. That defendant pleaded guilty to a charge of dangerously operating a motor vehicle on 12 August 2009, causing death. He was sentenced to a term of three years' imprisonment, suspended after nine months with an operational period of three years; and was disqualified from holding or obtaining a driver's licence for four years.

[59] The defendant had been driving his utility northbound along a road with a speed limit of 60 kilometres per hour. As he turned right at an intersection, he collided with an oncoming motorcyclist. The accident occurred sometime after 8.55 pm, but the motorcyclist had travelled for a distance of two kilometres along a straight road leading up to the intersection, with his lights on, and the road was well lit. The motorcyclist was not exceeding the speed limit. There were skid marks for a distance of five metres from the motorcycle, leading up to the point where the collision occurred. The utility continued to make its turn after the collision, travelling over the top of the motorcycle and the rider, and it did not stop until it had turned fully and proceeded some 24 metres down the side street. The accident occurred after the defendant had completed a 16 hour day working as a concrete driller, being the tenth consecutive day on which this occurred. The sentencing judge, in view of the time and distance for which the oncoming motorcycle must have been visible, found the accident was the result of a "prolonged failure to keep a proper lookout",[77] and the case was not one of momentary inattention. The accident was explained by the fact that the defendant "must have been so tired that he should not have been driving".[78] The defendant had been convicted of a number of drug related offences in the 1980s and 1990s, the most recent occurring on 12 February 2001. He had also been convicted of being in charge of a motor vehicle whilst under the influence of liquor or drugs in 1984; and again in 1985, when he also convicted for dangerous driving. He had offences of driving under the influence of liquor in 1983 and 1985 and for offences of exceeding the speed limit, "but not egregiously so".[79]

[60] There were victim impact statements which were not without significance, from the deceased's widow, the deceased being the father of a seven month old child; as well as the deceased's father and stepmother.

[61] The sentence was found to be within "the range of a sound sentencing discretion"; with the significant mitigating features being reflected in the early suspension of the sentence.[80]

[62] Another case referred to before the learned sentencing judge, though not relied on in the present application, was *Nikora*.[81] Although the offending occurred in 2014, the

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76 [2012] QCA 7.
77 *Maher* at [26]; see also [31].
78 *Maher* at [26].
79 *Maher* at [17].
80 *Maher* at [43]-[44].
81 [2014] QCA 192.

case is of little utility on the present application. The defendant had been driving at speeds of the order of 120 kilometres per hour in a residential district with a speed limit of 60 kilometres per hour; had gone through a red light, and ultimately drove over the top of a roundabout, continuing on to the next intersection, before rolling over, going through a fence and finishing in the front yard of a residential property. There was evidence of heavy braking as the vehicle approached the roundabout, it being estimated that the vehicle's speed prior to the braking was between 127 and 132 kilometres per hour. The vehicle had been driven at speed for a period of some 15 minutes. The defendant had been drinking at a party prior to the driving. He was found to have a blood alcohol reading of .171 per cent. At some stage at the party the defendant had said that he was "too drunk to write my own phone number"; and was then described as "giggling and unsteady on his feet".[82] Two passengers were killed in the accident.

[63] Of greater assistance is *R v Huxtable*,[83] referred to in the present application. On a successful appeal, the defendant in that case was sentenced to a term of imprisonment of three and a half years, suspended after 14 months, with an operational period of three and a half years.

[64] The defendant had pleaded guilty to a charge of dangerous operation of a vehicle, causing death and grievous bodily harm, committed on 27 July 2011. He had been driving an unladen tip truck towing a trailer south along the Ipswich-Boonah Road. He was travelling behind a Holden Commodore. That car slowed, and stopped at an intersection, waiting to turn right, with its indicator flashing. The defendant braked hard, but was too late to avoid colliding with the rear of the Commodore, forcing it into the path of an oncoming Hyundai. The driver of the Commodore died instantly. The driver of the Hyundai suffered multiple spinal fractures, fractures to both femurs, tibias and fibulas and to one hip, a 100 per cent left patella tendon laceration, a scalp laceration, subdural bleeding, a right haemothorax, a left pneumothorax, and multiple rib fractures. She required extensive treatment and was hospitalised for five months. At sentence (almost two years and eight months after the accident) she had only recently begun to walk without aids. The passenger in the Hyundai had relatively minor injuries.

[65] At the place where the collision occurred, there were two lanes southbound, with room for the tip truck to pass the Commodore to the left.

[66] The defendant was found not to be following at a safe distance; and he should have been able to swerve to the left to avoid the accident. As a professional driver, he was under a special duty to exercise care when driving, and to obey the traffic rules. The case did not involve alcohol, drugs, speed, fatigue, or a lengthy period of reckless driving. Nevertheless, the Court relied on the fact that he was a professional driver of a large truck, with the commensurate heavy responsibility to take proper care and to keep a careful lookout. On the evidence, he should have seen that the Commodore was turning, almost seven seconds before impact; but did not brake until about three seconds before the collision, and did not steer to avoid it.

[67] This defendant had a traffic history of some relevance. In 1999, he had been convicted in New Zealand of driving with excess breath alcohol after a third or subsequent reading, and sentenced to non-residential periodic detention for five months. He had been convicted of like offences in 1987 and 1997. He had been fined for speeding in Queensland

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82 *Nikora* at [8].

83 [2014] QCA 249.

in 2008. In 2010 he was fined for possessing false or misleading documents and making false or misleading entries in work records. After the commission of the offence, in February 2012, he was again fined for speeding.[84] Nevertheless, there were many mitigating features. In the result, the appeal against the original sentence of five years' imprisonment, suspended after 15 months was allowed, and the sentence mentioned earlier was imposed.

[68] Another case referred to by the respondent on the present application is *R v Osborne*.[85] The defendant in that case pleaded guilty to one count of dangerous operation of a vehicle causing death and grievous bodily harm. He was sentenced to a term of three and a half years' imprisonment, suspended after 14 months, with an operational period of four years. He was disqualified from holding or obtaining a driver's licence for five years.

[69] The defendant worked as a truck driver. On the morning of the collision, he was driving a truck transporting formwork. The load protruded about 40 centimetres beyond the ordinary width of the truck tray on each side. The defendant was conscious he was transporting a wide load, and had warning flags attached to the load, for that reason.

[70] The defendant was travelling towards Townsville, on a rural bitumen-sealed road, with a speed limit of 80 kilometres per hour. There was single lane for travel in each direction, the lanes being marked by a dividing centre line and by fog lines. There was a sweeping curve in the road, where it crossed a bridge over a culvert in a gulley. In this location there was an unbroken double centre line;, and a safety guardrail confined the edge of the road. Beyond the fog line, there was 90 centimetres of sealed road surface, and a further 75 centimetres of gravel surface to the guardrail.

[71] A group of cyclists approached the bridge over the culvert, from the same direction as, and in front of, the defendant's truck. A line of cars was crossing the bridge in the opposite direction. The defendant was faced with a narrow gap between the fog line, outside which the cyclists were riding, and the oncoming traffic. Notwithstanding the limited space, the defendant drove onto the bridge, perceiving it was going to be a "tight squeeze". The truck struck one of the cyclists, propelling her and her bike into another; and brushed another, causing that cyclist and yet another cyclist to be thrown from their cycles. One of the cyclists died, and two others suffered grievous bodily harm. The fourth suffered fractures to her right hand, a deep laceration to her forearm, deep bruising to her right lower leg, a possible fracture to her tailbone, bruising to her left lower bicep, and a loss of strength in her left forearm. One of the cyclists who suffered grievous bodily harm was a medical practitioner. The accident had resulted in substantial interference with his capacity to practise as a medical practitioner; and had had a significant psychological and physical toll. The other cyclist who suffered grievous bodily harm was a pilot. Safety concerns about her closed head injury resulted in her no longer being permitted to conduct single pilot operations. Needless to say victim impact statements described the enormous emotional toll resulting from the death of the fourth cyclist.

[72] The defendant's driving was described as "a very serious error of judgment", beyond mere momentary inattention.[86] The particularly serious feature of the defendant's

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84 *Huxtable* at [2].
85 [2014] QCA 291.
86 *Osborne* at [28].

misjudgement derived from the fact that he was driving a wider than ordinary load; with a higher potential for danger and injury; thus requiring a higher than ordinary standard of care to those on or near the road.[87] He was, however, at least keeping a look out,[88] and the case involved no intoxication, no course of dangerous driving and no past pattern of dangerousness.[89] The head sentence was described as significant, but within the sound exercise of the sentencing discretion.[90] While the head sentence was undisturbed, the period prior to suspension was reduced from 14 months to nine months; and the period of disqualification was reduced from five years to two years.

Consideration

[73] It will be apparent that a number of the authorities to which the learned sentencing judge was referred are of no real utility. On the other hand, his Honour did not have the benefit of some cases to which reference was made on this application which are of considerable relevance.

[74] The respondent was unable to identify a case where a person had been convicted of the dangerous operation of a motor vehicle causing a death and causing grievous bodily harm to another person, where neither alcohol nor drugs had played a role, and the defendant did not leave the scene, which had resulted in a sentence as high as the present sentence.

[75] It was not suggested that the learned sentencing judge erred in identifying the relevant driving as being the driving subsequent to the time when the applicant had overtaken the Turners. Although this occurred for an appreciable period of time, it was still relatively brief. The uncontradicted submission for the applicant at first instance was that it involved travelling a distance of 300 metres, which at a speed between 90 kilometres an hour and 100 kilometres an hour involves driving for a number of seconds, on the incorrect side of the road.

[76] The learned sentencing judge sentenced the applicant on the basis that nothing had occurred which would specifically warn her that she had reached the point where her fatigue would materially affect her capacity to drive safely. It has not been demonstrated that these proceedings should proceed on a different basis. Nevertheless, when a person drives a motor vehicle for a sufficiently long period of time, that point will inevitably be reached. What occurred on this occasion demonstrated that the applicant had in fact reached that point. Her fault lay in her failure to appreciate the risk she had taken, and her failure to ensure that she had sufficient rest to enable her to continue safely.

[77] Plainly enough, the significant consequences of the accident are of substantial relevance in determining the appropriate sentence. They are also a material consideration, when comparing the sentence imposed to sentences imposed in other cases.

[78] The fact that the applicant was disqualified from driving at the time is also a material consideration. It demonstrates a disregard for the law; even if it does not demonstrate any lack of competence as a driver.

[79] In my view, none of the cases to which reference has been made would support a head sentence of five years in the present case. While some of the aggravating features in

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87 *Osborne* at [37].
88 *Osborne* at [40].
89 *Osborne* at [43].
90 *Osborne* at [40].

the present case are of greater significance than in *Huxtable* and *Osborne*, those cases each involved a professional driver with a higher duty of care. The driving in the present case bears some similarity to that in *Maher*, at least because both involve fatigue, operative for an appreciable, though relatively short, period of time before a tragic accident occurred. The driving of the defendant in *Ruka* might be regarded as somewhat similar, though, if anything, more culpable, as he acknowledged that he ought to have appreciated that he was fatigued, and ought to have pulled over before he fell asleep. The difference in the sentences cannot be explained by the fact that there was not an additional victim in *Maher*; nor in the different circumstances of these defendants and the applicant.

[80] In my view, a consideration of these decisions leads to the conclusion that the sentence which was imposed for the offence involving dangerous operation of a motor vehicle was outside the boundaries of the proper exercise of the sentencing discretion, and was accordingly manifestly excessive.

[81] If the sentencing discretion is to be re-exercised, taking into account the aggravating features of the applicant's offending conduct, it seems that an appropriate head sentence for the most significant offence would be a term of imprisonment of four years. The learned sentencing judge's approach to the suspension of the sentence seems appropriate, and might be translated to an order that the substituted sentence be suspended forthwith.

[82] In her oral submissions, the applicant appeared to accept that she should be subjected to an absolute disqualification from holding a driver's licence. Although not necessary to my conclusion, I am conscious that this amounts to an additional penalty;[91] and a penalty of some significance. It provides further reason for concluding that the sentence imposed was manifestly excessive; and for the sentence which I would propose.

[83] There is no practical utility in varying the sentences imposed for the other offences. The periods of imprisonment have already been served; and the substitution of fines, as at one point the applicant advocated, would simply imposed an additional burden on the applicant.

Conclusion

[84] I would propose the following orders:

(a) Grant the applicant's application for an extension of time within which to apply for leave to appeal against sentence.

(b) Treat the hearing as the hearing of the application for leave to appeal against sentence, and the appeal.

(c) Grant the application for leave to appeal.

(d) Allow the appeal against sentence.

(e) For the term of five years' imprisonment, suspended after two years, with an operational period of five years, for the offence of dangerous operation of a motor vehicle causing death and grievous bodily harm, substitute a sentence of four years' imprisonment, suspended forthwith, with an operational period of four years.

(f) Otherwise not vary the sentences imposed at first instance.

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91 *R v Nhu Ly* [1996] 1 Qd R 543 at 547 referred to in *Osborne* at [57].