suspended was the appropriate sentence. In *R v Dwyer*,[5] an approach of the kind advocated on behalf of the applicant was rejected:

> "... An approach which seeks to grade the criminality involved in such cases by a close comparison of aggravating and mitigating factors, as if there is only one correct sentence, is to be deprecated as involving the illusion of a degree of precision which is both unattainable, and, in truth, alien to the sentencing process (*Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]). In *Markarian v The Queen* ((2005) 288 CLR 357 at 371 [27] (citations footnoted in original)), Gleeson CJ, Gummow, Hayne and Callinan JJ said:
>
> > 'Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence (*Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]). And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies (*Johnson v The Queen* (2004) 78 ALJR 616 at 618 [5]; 205 ALR 346 at 348 per Gleeson CJ; at 624, 356 [26] per Gummow, Callinan and Heydon JJ).'
>
> In the same case, McHugh J said ((2005) 228 CLR 357 at 383 – 384 [65] – [66] (citations footnoted in original)):
>
> > 'Unfortunately, discretionary sentencing is not capable of mathematical precision or, for that matter, approximation. At best, experienced judges will agree on a range of sentences that reasonably fit *all* the circumstances of the case. There is no magic number for any particular crime when a discretionary sentence has to be imposed. What Jordan CJ said in *R v Geddes* ((1936) 36 SR (NSW) 554 at 555 – 556) about the reality of the sentencing process has never been bettered and probably has never been equalled. With the passage of time, it is no longer cited as frequently as it once was. But the whole judgment repays careful study. I make no apology for setting out the crucial passage, lengthy though it is:
> >
> > > 'This throws one back upon a preliminary question as to the general principles upon which punishment should be meted out to offenders. In the nature of things there is no precise measure, except in the few cases in which the law

[5] [2008] QCA 117 at [37] – [38] (citations footnoted in original).

> prescribes one penalty and one penalty only. In all others, the judge must, of necessity, be guided by the facts proved in evidence in the particular case. The maximum penalty may, in some cases, afford some slight assistance, as providing some guide to the relative seriousness with which the offence is regarded in the community; but in many cases, and the present is one of them, it affords none. The function of the criminal law being the protection of the community from crime, the judge should impose such punishment as, having regard to all the proved circumstances of the particular case, seems, at the same time, to accord with the general moral sense of the community in relation to such a crime committed in such circumstances, and to be likely to be a sufficient deterrent both to the prisoner and to others.
>
> When the facts are such as to incline the judge to leniency, the prisoner's record may be a strong factor in inducing him to act, or not to act, upon this inclination. Considerations as broad as these are, however, of little or no value in any given case. It is obviously a class of problem in solving which it is easier to see when a wrong principle has been applied than to lay down rules for solving particular cases, *and in which the only golden rule is that there is no golden rule*.
>
> The position of the judge is analogous to that of a civil jury who are called upon to award damages for a breach of contract, or a tort, in relation to goods which have no market value, and for the assessment of the value of which no generally accepted measure exists. The jury must do the best they can; and so must the judge. In applying considerations as general as these, it is necessarily not often that it can be said, with reasonable confidence, that the sentence imposed was wrong.' (Emphasis added.)

This passage is not a testament of despair but a perceptive understanding of the reality of the sentencing process by one of the greatest judges that the common law system of justice has produced. It recognises that the judge must weigh all the circumstances and make a judgment as to what is the appropriate sentence. In *R v Williscroft* ([1975] VR 292 at 300), the Full Court of the Supreme Court of Victoria referred to this value judgment as an 'instinctive synthesis of all the various aspects involved in the punitive process.' This was a

> candid recognition of the fact that in the end sentencing depends on the judge's assessment of what is the correct sentence. There is no objectively correct sentence, only a range of sentences that the majority of experienced judges would agree applied to the case. The only novelty in *Williscroft* was the description that it gave to the sentencing process.'"

[21] In my respectful opinion, the imposition of a custodial sentence was within the sound exercise of the sentencing discretion. That this is so is clearly established by this Court's decisions in *R v Gruenert*, and *R v Vance; ex parte A-G (Qld)*.[6] Those decisions, and the earlier decisions reviewed in them, proceed on the basis that the death of a human being as a result of dangerous driving is so serious that a term of imprisonment of at least 18 months should be expected save in exceptional cases. Usually such a sentence will involve actual custody. In this case, in addition to the death of the deceased, the applicant's dangerous operation of his motor vehicle also caused serious injury to Constable Haupt. While it is arguable that it might have been open to the learned sentencing judge fully to suspend the sentence imposed on the applicant, it cannot be said that his Honour erred in regarding the applicant's fault as so serious as to require some period of actual custody bearing in mind the tragic consequences of his offence.

Conclusion and order

[22] The sentence which was imposed was not manifestly excessive.

[23] The application for leave to appeal against sentence should be refused.

[24] **FRASER JA:** I agree with the reasons of Keane JA and the order proposed by his Honour.

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6 [2007] QCA 269.

[13] In the circumstances the application for leave to appeal should be refused.

[14] **MACKENZIE J:** I agree with the order proposed by Williams JA. Despite the comprehensive submissions on the applicant's behalf, I particularly endorse Williams JA's reasons for concluding that the experienced sentencing judge did not overemphasise the effect of the event on the victim's family and that he did not err in assessing the weight to be given to the applicant's personal circumstances. I agree in other respects with the reasons he gives for refusing the application.

[15] The sentencing judge regarded that as indicating a head sentence of around the three year mark, but he remarked also that the fact that there were two people killed in the present case was an aggravating feature which required a somewhat higher head sentence than had been suggested by the Crown or by defence counsel. (The prosecutor and defence counsel had submitted that the range for the head sentence was between 18 months and three years imprisonment. The prosecutor submitted for a sentence in the higher end of that range and one that involved a period of actual custody. Defence counsel submitted that a sentence of 18 months to two years imprisonment was appropriate, that the sentencing judge might impose a parole release date ranging from immediate parole release to four months, but that the judge should exercise his discretion by ordering an immediate parole release date.) The sentencing judge also referred to Keane JA's statement in *R v Gruenert; ex parte A-G (Qld)* [2005] QCA 154 at [16] that, "The considerations of deterrence, and of the gravity of the consequences involved in the offence, mean that it will be a rare case that does not attract a custodial term."

[16] The sentencing judge described the applicant's favourable personal circumstances, including that he had undertaken self-rehabilitation and expressed genuine remorse. The judge accepted that it was unlikely there was a need for personal deterrence but considered that there was a wider need for general deterrence and a need for victims to feel that the courts have taken their grief and their views seriously.

[17] Immediately before passing sentence the sentencing judge referred again to the fact that the applicant's standard of driving fell below that which was acceptable under all of the circumstances in that the speed at which he was driving was not such that he could safely recover from the difficulty which was caused either by an animal coming across the road or the applicant's car drifting off the side of the road.

The applicant's contentions in the appeal

[18] The applicant contended that the sentence was manifestly excessive for two reasons, first, that the sentencing judge placed too much weight on the outcome of, rather than the act of, the dangerous operation of a vehicle, so that the sentencing discretion miscarried and, secondly, that the sentence was out of line with the general sentencing trend in comparable cases considered by the Court.

Discussion

[19] There is no substance in the applicant's first contention. The judge sought to summarise the defect in the applicant's driving as a "momentary misjudgement". That is an accurate enough précis, but more importantly there is no indication that the sentencing judge failed to take into account his more extensive findings concerning the objective dangerousness of the applicant's driving: the judge twice described and he plainly took into account the relevant respects in which he had found that the applicant drove dangerously. The applicant does not challenge those findings. I accept that it may be inferred that the sentencing judge regarded a term of imprisonment of three and a half years as appropriate, rather than the term of three years the judge thought was otherwise consistent with *R v Wilson*, largely because the applicant's offence resulted in even more devastating consequences than were present in *R v Wilson*. I discuss later in these reasons the appropriateness of the overall sentence imposed, but the point here is that the sentencing judge did not err by significantly increasing the length of the term of imprisonment that was otherwise appropriate to take into account the fact that the consequences of the applicant's dangerous driving were substantially worse than in *R v Wilson*.

[20] Of course any such notional increase could not be the result of some pseudo-arithmetical exercise, but it does not understate the seriousness of the facts of *R v Wilson* to say that this was an even worse case. Even though the extent and severity of the consequences of an accident caused by dangerous driving are typically unforeseen (though not unforeseeable), and both unintended and outside the control of an offender who is not guilty of deliberate misconduct, the consequences can matter a great deal in the determination of the appropriate punishment. There is ample authority for that proposition. Reference might be made, for example, to *R v Balfe* [1998] QCA 14, in which that approach is confirmed in the particular context of an offence against s 328A. But it is hardly necessary to refer to authority when the terms of s 328A themselves provided (at the time of the offence on 21 February 2007)[1] for a maximum term of imprisonment of seven years for this offence of dangerous driving causing death or grievous bodily harm (where, as here, there are none of the specified circumstances of aggravation) whereas dangerous driving without any such consequence carried the much lower maximum penalty of three years imprisonment.

[21] In support of the applicant's second contention, his counsel undertook a thorough analysis of the following decisions: *R v Harris, ex parte A-G (Qld)* [1999] QCA 392; *R v Hart* [2008] QCA 199; *R v Gruenert, ex parte A-G (Qld)* [2005] QCA 154; *R v Price* [2005] QCA 52; *R v Manners, ex parte A-G (Qld)* (2002) 132 A Crim R 363, [2002] QCA 301; and *R v Balfe* [1998] QCA 14.

[22] As McPherson JA observed in *R v Price* [2005] QCA 52, since the Court of Appeal's decision in November 2002 in *R v Wilde, ex parte A-G (Qld)* (2002) 135 A Crim R 538; [2002] QCA 501 there had been a marked upward trend in the penalties imposed in cases of dangerous driving causing death or grievous bodily harm. More significantly for present purposes, in none of the decisions cited by the applicant's counsel were the consequences of the dangerous driving as far reaching and as shocking as they were in this case. In these circumstances, and in light of the extensive analyses of the earlier decisions in more recent authorities, it is necessary only to discuss those more recent authorities.

[23] In *R v Hart* [2008] QCA 199, Keane JA, with whose reasons de Jersey CJ and I agreed, observed that a number of earlier decisions of this Court "proceed on the basis that the death of a human being as a result of dangerous driving is so serious that a term of imprisonment of at least 18 months should be expected save in exceptional cases. 'Usually such a sentence will involve actual custody." (It is relevant here to note that Keane JA cited *R v Gruenert, ex parte A-G (Qld)* [2005] QCA 154 and *R v Vance; ex parte A-G (Qld)* [2007] QCA 269, both of which concerned sentences imposed before the maximum penalty for the present offence was increased from seven to 10 years.) It is to be emphasised that, although a non-custodial sentence may be the just sentence in a particular case, *R v Hart* is authority for the proposition that a **minimum** term of 18 months, usually involving some period of actual custody, is to be expected for this offence where a death results from it. *R v Hart* is not authority for the proposition that a substantially longer term of imprisonment is outside the sentencing range where the facts of a particular case call for it.

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1 On 20 March 2007, the maximum penalty for the offence of dangerous driving causing death or grievous bodily harm (without circumstances of aggravation) was increased from seven years imprisonment to 10 years imprisonment: s 4 of the *Criminal Code and Civil Liability Amendment Act* 2007 (Qld), Act No 14 of 2007, which was assented to on 20 March 2007.

[24] *R v Hart* was a case in which the dangerous driving caused the death of one person and grievous bodily harm to another. There were of course other points of distinction. It is not appropriate or practicable to devise some fixed scale to take into account the relative seriousness of shocking cases of this kind, but for the reasons I have given it is right to take into account that the consequences in this case were more devastating than in *R v Hart* or any of the other decisions cited to the Court.

[25] In *R v Gallaher* [2004] QCA 240, the Court rejected a contention that a sentence of three and a half years imposed after a trial (on an offender who was not remorseful and had a bad traffic history and a criminal record) was manifestly excessive. That offender had driven over a crest on a rural road at an excessive speed for the conditions of 80 kph, which was characterised as "extremely dangerous", driven onto the incorrect side of the road, and collided head on with an oncoming vehicle. A passenger in that vehicle died as a result of the collision. In view of that decision, and despite the applicant's much more favourable personal circumstances, it is difficult to accept the proposition that the sentence in this case, in which the consequences of the dangerous driving were very much worse, was manifestly excessive.

[26] I earlier reproduced the obiter dictum in McMurdo P's reasons in *R v Wilson* to the effect that the authorities do not support a sentence higher than about three years imprisonment for an offence involving a serious error of judgment over a short period by someone with a concerning traffic history but without prior convictions, even after a trial. It is true that the applicant had the benefit of a plea of guilty and that his personal circumstances were very much more favourable than Wilson's (although it is material that the applicant was driving without complying with the terms of his learner's permit), but the sentencing judge's approach was to take those factors into account largely in the early suspension of the imprisonment. It is again a significant point of distinction here that McMurdo P made the quoted statement in a case in which the consequences of the applicant's offence were much less extensive than they were in this case.

[27] It is a personal tragedy for the applicant and for his family and friends that his unintended and momentary misjudgement has led not only to the death of his cousin but also to a lengthy term of imprisonment, with a substantial period in actual custody, and even though such a severe penalty is not required for the purposes of rehabilitation or personal deterrence. But the sentencing judge was obliged to take other factors into account. The terrible fact is that the applicant's dangerous driving led to two deaths and to the grievous bodily harm of a third person. That and the importance of general deterrence in sentencing for this frequent offence called for a term of imprisonment and a significant period of actual custody, despite the applicant's compelling personal circumstances. Although the term of three and a half years with the imprisonment suspended after 12 months was a severe sentence, I am unable to conclude that it was so excessive as to demonstrate that the sentencing judge must have strayed outside the broad sentencing discretion reposed in him.

High but within range.

Proposed order

[28] I would refuse the application.

[29] **WILSON J:** The application for leave to appeal against sentence should be dismissed for the reasons given by Fraser JA.

the speed or force of the collision as the utility did not stop moving on impact. The scientific traffic expert opined that because of the limited damage and spread of debris it was a low speed crash consistent with the deceased's motorcycle travelling at the speed limit immediately before the collision. Forensic testing of the light bulbs of the headlights of the motorcycle showed the low beam light was illuminated at the time of impact. There were no mechanical defects in either vehicle which could have contributed to the collision.

[13] The schedule of facts stated in its penultimate paragraph:

> "Later investigations revealed the [applicant] had just finished working a 16-hr day and it was his 10th consecutive day of [working] as a concrete driller."[5]

This was a statement which assumed significance in the sentencing judge's approach to the characterisation of the nature of the dangerous driving.

[14] The applicant was charged and issued with a notice to appear on 9 October 2010, almost 14 months after the collision, after declining a formal interview.

[15] The schedule of facts stated in conclusion:

> "The Crown accepts that the [applicant's] criminality is one of momentary inattention resulting in him not noticing the deceased before executing the turn across the deceased's path."[6]

Criminal and traffic history

[16] The applicant had a number of drug related offences dealt with in the Magistrate's Court in Mackay in the 1980s and 1990s, although the most recent was a conviction for possession of a dangerous drug on 12 February 2001 and possession of property reasonably suspected of being tainted property for which he was fined $750. His criminal history included an offence of being in charge of a motor vehicle whilst under the influence of liquor or drugs in 1984 for which he was fined $325 and disqualified for 10 months. The following year he was similarly convicted but additionally, he was convicted of dangerous driving, fined $400 and disqualified from driving for two years.

dated CH + TH

[17] The applicant's traffic history (in addition to those mentioned in the criminal history) included two offences of driving under the influence of liquor in 1983 and 1985 respectively and four offences of exceeding the speed limit but not egregiously so. The last entry was in October 2009. The sentencing judge remarked that this offending was largely confined to matters which had occurred when the applicant was a young man.

Prosecution case below

[18] The prosecution proceeded on the basis that the applicant's dangerous driving was to be characterised as "momentary inattention" in not seeing the deceased before executing the turn across the path of the oncoming motorcycle. The prosecutor submitted for a head sentence from 18 months to two years, extending from a wholly suspended sentence to one in which actual imprisonment could be required. The prosecutor relied upon the authorities of *R v Hart*[7], *R v Gruenert;*

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5 AR 41.
6 AR 41.
7 [2008] QCA 199.

ex parte Attorney-General (Qld)[8] and *R v Price*.[9] However, early in the prosecutor's submissions the sentencing judge intervened stating that he needed to be persuaded that the applicant's conduct could be characterised as "momentary inattention".

[19] The victim impact statements from the deceased's widow (the deceased was the father of a seven-month-old child), father and step-mother spoke of the family's sadness and loss. The father made a further statement in court pursuant to s 15(8) of the *Victims of Crime Assistance Act* 2009. He told the court that his son was a very good motorcycle rider who had been well-trained in riding a motorcycle.[10]

Defence submissions at sentence

[20] Defence counsel told the court that the applicant had always been gainfully employed but had been diagnosed with a post-traumatic stress disorder as a consequence of the accident and suffered from overwhelming feelings of guilt and was on periodic WorkCover. He was financially supporting his elderly mother because other members of the family due to serious ill health were unable to assist. Any incarceration would affect her.

[21] Defence counsel submitted that there was no demonstrated course of dangerous driving prior to the collision which permitted the driving properly to be categorised as anything other than "momentary inattention". The judge again expressed his reluctance to accept this categorisation, noting that the road was long and straight and the vehicles' lights were operating. Counsel explained that his client saw lights in the distance but thought they were far enough away to turn safely so that the traffic misconduct could be characterised at most as borderline miscalculation.[11]

[22] Defence counsel relied on *R v Gruenert; ex parte Attorney-General (Qld)*[12]; *R v Ryan; ex parte Attorney-General (Qld)*[13] and *R v Proesser*[14] and submitted that it was open to the court to impose a wholly suspended sentence.

[23] The judge continued to press defence counsel for facts which supported the conclusion of momentary inattention because of his submission that, although not in the schedule of facts, the applicant had seen, as had the passenger, distant lights and thought there was ample time to turn. The prosecutor produced the statement to police at the scene in which the applicant had said that he had slowed down to about 30 kilometres an hour to make the right-hand turn and did not see any traffic coming towards him "only a car about 500 metres away". He had started the turn, had not seen any lights and the motorcycle was "there at my [bullbar]".[15] Those distant lights were described, as the judge pointed out to counsel, as car lights.

[24] The prosecutor further directed the court's attention to the statement of the crash investigator who had given evidence at the committal hearing that the scatter of the debris was consistent with a low speed collision and with the deceased travelling at the speed limit immediately before the collision.

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8 [2005] QCA 154.
9 [2005] QCA 52.
10 AR 14-15.
11 AR 20.
12 [2005] QCA 154.
13 [1996] QCA 434.
14 [2007] QCA 61.
15 AR 26.

[25] His Honour reserved the matter until after the luncheon adjournment. He then queried whether the indicator on the applicant's vehicle was operating when it was turning. Defence counsel was instructed that it had been activated although there was no specific reference to it in any of the statements. His Honour then pronounced sentence.

Approach of the sentencing judge

[26] His Honour immediately identified as the important issue whether the driving could be categorised as dangerous driving as a result of momentary inattention or should be given a more serious descriptor. He noted, by reference to the aerial photograph tendered, that a substantial length of the roadway was straight and that there was no obstruction to vision nor was there other traffic to obscure the view that the applicant had of the motorcycle or of the motorcyclist's view of the applicant's utility. His Honour said:

> "Because of the length of the straight [road] and the fact that your vision was unobscured and it is common ground that the motorcyclist's headlight was activated, it seems to me that there must have been a very significant period when you should have had him under observation. On that basis, it does not seem to me that the event can be described as one arising from momentary inattention.
>
> I think there is a serious and in terms of driving accidents, prolonged failure to keep a proper lookout. Because I make that finding, I ask what could be the cause and I wonder if it's not found in the last paragraph or the second last paragraph of the statement of facts, which records that you were at the end of a 16 hour working day and it was your tenth consecutive day of work as a concrete driller. It seems to me that you must have been so tired that you should not have been driving."[16]

The judge accepted that the applicant intended no harm but observed that driving when very tired was "a serious breach of the standard of driving that other road users are entitled to expect". His Honour referred to community concerns with the prevalence of long shifts of work and driving significant distances.

[27] It was for that characterisation of culpability – a prolonged period of inattention likely brought about by fatigue – that his Honour concluded that the appropriate sentence was not one of 18 months which would have been the case on the basis of momentary inattention but three to four years imprisonment. His Honour referred to the applicant's favourable circumstances of a hard working man who was a good provider for his family; that imprisonment would in effect punish other members of the family who would be deprived of his support; that he himself had suffered significantly (emotionally) since the accident; his remorse; the plea of guilty; and the significant delay in having the case brought to court. His Honour observed that the delay allowed the applicant to demonstrate his usefulness to the community and to his family and that he was unlikely to re-offend. Advantageously for the applicant his Honour did not regard his traffic and criminal histories as relevant to sentence.

Applicant's submissions on application for leave to appeal

[28] Ms Prskalo, for the applicant, submitted that a finding that fatigue was the significant cause of the applicant's failure to see the oncoming motorcycle and thus

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16 AR 31-32.

contributed to his culpability was not reasonably open on the evidence. She argued that even if the conduct was to be characterised as something more serious than momentary inattention neither the quality of the applicant's driving nor his antecedents justified an escalation of penalty from 18 months to two years imprisonment to between three and four years imprisonment. She submitted that there was no aggravating feature to the driving such as excessive speed, a substantial traffic history, careless driving of a heavy vehicle or a deliberately dangerous course of reckless driving to justify a higher sentence. She referred to *R v Wilson*[17] where the offender was sentenced to four years imprisonment with parole eligibility after 18 months. That offender had a serious traffic history and he was convicted after a four day trial. The driving involved overtaking on his motorbike in an unsafe manner. It was unsafe because there was another motorcyclist travelling in the opposite direction with which he collided. The other cyclist died and his pillion passenger suffered grievous bodily harm. The appeal did not concern the issue of the sentence imposed since the conviction appeal was successful. In *obiter dictum* observations the President stated that the authorities did not support a sentence over three years for an offence of a similar kind involving a serious error of judgment over a short period by an offender with a concerning traffic history but without prior convictions and without the exacerbating factor of intoxication[18] referring to *Gruenert*; *R v Manners; ex parte Attorney-General (Qld)*[19]; *R v Price*[20]; *R v Hart*[21] and *R v Newman*.[22] Her Honour's comment was made in respect of cases for which the maximum penalty[23] was seven years imprisonment.

[29] Ms Prskalo also referred to *R v Murphy*[24] to demonstrate that the sentencing judge's appreciation of the range where the culpability was worse than momentary inattention was, nonetheless, too high. That offender was sentenced to three and a half years imprisonment suspended after serving 12 months. He was charged with dangerous driving causing death and grievous bodily harm. He drove on or below the speed limit of 90 kilometres per hour but permitted his car to drift to the outside of his lane at a point where the highway curved. He attempted to correct the path of the car, but oversteered, causing the car to cross the double unbroken centre line into the path of an oncoming car. His passenger, who was his cousin, died as did the driver of the oncoming car. That driver's wife, who was a front seat passenger, sustained multiple life threatening injuries which left her with significant disabilities. There was a finding that the car was driven at a speed which was excessive in the circumstances. There had been some allegation that an animal had unexpectedly crossed the road but that was not resolved. The judge rejected the submission that the dangerous driving was momentary inattention but, rather, found it to be momentary misjudgement. Again, that sentence was imposed where the maximum penalty was seven years. It was not interfered with on appeal. Fraser JA, with whom Keane JA and Wilson J agreed, mentioned a "marked upward trend" in

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17 [2008] QCA 349.
18 At [26].
19 (2002) 132 A Crim R 363; [2002] QCA 301.
20 [2005] QCA 52.
21 [2008] QCA 199.
22 [1997] QCA 143.
23 *Criminal Code and Civil Liability Amendment Act* 2007 (Qld), Act No 14 of 2007, s 4, assented to on 20 March 2007 increased the maximum penalty to 10 years imprisonment.
24 [2009] QCA 93.

the penalties imposed in cases of dangerous driving causing death or grievous bodily harm.[25]

Discussion

(i) Procedural fairness

[30] The applicant contends that his counsel ought to have been alerted by the sentencing judge that he intended to depart from the agreement between the parties that the collision occurred because of his momentary inattention. From the outset of the sentence hearing the judge alerted the prosecutor and thus defence counsel that he was concerned at the characterisation of the driving misconduct as momentary inattention. He raised this on several occasions and later with defence counsel. In *R v Ruka*[26] a similar complaint was made of lack of warning about the basis on which the judge would sentence where the facts were not in dispute. Wilson J (as her Honour then was) said:

> "Whether the conduct should be characterised as momentary inattention or as something more serious was a matter of evaluation of admitted facts. In those circumstances, the sentencing judge was not obliged to warn counsel for the applicant that his contention might be rejected. There was no breach of the rules of procedural fairness."[27]

That is the case here. It is true that fatigue was not discussed with counsel but the facts which pointed to that inference were not in dispute. The applicant had given no interview after his initial statement which might have rebutted that inference.

(ii) Characterisation of the driving

[31] His Honour looked for an explanation for the failure of the applicant to observe the oncoming motorcycle on the long, straight stretch of road which, according to the agreed schedule of facts, was free of obstruction including other traffic and was well lit. That was hardly surprising. The only explanation offered by the undisputed facts was that the applicant was so fatigued that he did not register the presence of the deceased's motorcycle. The conclusion was open to his Honour that the applicant had engaged in a prolonged period of failure to keep a proper lookout.

(iii) Manifest excess?

[32] As the sentencing judge was informed, the maximum penalty for the offence of dangerous driving causing death or grievous bodily harm (without circumstances of aggravation) was increased in 2007 from seven years to 10 years imprisonment. Accordingly, authorities which pre-date that amendment may be regarded of some limited value in indicating a range. In exchange with counsel it was recognised that there had been an upward trend in sentencing for this offence in more recent times.[28]

[33] Mr S Vasta, for the respondent, submitted that since *R v Damrow*[29] and *R v Ruka*[30] were the only post-2007 cases to which the increased penalty was applied they would give the most assistance. It is useful to consider those decisions first.

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25 At [22].
26 [2009] QCA 113.
27 At [12].
28 AR 21.
29 [2009] QCA 245.
30 [2009] QCA 113.

[34] In *Damrow* the applicant was found guilty after a two day trial in the District Court of the dangerous operation of a motor vehicle causing death. She was sentenced to 18 months imprisonment suspended after eight months with an operational period of 18 months and was disqualified from holding or obtaining a licence for two years. She was also driving unlicensed. The applicant contended that since neither speed nor alcohol/drugs were factors, an actual period of imprisonment was not justified. She drove her car into an unfamiliar intersection and collided with a truck. There had been a stop sign facing where she entered the intersection but it had been removed earlier and the stop line on the road had faded. The pending intersection was indicated by traffic signs and, as Fraser JA commented,[31] the jury must have accepted the prosecution case that those features were sufficient to alert a reasonable driver that she was approaching an intersection. At the time she and the other occupants of the car were singing along to music on the car radio. The collision caused the death of a passenger in her car. The applicant had no prior criminal convictions and was otherwise of good character. She was unlicensed because she had not responded to a letter which offered her the opportunity of getting her licence back with only one demerit point.

[35] Fraser JA responded to the submission that the level of dangerousness of the driving was very low:

> "I accept that the level of seriousness of the applicant's driving was at a relatively low level within the range of driving which might be stigmatised as "dangerous", but I am nevertheless not persuaded that the sentencing judge erred in concluding that this was not a case of mere momentary inattention or otherwise a rare case which necessarily attracted a non-custodial sentence."[32]

His Honour distinguished the offender's driving from that in *Gruenert*[33] where the driving was described as mere momentary inattention. His Honour emphasised that the *quality* of an offender's driving is significant and driving which is more culpable than mere momentary inattention calls for a higher penalty. Keane JA in *Gruenert* had observed that a head sentence of 18 months imprisonment was at the bottom end of the range for a case of dangerous driving causing death.

[36] The offender in *Ruka*[34] pleaded guilty to dangerous operation of a motor vehicle causing death. He was sentenced to two years imprisonment with a parole release order after serving six months. He was automatically suspended from holding or obtaining a licence for six months. The offender contended that a fully suspended sentence was appropriate and that the judge had erred in finding that it was not a case of momentary inattention. He had just finished a 12 hour shift at 6.00 am and it was the tenth consecutive day on which he had worked such a shift. He proceeded to drive home along the Mount Lindesay Highway and after stopping for petrol and something to drink resumed his journey. Fifteen minutes later he fell asleep at the wheel, his vehicle drifted to the wrong side of the road into the path of an oncoming vehicle with which his vehicle collided. The driver of the oncoming vehicle was killed. There was no suggestion that the offender had been speeding or was affected by alcohol.

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31 At [5].
32 At [16].
33 [2005] QCA 154.
34 [2009] QCA 113.

[37] There is, of course, no question here that the applicant fell asleep at the wheel. Wilson J, with whom Muir and Chesterman JJA agreed, noted in *Ruka* that the sentencing judge appreciated the importance of identifying the level of seriousness of the offender's driving (immediately before falling asleep[35]) and that it was more blameworthy than a case of momentary inattention. The offender had conceded that he ought to have appreciated his fatigue and pulled over before falling asleep. Here there is no such concession. Fatigue was an inference drawn by the sentencing judge seeking an explanation for the prolonged failure to observe the deceased's motorcycle. Wilson J observed that fatigue has been widely recognised as a major cause of traffic accidents and the courts must be vigilant to ensure community appreciation of a driver's responsibility not to endanger the lives of others by driving when he or she is too tired to do so safely. The offender in *Ruka* was 37 at the time of the offence, 39 at sentence and had no criminal history. He did, however, have a traffic history which involved five speeding offences over 10 years. He was of good character with a solid work history. He was deeply remorseful for his conduct and its catastrophic effect. The court particularly referred to *Vance*[36] and concluded that the sentence was not manifestly excessive.

[38] In *R v Vance; ex parte Attorney-General (Qld)*[37] the offender pleaded guilty to the dangerous operation of a motor vehicle in 2006 (when the maximum penalty was seven years). He was sentenced to two years imprisonment suspended after six months with an operational period of two years and disqualified from driving for five years. He was 20 and his prior history included convictions earlier in 2006 for a minor drug offence and two years earlier for failing to stop at a red light. The deceased was a 54-year-old man who was riding his bicycle between 5.15 am and 5.30 am along a main arterial road at Burleigh Waters in a lane to the left of lanes available to motorists. The offender, driving his motor vehicle in the same direction, approached the deceased on his bicycle from the rear. There was little traffic and street lights were still illuminated and the weather fine. At a point where the road started to curve to the right the offender's vehicle crossed into the emergency lane where the bicycle was situated and collided with the guard rail. The vehicle then collided head on with the rear of the bicycle. The deceased was thrown many metres forward. The offender did not stop at the scene. Other motorists found the deceased lying face down on the road. He died shortly afterwards. The following day police were notified by the offender's solicitors and several days later police attended at his home and took possession of his vehicle. Although the offender had been drinking alcohol he had consumed his last alcoholic drink by 7.00 pm the previous day. He had drunk only water thereafter but had driven with friends to establishments in and around Surfers Paradise and at 4.30 am had decided to drive home.

[39] It was submitted on his behalf that he had no recollection of a collision and did not see the deceased before or after. He looked at the damage to his vehicle (presumably because of the impact with the guard rail on the road) but then drove home. It was the offender's contention that he must have fallen asleep. He was sentenced on the basis that the only factor which contributed to the collision was fatigue. He had pleaded guilty on ex officio indictment. He had expressed remorse to the family and had undertaken driving rehabilitation. The Attorney-General contended that the sentence was manifestly inadequate. The Chief Justice observed:

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35 *Jiminez v The Queen* (1992) 173 CLR 572; [1992] HCA 14; *R v Pellow* [1997] NSWSC 286.
36 [2007] QCA 269.
37 [2007] QCA 269.

> "The predominantly important features of this case, for a sentencing Judge were, first and foremost, that a fellow human being was killed because of the [offender's] dangerously neglectful driving."[38]

His Honour further emphasised that the offender should have appreciated that he was unfit to drive through fatigue yet nevertheless chose to do so. The characterisation of the neglect as surpassing momentary inattention was said to be correct since the offender had driven over an appreciable period while grossly fatigued. The other factor of significance was leaving the scene of the accident and failure to surrender promptly to police.

[40] The Attorney-General submitted for a sentence in the order of three and a half years imprisonment after taking into account the offender's youth and his plea of guilty on ex officio indictment and the lack of any relevant prior criminal history. His Honour referred to *R v McGuigan*[39] and *Rv Hardes*.[40] In *McGuigan* a three and a half year sentence was imposed with parole after 18 months. The driving had caused grievous bodily harm not death. In *Hardes* a term of imprisonment of three years was imposed. Each offender had a bad traffic history. In *Hardes* three years was described as "at the very bottom of the range for such an offence". The Chief Justice concluded that Vance's sentence was manifestly inadequate. He said:

> "Fundamental considerations in cases like these are the ultimate gravity of causing the death of a fellow human being, and the primacy of the Courts continuing to do their utmost to secure general deterrence in a potentially very dangerous sphere of human activity.
>
> While past decisions of the Court of Appeal are helpful in suggesting a general range in cases like these, the determination of penalty is, in the end, a value judgment in which the Court must carefully balance all relevant considerations."[41]

As is customary with Attorney's appeals against sentence a moderate approach was taken to increasing the sentence. The head sentence was increased to three years requiring the offender to serve 12 months actual imprisonment. The Chief Justice added:

> "I accept the submission for the Attorney-General that a range appropriate to this case was of the order of three to four years' imprisonment."

Keane JA and Mullins J agreed.

[41] Mr Vasta also referred to *R v Hart*[42] (a sentence imposed when the maximum penalty was seven years). The offender pleaded guilty to one count of dangerous operation of a motor vehicle causing death and grievous bodily harm. He was sentenced to 18 months imprisonment suspended after four months with an operational period of 18 months and disqualified from driving for 12 months. That offender contended that the sentence was manifestly excessive. At about 10.00 pm in January 2005 the applicant was driving a taxi from Townsville approaching the

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38 At p 9.
39 [2004] QCA 381.
40 [2003] QCA 47.
41 At p 14.
42 [2008] QCA 199.

intersection of the Bruce Highway and Mount Low Parkway. The deceased was a front passenger in the taxi. The offender was following another vehicle which executed a right-hand turn into Mount Low Parkway. The offender then executed his own right-hand turn and collided with a motorcycle driven by a police constable travelling in a southerly direction on the Bruce Highway. The offender did not see the motorcycle until it was too late to avoid the collision. The passenger was killed as a consequence of injuries sustained in the collision and the police constable suffered grievous bodily harm. The intersection was described as hazardous, it was dark and the road surface was wet because it had been raining. There were no traffic lights and the overhead lighting at the time was deficient. The speed limit was 100 kilometres per hour but excessive speed was not involved. No explanation was advanced by the offender to explain why he failed to see the oncoming motorcycle. The collision was said to have been caused by momentary inattention. The offender was 63 at the time of the offence. He had no criminal history and a minor traffic record. He was said to be of good character and as a result of the offence he had lost his livelihood. It was contended for him that the term of imprisonment should have been wholly suspended.

[42] The present case is not one of momentary inattention so *Hart* is not of great assistance. Keane JA, with whom de Jersey CJ and Fraser JA agreed, identified the crucial issue as the level of seriousness of the actual driving of the offender[43] quoting Thomas JA in *R v Harris; ex parte Attorney-General (Qld)*.[44] In *Hart* the offender's inattention was momentary although described as a "serious fault".[45] Importantly Keane JA referred to *R v Dwyer*[46] which deprecated:

> "... An approach which seeks to grade the criminality involved in such cases by a close comparison of aggravating and mitigating factors, as if there is only one correct sentence, ... [it involves] the illusion of a degree of precision which is both unattainable, and, in truth, alien to the sentencing process ..."

Conclusion

[43] The question is whether the range proposed by his Honour of three to four years reflects a consistency of approach with previous sentences for broadly comparable conduct taking into account not dissimilar background facts. Once it is accepted that his Honour was entitled to reject the characterisation of the driving as momentary inattention, the range of comparable sentences was enlarged. Furthermore, the increase in the maximum penalty from seven to 10 years in 2007 is a clear indication of the legislative intent that dangerous driving causing death is to attract a greater level of penalty than might hitherto have been the case. The death of any valued family member will always cause grief and be described as a tragedy. As the Chief Justice observed in *Vance*, there is a strong role for general deterrence in this area. Driving a vehicle tends to be taken very much for granted. It tends to be regarded as a right rather than a privilege. The public must have a level of understanding that those who engage in driving must do so carefully to protect other users of the road. If they drive dangerously by prolonged inattention, whether resulting from fatigue, distraction from passengers or some other reason, and cause thereby the death or serious injury of another, punishment which strongly

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43 At [17].
44 [1999] QCA 392.
45 At [18].
46 [2008] QCA 117 at [37]-[38]. See also *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27].

denounces that conduct will be imposed. The head sentence of three years was not outside the range of a sound sentencing discretion.

[44] In suspending the sentence at nine months his Honour appropriately recognised the mitigating features of good character, hard work, remorse and the plea of guilty. Furthermore, his Honour was generous in his characterisation of the applicant's criminal and traffic history as not of great relevance and confined to the applicant's youth. I am not persuaded that his Honour erred in his approach to the sentence and I would refuse the application for leave to appeal against sentence.

[45] **ATKINSON J**: For the reasons given by White JA, I would refuse the application for leave to appeal against sentence.

R v Manners; ex parte A-G (Qld) [2002] QCA 301; (2002) 132 A Crim R 363, cited
R v Anderson; ex parte A-G (Qld) [1998] QCA 355; (1998) 104 A Crim R 489, cited

COUNSEL: D L Meredith for appellant
A J Glynn SC for respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for appellant
Bill Cooper & Associates (Clermont) for respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Keane JA in this matter. There is nothing I wish to add thereto. I agree with those reasons and with the order proposed.

[2] **KEANE JA:** The respondent to this appeal by the Attorney-General of Queensland was convicted on 26 November 2004 after a trial of dangerous operation of a motor vehicle causing death. The offence in question occurred on 19 September 2002.

Background

[3] Shortly after 4.00 pm in the afternoon the respondent was driving a truck on the Peak Downs Highway heading towards Mackay. The learned sentencing judge observed that the photographic exhibits showed that the respondent had a clear view for a length of the highway which allowed him to overtake safely. The speed limit on this area of the highway was 100 kph. The respondent overtook a white utility towing a caravan travelling in the same direction. The utility was being driven by Johannes Krop. Mrs Elizabeth Ann Krop was in the passenger seat. According to Mrs Krop, they were travelling at between 70 and 80 kph. The respondent started to overtake them as they approached the Stockyard Creek Bridge on what was, as I have mentioned, a relatively straight stretch of the highway. It was a fine clear day.

[4] The respondent moved alongside the Krops' vehicle in an overtaking manoeuvre, but then veered back into the lane in which the Krops were travelling before his truck had fully passed their vehicle. Mr Krop moved to the left of the road in order to avoid a collision and was forced off the road onto a grass verge. The truck being driven by the respondent did not come into contact with the vehicle being driven by Mr Krop. Mr Krop tried to get his utility and caravan back onto the road, but the momentum of the caravan, having descended down a strong incline into an earthen drain, flipped the utility over. Mr Krop, who was not wearing a seat belt, was partially thrown out of the utility and trapped under it. He died as a result of the injuries he sustained.

[5] When they came to a stop the utility and caravan stretched across both lanes of the road, stopping the rest of the traffic travelling in both directions. The respondent did not stop.

[6] Mr Joseph Wilkinson and his son witnessed the accident. They gave evidence that they were in a car coming from the other direction. Their evidence was that, if they had not slowed down, the respondent would have hit them, and that there was insufficient room for the respondent to overtake the Krops' vehicle without creating a danger of a collision with them. This was contrary to the evidence of Mr Darren Miller, who said that it appeared to him that the respondent had sufficient time to

pass the Krops' vehicle without colliding with the Wilkinsons' vehicle. It is urged by the respondent that the learned sentencing judge must be taken to have resolved this conflict in favour of Mr Miller's evidence.

[7] However this may be, the appellant now concedes that the Crown case put to the jury was that the essence of the respondent's dangerous driving was the manner in which the respondent pulled back onto his correct side of the road, rather than in undertaking a dangerous manoeuvre when he moved onto the right hand side of the road to overtake the Krops' car and caravan. The substance of the Crown case was that the respondent failed to keep a proper lookout when he was returning to the correct side of the road and thereafter when he failed to stop.

[8] The respondent did not give evidence. It was suggested to Mrs Krop in cross-examination that she was wrong when she said that her husband had been forced off the road. It was suggested to her that Mr Krop had over-reacted, and that the respondent had, in fact, been past the Krops' vehicle when he pulled in front of it. The jury must be taken to have rejected this suggestion.

The decision below

[9] The learned sentencing judge described the case as "one of momentary inattention" on the part of the respondent. He also observed that the respondent had no previous convictions of a criminal nature or for traffic offences, that he had been driving for over 30 years and that he has "an exemplary character". His Honour went on to conclude:

> "The factors which are relevant here are that this was a dangerous act but of a momentary nature of pulling in when there was some threat from the vehicle coming in the opposite direction, it was not over a long period of time obviously, there is no alcohol involved and no excessive speed. Given your previous history, the prospects of rehabilitation are good. In this case there was a delay, the charges were not laid until August 2003, the events having occurred in September 2002 and the committal did not occur until the 19th February 2004 and the trial is now November 2004, this would have been hanging over your head for over two years. During that time of course you have continued in a useful employment as attested to by your employer.
>
> ... A conviction is recorded, 18 months imprisonment wholly suspended with an operational period of two years. There is an automatic suspension of six months for this type of offence. I do not propose to add to that, as a truck driver, a loss of licence for six months will adversely affect your career. In the circumstances of this case that in my view is sufficient."

The issues on appeal

[10] It is submitted on behalf of the Attorney-General that the learned sentencing judge erred in his characterization of the respondent's conduct as "momentary inattention". This was said to be unduly generous to the respondent. It was also submitted that the sentence imposed was manifestly inadequate.

[11] The first submission depends largely on the significance of the respondent's failure to stop as an indicator of the extent of the respondent's inattention.

[12] Often a failure to stop in these circumstances might suggest a level of carelessness which cannot properly be characterized as "momentary inattention". The learned sentencing judge did not attach that level of significance to the respondent's failure to stop. Indeed, his Honour did not expressly advert to the point. It would be wrong, however, to infer that his Honour had overlooked the point. In this regard, the evidence suggests that the respondent's truck, a long vehicle consisting of a prime mover and high trailer, was so configured that the respondent had vision rearwards only in his "wing" mirrors. He could have seen the wreck left in his wake only if it was in his line of vision. There is no evidence to suggest that he did see it, and this Court cannot infer that he left the scene with callous disregard for the plight of Mr and Mrs Krop.

[13] In the upshot, it cannot be demonstrated that his Honour erred in describing the respondent's conduct as "momentary inattention". In my view, the appellant has not made good its submission that the learned sentencing judge proceeded on an erroneous view of the facts.

[14] I turn, therefore, to consider whether the sentencing discretion miscarried on the ground of manifest inadequacy.

[15] In this Court in *R v Harris: ex parte A-G*[1] Thomas JA said:

> "In a case such as this it becomes very important to identify the level of seriousness of the actual driving of the offender."[2]

[16] From a consideration of the decisions of this Court in *Harris*,[3] *R v Balfe*,[4] *R v Manners: ex parte A-G (Qld)*[5] and *R v Anderson: ex parte A-G (Qld)*,[6] it emerges that in a case of dangerous driving which causes death:

(a) a head sentence of 18 months imprisonment is at the bottom end of the range;

(b) the considerations of deterrence, and of the gravity of the consequences involved in the offence, mean that it will be a rare case that does not attract a custodial term;

(c) the imposition of a custodial sentence is not, however inevitable in every case; and

(d) cases of "momentary inattention" are among rare cases of dangerous driving which may attract a non-custodial sentence because, in such cases, the claims of the consideration of deterrence are less compelling.

[17] In my view his Honour's characterization of the respondent's offence as one of "momentary inattention" was correct. The respondent has a blameless record both as a driver and as a citizen. An impressive body of references vouch for his good character.

blameless record body of referees

[18] In these circumstances, I am not persuaded that the sentence which was imposed was manifestly inadequate.

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1 [1999] QCA 392; CA No 161 of 1999, 21 September 1999 at [42].
2 See also *R v Manahan* [2000] QCA 382; CA No 207 of 2000, 19 September 2000 at [19].
3 [1999] QCA 392; CA No 161 of 1999, 21 September 1999.
4 [1998] QCA 014; CA No 444 of 1997, 20 February 1998.
5 [2002] QCA 301 esp at [11] - [14]; (2002) 132 A Crim R 363 esp at 364.
6 [1998] QCA 355; (1998) 104 A Crim R 489.

[19] In my opinion, the imposition of a head sentence of 18 months was within the proper range although at the lower end of that range. The suspension, in its entirety, of that sentence for an operational period of two years is consistent with the approach reflected in *Manners*, *Harris* and *Anderson*.

Conclusion

[20] In my opinion, the appeal should be dismissed.

[21] **FRYBERG J:** I agree with the reasons of Keane JA and with the order proposed by his Honour.

Probably won't rely on

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Allen* [2012] QCA 259
PARTIES:	**R** **v** **ALLEN, Matthew Liam** (applicant)
FILE NO/S:	CA No 84 of 2012 DC No 248 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	25 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2012
JUDGES:	Margaret McMurdo P and Fryberg and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence is refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted after a trial of dangerous operation of a vehicle causing death – where applicant was 24 years old at time of offence and had no criminal history – where applicant had three entries in his traffic history – where applicant was in one of two right turning lanes and turned across oncoming traffic colliding with a motorcycle driver – where he was sentenced to 18 months imprisonment with a parole release date after nine months – where he was disqualified from holding or obtaining a driver's license for two and a half years – whether sentence was manifestly excessive *R v Damrow* [2009] QCA 245, considered *R v Gruenert; ex parte A-G (Qld)* [2005] QCA 154, considered *R v Maher* [2012] QCA 7, considered *R v Major; ex parte A-G (Qld)* [2012] 1 Qd R 465; [2011] QCA 210, cited
COUNSEL:	S A Lynch for the applicant A Moynihan SC for the respondent

@ turned right into path of motorbike rider - killing him.

SOLICITORS: Bell Miller Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicant, Matthew Allen, was convicted after a four day jury trial of dangerous operation of a vehicle causing the death of Matthew Caltabiano on the Sunshine Coast on 28 February 2009. He was sentenced to 18 months imprisonment with a parole release date of 11 January 2013, that is, after nine months. He was also disqualified from holding or obtaining a driver's licence for two and a half years. He has applied for leave to appeal against his sentence contending that it is manifestly excessive given his good prior history and that the judge failed to give adequate weight to his cooperation with authorities and mitigating factors.

[2] He was 24 at the time of the offence and 27 at sentence. He had no prior criminal history. He had three entries in his traffic history. In 2004 he exceeded the speed limit by between 13 and 20 kph and was fined $150. In 2005 he was charged with driving a motor vehicle whilst under the influence of liquor with a blood alcohol reading of .105 and fined $600 and disqualified from driving for three months. In 2009, after the commission of the present offence, he was fined $133 for exceeding the speed limit by less than 13 kph.

[3] The circumstances pertaining to the offence were as follows. The applicant was driving a Toyota Landcruiser on the afternoon of 28 February 2009. His partner, Ms Malinda Byrnes, was seated beside him. Their baby was in a capsule in the back seat. They were travelling north on Nicklin Way, Buddina. The deceased was riding his motorcycle travelling south on Nicklin Way. The applicant was in one of two right turn lanes waiting to turn across the southbound lanes of Nicklin Way into Point Cartwright Drive. Eyewitnesses gave differing accounts of what transpired. The applicant maintained to police, both at the scene and 12 months later when interviewed, that he turned across Nicklin Way into Point Cartwright Drive on a green arrow.

[4] In sentencing, the judge found that it was most probable the jury ultimately accepted the evidence of Ms Danielle Denman and Mr Ryan.

[5] Ms Denman was a passenger in a maxi taxi driven by Mr Ryan travelling north on Nicklin Way. She was sitting behind the driver facing the rear of the taxi but had turned to talk to Mr Ryan whilst stopped at lights waiting to turn into Point Cartwright Drive. The applicant's vehicle was a couple of cars ahead of the taxi. She saw the applicant turn on the red arrow into the path of the deceased's motorcycle.

[6] Mr Ryan confirmed that his taxi was waiting in a turning lane to turn across Nicklin Way into Point Cartwright Drive. He saw a four wheel drive ahead at the front of the line of traffic and noticed there was a red light. He saw the four wheel drive move out on the red light and then brake quickly. He had a vague memory of south bound traffic starting to move into the intersection and he thought one or two vehicles moved through the intersection before the accident.

[7] The judge found that the applicant's dangerous operation of the vehicle was failing to keep a proper lookout in the sense that, although he had stopped for some time

with a red arrow facing him, when the through light went green for the lanes going north, he inexplicably thought he had a green arrow and proceeded into the path of the deceased's motorcycle. He proceeded against a red traffic light into the face of oncoming traffic.

[8] Photographs of the scene depicting the point of impact and the skid marks of the motorcycle were tendered at trial. They suggested that, having mistakenly turned on the red arrow, the applicant should have seen the motorcycle had he been keeping a proper lookout.

[9] The prosecutor at sentence tendered victim impact statements from the deceased's mother and sister. They eloquently expressed the family's deep loss following Matthew's death. Their still raw grief had been heightened by the loss of their first born son and older brother in a trail bike accident in 1991. Relying on *R v Damrow*,[1] the prosecutor submitted that the appropriate head sentence for this dangerous driving through failing to keep a proper lookout was between two and two and a half years imprisonment, with a period of actual custody.

[10] Defence counsel submitted that the case was one of momentary inattention; the circumstances of the dangerous operation of the vehicle were at the lowest level of seriousness; it was one of those rare cases that did not call for an actual custodial sentence. The offending involved no speed, drugs or alcohol. The applicant was not driving a heavy vehicle or truck. The offending conduct took place over a very short period. The applicant was not callous and stayed at the scene. His partner called for help immediately. He cooperated with police on all occasions. He was not distracted by a phone or music. Although he did not plead guilty, the case raised issues which required a jury determination. There was also considerable delay. Police first asked to interview him 12 months after the accident. He was served with a complaint charging him with the summary offence of driving without due care and initially appeared in court to answer that complaint in April 2010. He was not charged with the much more serious indictable offence of dangerous operation of a vehicle causing death until 14 July 2010. The committal proceedings took place on 25 February 2011, two years after the accident and the trial occurred over three years later. This matter had been hanging over his head all this time.

[11] Defence counsel reported that the applicant grew up in Bundaberg and was employed as an assistant manager at a tyre shop where he had worked since leaving school at 17. He was seriously ill and almost died from meningococcal virus when he was 18 years old. He had been in a long term relationship for seven years and he and his partner have a son, now aged five, and a 10 month old daughter. He was the sole breadwinner and his partner was a fulltime mother to the children. She did not drive and was frightened to get her licence because she was still traumatised by this accident. Defence counsel tendered an excellent work reference from the applicant's employer. She submitted the applicant was genuinely remorseful and, as a parent himself, he had insight into the dreadful impact of the deceased's death on his family. All these circumstances placed this case in that category of cases including *R v Gruenert; ex parte A-G (Qld)*[2] where an actual term of imprisonment did not have to be served.

[12] Given his Honour's findings of fact and the importance of the integrity of the traffic light system in protecting the public at major intersections involving a significant

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1 [2009] QCA 245.
2 [2005] QCA 154, [12]–[19].

flow of traffic at a busy time of the day, the judge determined that the applicant's dangerous driving was not momentary inattention. It was driving of the kind discussed in *Damrow*,[3] that is, it was at a relatively low level within the range of driving which may be stigmatised as dangerous. This was not one of those rare cases where a sentence not involving actual custody should be imposed.

[13] The sentencing judge took into account the victim impact statements. His Honour also took into account the delay but it was not such as in *R v L, ex parte Attorney-General of Queensland*.[4] His Honour noted that imprisonment would have a dramatic and adverse effect on the applicant's partner and children and his extended family but this was not so exceptional to justify mitigation of penalty.

Conclusion

[14] In *Gruenert*, Keane JA, with whom Williams JA and Fryberg J agreed, noted:

> "From a consideration of the decisions of this Court in *Harris* [[1999] QCA 392; CA No 161 of 1999, 21 September 1999], *R v Balfe* [[1998] QCA 014; CA No 444 of 1997, 20 February 1998], *R v Manners: ex parte A-G (Qld)* [[2002] QCA 301, esp at [11]-[14]; (2002) 132 A Crim R 363, esp at 364] and *R v Anderson; ex parte A-G (Qld)* [[1998] QCA 355; (1998) 104 A Crim R 489], it emerges that in a case of dangerous driving which causes death:
>
> (a) a head sentence of 18 months imprisonment is at the bottom end of the range;
>
> (b) the considerations of deterrence, and of the gravity of the consequences involved in the offence, mean that it will be rare case that does not attract a custodial term;
>
> (c) the imposition of a custodial sentence is not, however, inevitable in every case; and
>
> (d) cases of 'momentary inattention' are among rare cases of dangerous driving which may attract a non-custodial sentence because, in such cases, the claims of the consideration of deterrence are less compelling."[5]

This Court considered Gruenert's driving, failing to keep a proper lookout when he pulled back onto the correct side of the road after an aborted attempt to overtake the deceased's car and caravan, was rightly characterised as momentary inattention. Gruenert had a blameless record both as a driver and as a citizen and an impressive body of references vouched for his good character. In these circumstances, this Court was unpersuaded that the sentence, 18 months imprisonment fully suspended with an operational period of two years, was manifestly inadequate.

[15] In *Damrow*, which the sentencing judge in this case considered comparable, the applicant was convicted of dangerous driving causing death after a two day trial. She was sentenced to 18 months imprisonment, suspended after eight months with an 18 month operational period and was disqualified from driving for two years. She also pleaded guilty to unlicensed driving. She claimed her sentence was manifestly excessive. She drove through an intersection and collided with a prime mover, killing one of her passengers. A stop sign had been removed and the stop

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3 [2009] QCA 245.
4 [1996] 2 Qd R 63; [1995] QCA 444.
5 [2005] QCA 154, [16].

line was faded. She and others in her car were singing along to music on the radio. She was 18 at the time and 20 at sentence. She had no criminal history but had lost her licence over two speeding violations. She was of good character, in employment and had the support of her family and partner. This Court considered that her driving did not have common aggravating features and was at a relatively low level of dangerousness. Nevertheless, the judge was entitled to consider it was more than momentary inattention. A life had been lost and the maximum penalty was 10 years imprisonment. Despite the mitigating features, the sentence was not manifestly excessive.

[16] The respondent placed considerable emphasis on *R v Maher*,[6] where the deceased was riding his motorcycle at about 9.00 pm on Connors Road, Paget when he was hit by Maher's Nissan utility which turned into his path. The deceased probably died instantly. Neither the deceased nor Maher had consumed alcohol or drugs. Maher did not see the motorcycle and apprehended that the motorcycle was travelling at excess speed or without a headlight. But forensic testing demonstrated that the motorcycle had been travelling at a low speed and with its head light on low beam prior to the accident. Maher had just completed a 16 hour shift and his tenth consecutive working day as a concrete driller. The prosecution accepted that the driving was momentary inattention and submitted that a head sentence of 18 months to two years was appropriate. Victim impact statements from the deceased's widow (they had a seven month old baby), father and step-mother spoke of their sadness and loss and the father gave evidence at sentence stating that the deceased was a competent and well trained motorcycle rider.

In sentencing, the judge rejected the prosecutor's characterisation of the driving as involving momentary inattention: the accident occurred on a long straight road with unobscured vision so that, had Maher been paying attention, he should have seen the motorcycle headlight for a very significant period. Maher failed over a prolonged period to keep a proper lookout, probably exacerbated by tiredness through his lengthy periods of work. Driving when tired was a serious breach of the standard of driving that other road users are entitled to expect. The sentencing judge considered that, in these circumstances, the appropriate sentence was not 18 months but three to four years imprisonment. Taking into account the many mitigating factors, including remorse, plea of guilty, delay, good work history and the impact of prolonged imprisonment on Maher's family, the judge suspended the three year sentence after nine months with an operational period of three years.

This Court emphasised that the maximum penalty for the offence had increased from seven to 10 years in 2007. Driving dangerously with prolonged inattention resulting in the death or serious injury of another required punishment to strongly denounce that conduct. The sentence was not manifestly excessive.

[17] The present case is not as serious as *Maher* in that there is no suggestion the applicant was driving whilst fatigued; that fatigue was a causative factor in the dangerous driving; and nor was the dangerous driving over such an extended period. The primary judge rightly found that there was no explanation why the appellant turned on the red arrow into the path of the deceased's motorcycle other than a continuing serious failure to take proper care when driving a motor vehicle such that it amounted to criminal conduct resulting in the death of the deceased. The

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6 [2012] QCA 7.

sentence imposed had to reflect the community's disapprobation of this conduct, the fact that it took a life and its effect on the deceased's family. No doubt the appellant and his family's interests would benefit were the applicant able to continue in employment and support his family by the imposition of a fully suspended sentence. But that is not the sole consideration in sentencing. Although deterrence does not loom as large in this case as in cases involving alcohol, speed, fatigue or a lengthy period of reckless driving, a deterrent sentence is still apposite as a salutary reminder to all who undertake the serious responsibility of driving a motor vehicle. Drivers must take proper care and remain astute to observe traffic signals and to keep a careful lookout when turning across oncoming traffic. The judge was entitled to conclude that this case was more than momentary inattention and so required a period of actual imprisonment, despite the hardship this would cause to the applicant and his young, dependent family. His Honour took into account all the mitigating features, including delay. After balancing the competing considerations, the sentence upon which his Honour settled was within the appropriate range. A lesser period of actual detention was open but the sentence imposed was supported by *Damrow*. It was not manifestly excessive.

[18] It follows that the application for leave to appeal against sentence must be refused.

[19] **FRYBERG J:** The only ground raised in support of this application for leave to appeal against sentence was:

> "If the verdict is upheld, the sentence should be reduced as it is manifestly excessive given the appellant's lack of criminal history and minor traffic history. His Honour failed to give adequate weight to the appellant's significant cooperation with authorities and mitigating factors."

[20] That ground was defectively stated.[7] Manifest excess is not demonstrated by identifying specific errors. But that deficiency does not affect the outcome of the appeal. I refer to the ground simply to demonstrate that the appellant has not suggested any relevant error of principle in the judge's findings.

[21] I have been troubled by the fact that his Honour did not make any finding regarding the extent to which the applicant was responsible for causing Mr Caltabiano's death. There was evidence that his motorcycle left skid marks caused by harsh braking which were 19 m long and which terminated with marks of uncertain length caused by yawing. The traffic investigator called by the prosecution had the expertise to carry out what he called a "skid test" to determine the speed at which the motorcycle had been travelling before its brakes were applied. He had not carried out that test because, as he testified, he did not see the need for it. He accepted the possibility that the motorcycle was travelling at more than the speed limit on the road, 70 km/h. His Honour made no finding about that speed.

[22] An element of the offence of which the applicant was convicted under s 328A(4) of the *Criminal Code* is causing the death of another person. The maximum penalty for that offence is imprisonment for 10 years. By contrast a person who operates a vehicle dangerously and does not thereby cause death or grievous bodily harm is liable to a maximum term of imprisonment of three years. One might expect therefore that causing death would be an important factor not only in identifying the

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7 *R v Major; ex parte A-G (Qld)* [2011] QCA 210 at [90].

relevant offence but also in sentencing. One might expect that a person whose contribution to causing the death was relatively low would, other things being equal, receive a shorter period of imprisonment than one whose conduct was the sole or the major cause of death. And one might expect that excessive speed of the part of the victim might be an important consideration in assessing the offender's causal contribution to the death.

[23] I have concluded that it is unnecessary to embark without the benefit of submissions on a consideration of matters which the applicant did not see fit to raise.

[24] In relation to the ground argued I agree with the reasons for judgment of the President. I agree with the order which her Honour proposes.

[25] **NORTH J**: I have read the reasons for judgment of The President. I agree with the order proposed and with her Honour's reasons.

DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Lewis* [2012] QDC 42
PARTIES:	**R** (Respondent) **V** **BRENDON JOSEPH LEWIS** (Applicant)
FILE NO:	DCR 404/2011
DIVISION:	Criminal
PROCEEDING:	S 590AA Pre-trial Ruling
ORIGINATING COURT:	District Court at Charters Towers
DELIVERED ON:	12 March 2012
DELIVERED AT:	Charters Towers
HEARING DATE:	08 March 2012
JUDGE:	Durward SC, DCJ
ORDER:	**Applications refused**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR UNLAWFULLY OBTAINED – whether evidence of a breath analysing instrument test and a count-back by a medical practitioner to determine level of intoxication should be excluded – whether evidence of recorded conversations between the applicant and police should be excluded – whether evidence of prior driving by the applicant should be excluded
CASES:	*R v Smout* [2005] QCA 120; *R v Anderson* [2005] QCA 304; *Clauss v R* [1994] 1 Qd R 427; *R v Swaffield* (1998) 192 CLR 159; *R v LR* [2006] 1 Qd R 435; *EM v R* (2007) 232 CLR 67; *Van Der Meer v R* (1988) 62 ALJR 656; *R v Wilson* [1997] QCA 265; *R v W & Ors* [1988] 2 Qd R 308; *R v Cho* [2001] QCA 196; *Bunning v Cross* (1978) 141 CLR 54; *R v Lee* (1950) 82 CLR 133; *Cleland v R* (1982) 151 CLR 1; *Duke v R* (1989) 180 CLR 508; *R v Adamic* (2000) 117 A Crim R 332; *R v Ireland* (1970) 126 CLR 321; *R v Buchanan* [1966] VR 9; *R v Jurasko* [1967] Qd R 128; *R v Horvath* [1972] VR 533; *R v Clark* (1986) 4 MVR 245; *Martin v The Queen* (1981) 4 A Crim R 302

LEGISLATION:	*Criminal Code Act 1899* (Qld) ss 590AA; *Transport Operations (Road Use Management) Act 1995* (Qld) ss 80(1), (2), (4), (8), (8J), (15), (15A), (15G), (15H), (24), (24A), (26); *Police Powers & Responsibilities Act 2000* (Qld) ss 5(d) & (e), 7, 8(1), 54, 55, 56, 415, 418, 419; *Police Service Administration Act 1990* (Qld) s 1.4
COUNSEL:	H Walters for the applicant K Stone for the respondent
SOLICITORS:	Arthur Browne & Associates for the applicant Office of the Director of Public Prosecutions for the respondent

[1] This is a ruling in respect of three applications made on behalf of the accused, Brendon Joseph Lewis ("the applicant").

[2] The applicant is charged with dangerous operation of a vehicle causing death while adversely affected by an intoxicating substance, before leaving the scene.

The Applications

[3] Mr Walters, on behalf of the applicant, made three pre-trial applications pursuant to section 590AA of the *Criminal Code of Queensland*:

1. Exclusion of the evidence of a breath analysis instrument test conducted with the applicant at Charters Towers Police Station and a count-back by a medical practitioner to determine the level of alcohol concentration at the time of the incident, on an exercise of discretion, on the grounds of non-compliance with the *Transport Operations (Road Use Management) Act 1995* (Qld) ("the Act") and on unfairness;

2. Exclusion of evidence of conversations between police and the applicant on the grounds of non-compliance with the *Police Powers and Responsibilities Act 2000* (Qld) ("PPR Act") and on unfairness;

3. Exclusion of evidence of prior driving by the applicant on the grounds of remoteness and non-continuity, and with respect to a specific incident of driving on the ground of non-specificity and identification of the vehicle by the observer.

Factual Circumstances and the Investigation

[4] A summary of the relevant factual and other attendant circumstances is necessary in order to give context to the applications and to my rulings.

[5] Mrs Rebecca Lewis, in her statement, refers to having been at home at about 11.20 p.m. or 11.30 p.m. on the evening of 16 September, 2010. A disagreement between her and her husband, the applicant, occurred, and at about 11.33 p.m. she took their child and drove off the house block to go to her mother's home. The applicant got into another vehicle and overtook her within the house block and pushed a gate open with the vehicle. He then stopped, and she was able to drive through the gate and then onto public roads. She says that the applicant drove very close behind her,

some 3 to 4 metres apart, and followed her until he turned off Boundary Street onto another road and out of sight.

[6] The driving whilst he was very close behind occurred at about 11.39 p.m. She arrived at her mother's residence at about 11.50 p.m.

[7] Two residents of the area in the vicinity of the incident, Mr Casper and Ms Samuels, heard a thud at about 11.30 p.m. and upon investigation saw a body on the road.

[8] A Mr Shepherdson lives on the corner of the intersection of Park Street and High Street. He was in his front yard at about 11.30 p.m. He saw a utility coming from the direction of Boundary Street. He claims that it looked as if it was travelling fast and he heard the engine revving. He described it as a dark coloured tray-back utility. It had its headlights on. It went through a stop sign without stopping, and about five seconds later he heard a bang coming from the vicinity of the intersection of Park Street and Church Street. The utility went around a corner with screeching tyres and went out of view.

[9] In his evidence at the committal proceeding, he said that he had been outside his house for about five or ten minutes before he saw the utility coming. He could not say how fast it was going, and he was not able to say whether it was a petrol or diesel utility. After going through the stop sign the vehicle just kept going down to the end of the street, and it was from the end of the street that he heard the bang and the squeal of tyres. He estimated that the distance from where he was standing to the end of the street was about 200 metres. He thought it was a tray-back utility, but he was not absolutely certain of that.

[10] The applicant told police that he had an argument with his wife at home and that he last ate food at about 1:00 p.m. on that day. He said he had his first drink at about 9:00 p.m. to 9.30 p.m. He drank two ports from a small glass and three rums and Coke from a 7-ounce glass. His last drink was sometime between 11:00 p.m. and 11.30 p.m., and he had nothing else to drink by way of alcohol between the incident and when the police interviewed him. He said that his wife and child had driven off and he had followed her. He had no emergency reason to drive.

[11] He described his vehicle as a blue Holden Rodeo utility. There are some photographs amongst the material. Whilst they are not in colour, they indicate that the vehicle appears to be a dark colour.

[12] Snr Const Kirkwood was called at his home at about 12.30 a.m. The police, that is, Koekemoer and Harber, arrived at about 11.48 p.m. at the scene. They had both been on a 10:00 p.m. to 6:00 a.m. shift. Snr Const Kirkwood and another officer, Hogenelst and others came on the scene at about 12.50 a.m. A breathalyser test was conducted at the house of Mr Palmer, where the accused had driven after the incident.

[13] The applicant had arrived at the police station with the police at about 1.34 a.m. A requirement for a specimen of breath was made at about 1.50 a.m. at the police station. The first attempt on the breath analysing machine failed. It was reset, and a successful supply of breath was provided at about 2.07 a.m.

[14] In the course of conversations at the police station, the applicant raised the issue of whether a solicitor should be present. It seems that after that, no further questions were asked about the incident.

[15] The breath analysing machine showed a level of alcohol concentration of .123 per cent, which is more than two times the legal limit.

[16] In the course of the conversations the applicant said, "I could have pulled up and I could have rung ya. I'm sorry, I just gunned her and I thought get the hell out of there." Another person who was present, but unidentified, said, "That's just the initial shock, hey." The applicant responded, "It was. I know it wasn't the right thing to do. I know it was the wrong thing to do."

[17] The time of the collision between the applicant's vehicle and the deceased was estimated by police to be at about 11.50 p.m.

[18] The initial interview was completed at around 2.46 a.m. The police informed the applicant that he had a right to contact a solicitor for any later interview of a more formal nature, given the fact that at the time it was clear that he had consumed some alcohol.

[19] The only other piece of evidence to which it is necessary to refer is that of Dr Griffiths and the count-back that he conducted. Dr Griffiths is described as a forensic medical practitioner. Perhaps in other times he might have been described as a Government Medical Officer.

[20] The count-back was done on two bases: firstly, the alcohol concentration at a lower rate of elimination over a two-hour period was assessed at .143 per cent; secondly, the alcohol concentration at a higher rate of elimination over two hours was assessed at .179 per cent.

1. The Breath Analysing Instrument Test Evidence

[21] Counsel had different constructions of the legislation.

[22] The regime for breath testing for alcohol analysis is contained in section 80 of the Act.

[23] The proper construction of the Act, in my view, is as follows, by reference to provisions relied upon by counsel or relevant to the circumstances of this case.

[24] Section 80(1) has two relevant definitions:

> "Breath test" means a test to obtain an indication of the concentration of alcohol in a person's breath using a device approved under a regulation.

[25] The word "indication" refers to what is known as a roadside or breathalyser test.

> "Breath analysing instrument" means an instrument:
>
> (a) for finding out the concentration of alcohol in:

(ii) a person's breath, by analysing a specimen of the person's breath; and

(b) approved under a regulation.

[26] The general breathalyser provision is in section 80(2). A request for a specimen of breath for a breath test may be made if the officer has a reasonable suspicion that the person was, during the last preceding two hours, driving a motor vehicle.

[27] As a matter of observation, the request here was made within two hours of the approximate range of times of the driving incident.

[28] Section 80(2)(a) provides for a police officer to request a specimen of breath after an incident involving a motor vehicle and the death of any person from another person who he reasonably suspects was driving a motor vehicle at the time of the incident.

[29] There is no time limit specified in the section. It refers to a breath test. However, section 80(4) provides generally for a time limit requirement for a breath test made under section 80(2) and (2)(a); that is, as soon as practicable and within two hours after the incident.

[30] I have referred to those three subsections because they were raised in the course of submissions. However, in my view those provisions relate to the breath test or breathalyser test. As a matter of observation, both were complied with in this case. However, they are not the relevant provisions in this case.

[31] Mr Walters also referred to sections 80(16B) and 16(F). Those sections refer to blood analysis, not breath analysis and hence are not relevant provisions in this case.

[32] The Act has more specific provisions that are relevant to the circumstances of this case. The relevant provision for a breath analysis by instrument is in section 80(8).

[33] There is in this case no question that the accused was lawfully "detained". He was in police custody until given a notice to appear and released.

[34] Section 80(8)(c) provides that any person who is, for the purpose of the subsection, detained or taken to a police station where facilities are available for the analysis by a breath analysing instrument of a specimen of breath may be required by any police officer to provide a specimen of the person's breath for analysis by a breath analysing instrument.

[35] Further, in my view, section 80(8J) has been complied with. Sgt Harber was the operator of the instrument. He was an authorised police officer for that purpose, and he was not the police officer who made the requirement. That officer was Snr Const Kirkwood.

[36] Section 80(24) provides that evidence of the concentration of alcohol in the breath of a person is admissible on trial on indictment, for the offence charged in this case, "where compulsorily obtained or otherwise obtained in accordance with this section" at a time material to the time of an offence.

[37] Section 80(24A) provides that such evidence may be given by a witness or by a certificate.

[38] Section 80(15) provides for a breath analysis certificate to be given to the person who supplied the specimen of breath, stating the concentration of alcohol present in the breath.

[39] Section 80(15A) provides that the breath analysis certificate is evidence that the breath analysing instrument was working properly and that all relevant regulations were complied with.

[40] I note that there has been no notice given by the applicant with respect to the instrument (in terms of section 80(15H) or otherwise), pursuant to section 80(26).

[41] Section 80(15G) provides that a certificate or evidence of an authorised police officer or a doctor, is conclusive evidence of the blood alcohol concentration in the breath of the person supplying the specimen at the time the breath was analysed, and at a material time in any proceedings if the analysis was made not more than two hours after such material time, and at all material times between those times.

[42] The "material time" is the time of the incident. At the latest, the incident occurred at 11.50 p.m. The analysis was made at 2.07 a.m. Hence it was made more than two hours after the incident. There is therefore no conclusivity of alcohol concentration in this case at the time of the incident, whether in reliance on the certificate or other evidence.

[43] However, the certificate is still admissible for the purpose of proof of the alcohol concentration at the time of the analysis and for purpose of prima facie proof that the instrument was working properly and that all relevant regulations were complied with. I interpret "regulations" as meaning those regulations that identify the type of instrument used in the testing procedure.

[44] Two matters flow from that: firstly, the customary way of determining alcohol concentration at a point in time prior to the analysis (that is, at the time of the incident) is for a "count-back" to be conducted by a medical practitioner. That type of evidence is prima facie admissible. For an example, (one amongst many) see *R v. Smout* [2005] QCA 120; secondly, the count-back will produce a higher reading than the certificate because it takes into account the elimination rate of alcohol arising from the body's metabolising of the alcohol.

[45] That elimination rate may be variable due to a number of circumstances. In the case of the certificate, where it can be relied on for conclusivity, the reading upon the analysis is simply "deemed" to be the same at any time in the two hours preceding the analysis.

[46] The conclusivity provision is an evidentiary aid, even though it may not provide the actual or real alcohol concentration at times within the preceding two hours.

[47] Mr Walters, on behalf of the applicant, submitted that the alcohol concentration evidence was unlawfully obtained. He submitted that Dr Griffiths' count-back evidence produced an unfair result; that is, a range of alcohol concentration higher than that obtained by the analysis. He has sought its exclusion on the *Bunning v. Cross* principle.

[48] In addition to written and oral submissions on this application, I heard evidence on a *voir dire* from the operator of the breath analysing instrument, Sgt Harber. I do not consider that there was any unlawful or unreasonable delay in the conduct of the police in the investigation. There has been no deliberate conduct to exceed any relevant two hour time limit. I find that the police involved in the investigation, so far as is relevant to this application, have not acted unlawfully.

[49] The two hour limit referred to in section 80(15G) is the only temporal limit relevant to the circumstances of this case. It relates only to the conclusivity of the certificate and nothing more.

[50] The respondent rightly concedes that it cannot rely on any conclusivitiy of the alcohol analysis, that is why it is resorting to the count-back. See *R v. Anderson* [2005] QCA 304, per Keane JA at [59] to [65].

[51] The certificate is admissible for the limited purposes to which I have referred. They are, in reality, "technical" matters and also, more to the point, the alcohol reading at the time of the analysis of the breath of the applicant.

[52] The alcohol evidence was not unlawfully obtained. Hence I do not need to specifically refer to the authorities cited to me on the admission of evidence unlawfully obtained in respect of this application.

[53] That leaves the issue of the count-back. The unfairness is said to be the higher reading on the count-back than in the certificate. That is the point on which counsel submitted there was no published authority to provide guidance.

[54] The evidentiary aid supplied in section 80(15G) is precisely that: it is "an aid". It deems in an artificial way a fixed reading for a two hour period prior to the analysis. In an anatomical and physiological context that is highly unlikely. I do not need any specific expert evidence to support that proposition, although inferentially it is supplied in Dr Griffiths' forensic report.

[55] I do not consider that there is any unfairness to the accused *per se*, in the proof of an alcohol concentration by a count-back made by a suitably qualified forensic medical practitioner, a calculation which is likely to be more realistic and accurate than the artificial "deemed" reading arising from the conclusivitiy of a certificate.

[56] The calculation has a further purpose. It enables the qualified expert witness to state an opinion as to the effects of alcohol consumption at calculated levels, on the accused's capacity to properly control and operate the motor vehicle. That evidence, of course, is the reason this application for exclusion has been made.

[57] There is no reason why counsel cannot ask the doctor to give an opinion about that issue on the basis of a reading of .123 per cent; that is, the reading that the certificate demonstrates, although I doubt that it would be particularly helpful.

[58] The evidence of Dr Griffiths, of course, is a matter for the jury to assess at the end of the day.

[59] The fact that the evidence upon which the count-back is based and the opinion expressed, is compulsorily obtained is not a matter that in the circumstances of this

case I am prepared to rely on, for any exclusion of evidence in the exercise of a discretion: See *Clauss v. R* [1994] 1 Qd R 427.

Conclusion

[60] The evidence of the count-back is admissible. There is no unfairness to the applicant. I therefore refuse to exercise a discretion to exclude the evidence of alcohol analysis or the count-back calculation.

[61] The first application should be refused.

2. The Evidence of the Accused in Response to Questioning by Police

[62] The objection to the evidence is, in Mr Walters' submission, that no proper warnings were given by the police when questioning the accused after he was located and through the period of his detention in police custody.

[63] Mr Walters submitted that the police breached the provisions of the PPR Act and that their conduct was unlawful. The purposes of the PPR Act are set out in section 5:

> "5(d) to standardise the way the powers and responsibilities of police officers are to be exercised;
>
> (e) to ensure fairness to, and protect the rights of, persons against whom police officers.exercise powers under this Act."

[64] Section 8(1) provides as follows:

> "This act does not prevent a police officer from speaking to anyone or doing anything a police officer may lawfully do apart from this Act when performing the police officer's duties, whether or not in relation to an offence, without exercising a power under this Act or using a new form of compulsion."

[65] Part 3 of chapter 15 of the PPR Act contains "safeguards ensuring rights of and fairness to persons for indictable offences."

[66] Section 415 provides as follows:

> "(1)This part applies to a person ("*relevant person*") if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence;
>
> (2) However, this part does not apply to a person only if the police officer is exercising any of the following powers –
>
> (b) power conferred under any Act to require the person to give information or answer questions."

[67] Section 418 provides that a police officer, before starting questioning, must inform the person that he has a right to communicate with a friend, relative or lawyer.

[68] Section 419 provides that a person may speak to and have present a friend, relative or lawyer.

[69] The applicant was first spoken to at the home of a friend where he had gone after the incident. The friend had alerted the police as to the applicant's whereabouts. He and others were present during the conversation at that location. The PPR Act has specific provisions relating to vehicles and traffic, contained in chapter 3.

[70] Section 54 refers to the power of inquiry into road use contraventions:

> "(1) It is lawful for a police officer to make any reasonably necessary inquiry, investigation, inspection, examination or test for establishing whether or not an offence against the Road Use Management Act has been committed.
>
> (2) Also, it is lawful for a police officer to arrange for someone else to make any reasonably necessary inspection, examination or test for establishing whether or not an offence against the Road Use Management Act has been committed."

[71] Section 55 refers to power to require information about identity of drivers of vehicles, etc:

> "(1) This section applies if a person alleges to a police officer or a police officer reasonably suspects a contravention of the Road Use Management Act involving a vehicle has been committed."
>
> (2) A police officer may require any of the following to give the police officer information that will identify or help identify the person who was in control of the vehicle when the contravention happened:
>
> (a) an owner of the vehicle;
>
> (b) a person in possession of the vehicle."

[72] Section 56 provides for additional power of inquiry for a relevant vehicle incident:

> "(1) It is lawful for a police officer to make any reasonably necessary inquiry, investigation, inspection, examination or test –
>
> (a) to obtain information about a vehicle or other property involved in a relevant vehicle incident; or
>
> (b) to obtain information about the cause of a relevant vehicle incident and the circumstances in which it happened.
>
> (2) Also, it is lawful for a police officer to make any reasonably necessary inquiry or investigation to obtain information about a person involved in a relevant vehicle incident.
>
> (3) For subsection (1) or (2) a police officer may require a person to answer any question put to the person by the police officer or provide information relevant to the incident."

[73] A "relevant vehicle incident" includes an incident such as occurred in this case. The police questioning of the accused was substantially, if not entirely, about matters referred to in the provisions in chapter 3 of the Act.

[74] In those circumstances there is clear legislative authority for the police to conduct the inquiries that they made.

[75] But how does that impact on the exercise of discretion in this case? The discretion to exclude evidence on the ground of unfairness is a broad discretion, however it must be exercised in the context of all the relevant circumstances. In particular, where voluntariness is not an issue, the discretion should be exercised by reference to considerations of reliability and respect for the right of the accused to stay silent; *R v. Swaffield* (1998) 192 CLR 159; *R v. LR* [2006] 1 Qd R 435; and *EM v. R* (2007) 232 CLR 67.

[76] The object of the PPR Act is to ensure compliance by police officers, in the course of investigations, with safeguards intended to assure the rights of and fairness to persons questioned in respect of indictable offences. If a record of interview is made in circumstances where the provisions of the Act have been contravened, that failure on the part of the investigating police may amount at least to a breach of discipline: see section 1.4 of the *Police Service Administration Act 1990* (Qld). However, such contravention does not of itself warrant the evidence so obtained should necessarily be excluded at trial.

[77] In *R v. LR* (Supra) Keane JA, at [51], wrote:

> "The circumstance that the record of interview was obtained in contravention of the PPR Act does not of itself mean that it should have been excluded by the learned trial Judge. Illegality or impropriety on the part of law enforcement officers that results in the making of a confession merely enlivens a discretion to exclude the confession on the grounds of unfairness. The provisions of the Act to which I have referred do not purport expressly to govern the admissibility of evidence. The authorities suggest that they are to be 'regarded as a yardstick against which issues of unfairness (and impropriety) may be measured.'"

[78] His Honour referred to *R v. Swaffield* (Supra) and *Van Der Meer v. R* (1988) 62 ALJR 656.

[79] The statutory provisions in effect impose greater safeguards than are found in the common law rules relating to admission of evidence of inculpatory statements. They are to be considered inclusively with common law rules. However, the circumstances in a particular case may mean that upon a proper consideration and application of the common law rules to the facts and circumstances in issue, the determination of fairness or unfairness may be made without necessarily resorting to a consideration of compliance with the more specific and direct provisions of the Act.

[80] The police are also guided by manuals which refer to the conduct of investigations generally, and specifically in some cases. Insofar as the Police Operations and Procedures Manual is concerned, the rules are not intended to be binding as a matter of law, although a breach may be taken into account in determining the admission of evidence: See *R v. Wilson* [1997] QCA 265 per Macrossan CJ at [4] and [5]; and *R v. W and Ors* [1988] 2 Qd R 308 at 319. The same may be said of the manual for breath testing referred to by Sgt Harber in his evidence on the *voir dire*.

[81] Similarly, there is no doubt that the intention of the PPR Act and the Responsibilities Code, which is made under the PPR Act, is that police officers will comply with its requirements. That much is made clear by section 7 of the Act which "contemplates disciplinary or penal consequences if a police officer contravenes its provisions": See *R v. Cho* [2001] QCA 196 at [6].

[82] Mere breach of statutory requirements therefore is not the definitive issue. It is the question of unfairness to the accused which is the critical issue.

[83] I need to briefly set out some matters relating to unfairness and also to public policy even though I have arrived at a view about the questioning of the police in this case, to which I have already averted, namely that they acted in accordance with statutory authorisation and did not act unlawfully.

Unfairness

[84] The object of the PPR Act is to ensure compliance by police officers in the course of investigations with safeguards intended to ensure the rights of and fairness to persons questioned in respect of indictable offences.

[85] The High Court has previously distinguished between the application of the unfairness discretion and the application of the principles arising out of *Bunning v. Cross* (1978) 141 CLR 54, where the focus was upon impropriety on the part of the investigating police and the determination as to whether the evidence so obtained ought to be excluded or not. See also *R v. Lee* (1950) 82 CLR 133 at 154; and *Cleland v. R* (1982) 151 CLR 1 at 36.

[86] I note, however, that in *Duke v. R* (1989) 180 CLR 508 Brennan J, as he then was, at 511 expressed the view that the latter distinction to which I have referred was too narrow.

[87] In *EM v. R* (Supra), Kirby J in his dissenting judgment referred to *R v. Swaffield* (Supra) and observed that the joint reasons in the High Court acknowledged that the term "unfairness" lacks precision and demanded an evaluation of all the relevant circumstances. His judgment, of course, was a dissenting judgment.

[88] Gummow and Hayne JJ at [155] to [118] said that even though the police interviewed the appellant whilst he was being covertly recorded and without properly cautioning him, that did not necessarily establish that use at his trial of the evidence of what he said to the police in the conversation would be unfair and that the issue in the circumstances of that case and in the context of the legislative provisions that were being considered was whether the desirability of admitting the evidence outweighed the undesirability of admitting evidence that was obtained as a result of misrepresentation or without the benefit of caution.

[89] I have also considered the judgment of Holmes J, as she then was, in *R v. Adamic* (2000) 117 A Crim R 332.

Public policy grounds

[90] Many of the cases deal with the common law position and the former Judge's Rules. The specific statutory requirements in this case and the expectation that police

officers will comply with the Act and with the Responsibilities Code make the issue of noncompliance, if it exists, more critical.

[91] Quite apart from the unfairness grounds for exclusion there remains the issue of whether the record of interview should be excluded on public policy grounds, even though no unfairness to the applicant is shown.

[92] In *R v Ireland* (1970) 126 CLR 321 at 335 the High Court wrote:

> "Competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest to the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price."

See also *Cleland v. R* (Supra), per Deane J at [19] and [20] and at [26] and [27].

Conclusion

[93] Having said all of that, my finding is that there has been no unlawful conduct by the police in questioning the accused for the reasons that I have referred to. Therefore there is no basis for excluding the evidence because I do not consider that the unfairness ground or public policy considerations would compel me so to do.

[94] The second application should be refused.

3. Evidence of prior driving

[95] This application relates to the evidence of the accused's wife, Mrs Rebecca Lewis, and Mr Shepherdson. I have described their evidence earlier.

[96] Mr Walters' submission on behalf of the applicant, in the first instance, is that there was a "break" in the driving at the point in time when he ceased following his wife's vehicle and turned off Boundary Street; and in the second instance, that Mr Shepherdson is unable to identify the vehicle he saw as the vehicle that was, in fact, driven by the accused.

[97] Evidence of prior driving is prima facie admissible: see *R v. Buchanan* [1966] VR 9.

[98] *R v. Juraszko* [1967] Qd R 128 was a case about particulars. To the extent that it is relevant on this application, where the driving is over a short distance in time and is described adequately in the evidence, no specific particularisation is required if the description can enable the jury to assess a real and potential danger to the public. In my view, the driving in this case is over a short distance and time.

[99] In *R v. Horvath* [1972] VR 533 a witness had observed the accused's vehicle overtaking on a bend and on approaching a crest of a hill. These observations were made about 45 minutes before, and some 30 to 35 miles prior to, the relevant incident which involved the accused's vehicle drifting on to the incorrect side of the road and colliding with an oncoming vehicle. The evidence was held on appeal not to be admissible. It was too remote from the circumstances pertaining to the

incident and the time immediately prior to it. See also *R v. Clark* (1986) 4 MVR 245, a decision of the Court of Appeal of Queensland.

[100] In *Martin v. The Queen* (1981) 4 A Crim R 302 (a decision of the Court of Appeal of Queensland) evidence of driving behaviour prior to the offence was admissible. The evidence about the driving was from a point some 29 kilometres to a point some 10 kilometres, from the incident location. *R v. Horvath* (Supra) was distinguished on the basis that the relevant evidence in *Martin* was supplied by the driver of a car that had been following the accused's vehicle. Hence the accused's manner of driving over the whole of the distance was relevant and admissible.

[101] The key to admissibility of prior driving of an accused is a connecting link or continuity in the driving. In this case the relevant evidence is as follows:

1. A following by the applicant of the vehicle of Mrs Lewis for the distance from their home to the point where the applicant turned off Boundary Street into (as I understand) Park Street;

2. The distance was relatively short. The elapsed time was between 11.33 p.m. and 11.39 p.m., or shortly before the latter time;

3. The applicant drove very close behind Mrs Lewis's vehicle, at about 3 to 4 metres;

4. There had been an argument or disagreement between Mrs Lewis and the applicant before Mrs Lewis set off in her vehicle;

5. The applicant had been drinking and was over the legal limit;

6. The route between the intersection of Boundary Road and Park Street - I refer to Park Street because it appears that was the street that the applicant turned into - and the incident site was very short and direct;

7. There is evidence from residents of a vehicle passing by making excessive engine noise; and

8. Mr Shepherdson made an observation at the first intersection on Park Road from Boundary Street. The incident occurred a matter of seconds later.

Conclusion

[102] In my view, the evidence of Mr Shepherdson prima facie identifies the vehicle as being that of the applicant and with sufficient particularity in the circumstances of this case. There is also continuity in the driving. There is no cessation of the driving so as to divide the observations of Mrs Lewis and those of Mr Shepherdson into two separate events. There is a connecting link.

[103] In my view, the evidence is admissible.

[104] The third application should be refused.

Orders

1. The application to exclude evidence of alcohol concentration and "count-back" evidence is refused.
2. The application to exclude conversations between the accused and the police is refused.
3. The application to exclude evidence of prior driving is refused.