SUPREME COURT OF QUEENSLAND

CITATION:	*R v Purcell* [2017] QCA 111
PARTIES:	**R** **v** **PURCELL, Jiah Rhys** (applicant)
FILE NO/S:	CA No 1 of 2017 DC No 220 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns – Date of Sentence: 24 November 2016
DELIVERED ON:	31 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2017
JUDGES:	Sofronoff P and Gotterson JA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to dangerous operation of a vehicle causing death and five summary traffic offences – where four of the summary offences were committed while the applicant was on bail for the indictable offence – where the applicant was sentenced to eight years' imprisonment for the indictable offence, six months' imprisonment for failing to stop and two months' imprisonment for each of the other summary offences to be served concurrently – where the applicant will be eligible for parole after serving one-third of his head sentence – where the applicant was also disqualified from holding a driver's licence for two years – where the learned sentencing judge considered the range reflecting the totality of the offending and arising from comparable sentences was eight to nine years' imprisonment – where the learned sentencing judge adopted an eight year sentence because the applicant's driving was not deliberately reckless – whether the learned sentencing judge erred in concluding the sentencing range was between eight and nine years – whether the sentence was manifestly excessive

Criminal Code (Qld), s 328A

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
R v Blackaby [2010] QCA 84, distinguished
R v Goodwin; Ex parte Attorney-General (Qld) (2014) 247 A Crim R 582; [2014] QCA 345, cited
R v Hopper [2011] QCA 296, considered
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v Thomas [2015] QCA 20, distinguished

COUNSEL: F D Richards for the applicant
N Rees for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P**: I agree with the reasons of Gotterson JA and with the order his Honour proposes. I have nothing to add.

[2] **GOTTERSON JA**: The applicant, Jiah Rhys Purcell, pleaded guilty to an indictable offence and a summary offence committed on 6 February 2015 and to four summary traffic offences committed on 2 August 2015. He was sentenced for all offending on 24 November 2016 in the District Court at Cairns.

[3] The offences were as follows:

6 February 2015

- an indictable offence against s 328A(4)(b) *Criminal Code* (Qld), dangerous operation of a vehicle on the Cairns Western Arterial Road causing the death of Ricky Dillon Arthur Veit ("the deceased") with the aggravating circumstance that he was adversely affected by an intoxicating substance; and
- a summary offence against s 79(2)(a) *Transport Operations (Road Use Management) Act* 1995 ("TORUM Act") being the holder of a provisional licence driving over the general alcohol limit but not over the middle alcohol limit.

2 August 2016

- a summary offence against s 754(2) *Police Powers and Responsibilities Act* 2000 ("PPR Act"), failing to stop a motor vehicle;
- a summary offence against s 790(1) PPR Act, obstructing a police officer;
- a summary offence against s 80(5A) TORUM Act, failing to provide specimen of breath for a breath test; and
- a summary offence against s 79(2A)(a) TORUM Act, being the holder of a provisional licence driving over the no alcohol limit but not over the general alcohol limit.

[4] The applicant was sentenced to eight years' imprisonment on the indictable offence. Concurrent sentences of six months' imprisonment for failing to stop and two months' imprisonment on each of the other summary offences were also imposed.

Some 122 days pre-sentence custody were declared time served under the sentence. A parole eligibility date at 25 March 2019, when the applicant will have served one-third of his head sentence, was set. The applicant was disqualified from holding a driver's licence for two years.

The circumstances of the offending

[5] The applicant and his long-time friend, the deceased, were socialising on the afternoon of 6 February 2015. The applicant, who held a provisional licence, which carried a 0.0 per cent blood alcohol content requirement, drove them in his mother's Holden Commodore to the Courthouse Hotel in Cairns. The rear wheels of the vehicle had insufficient tread and, as the applicant knew, needed replacement.

[6] At about 7 pm, they were joined at the hotel by two female acquaintances. During the afternoon, the applicant and the deceased had each drunk three beers over a period of one to two hours. They continued to drink at the hotel, the applicant drinking both rum and beer.

[7] They all left the hotel at 11 pm to drive home the deceased who had a headache. The deceased sat in the rear driver's side seat. He did not fasten his seat belt. Torrential rain fell and the car's windscreen fogged up. At one point, the applicant veered to the wrong side of the road and one of the female passengers yelled at him to correct his driving.

[8] They stopped for takeaway alcohol at a leagues club then continued on to Redlynch. Music was playing loudly on the car stereo. The same female passenger shouted at the applicant to slow down. He ignored her. They turned onto Cairns Western Arterial Road which has two lanes in each direction separated by a grassed median strip. The speed limit on that road is 80 kph.

[9] At about 11.25 pm, the car lost traction with the road surface. It skidded as it entered a left-hand bend. It then broadsided into a light pole on the driver's side. The rear driver's door connected with the pole at speed, causing it to top over. The vehicle continued on sliding across the strip before coming to rest about 100 metres down the road in a ditch.

[10] At the time of impact, the deceased was lying across the back seat with his head on the arm rest of the door that impacted the pole. He suffered significant head injuries from which he later died.

[11] The applicant attempted to drive the vehicle but it did not go far. He started to run, yelling "don't tell my Mum", but he then returned to try to resuscitate his friend. A breath test disclosed a blood alcohol content of 0.091 per cent.

[12] The summary offences on 2 August 2015 arose from police observation of a black Holden utility driven by the applicant, failing to give way to pedestrians as it turned left from Spence St onto Lake St, Cairns. The applicant failed to stop in response to police intervention. Once stopped, he disrupted a police attempt to handcuff him and he refused to give a breath specimen. His appearance and breath smell, together with an open can of Toohey's New beer on the centre console, strongly suggested that he had been drinking alcohol. Ultimately, he admitted to a blood alcohol content of 0.037 per cent. This offending occurred while the applicant was on bail for the February offending.

The applicant's personal circumstances and history of offending

[13] The applicant was 21 years old at the time of the offending and is now 23 years old. He is single. He was educated to year 12 level. Since leaving school the applicant has worked in the hospitality and construction industries. At one stage, he had a lawn mowing business.

[14] Brief medical evidence prepared by the applicant's general practitioner and tendered at the sentence hearing indicated that the applicant was receiving counselling for post-traumatic stress disorder ("PTSD") following the death of his best friend in the accident. His mood was "very low" and he was anxious. He was described as being "extremely remorseful".

[15] The applicant had a very poor history of traffic offending, dating from April 2010. The offending involved unlicensed driving, driving while disqualified, speeding and driving with a blood alcohol content while unlicensed. Numerous fines had been imposed for this offending.

The sentencing remarks

[16] The learned sentencing judge referred to the circumstances of the offending in February 2015 and its catastrophic consequences. He mentioned the distress caused to the deceased's parents.

[17] His Honour stated that the applicant had driven in a dangerous manner "for some period of time" and had failed to heed the calls of at least one passenger to desist. He was of the opinion that general and personal deterrence were important considerations in sentencing the applicant. He described the applicant's traffic history as "disgraceful" and said that it caused him to doubt references which spoke of him as a responsible young man.

[18] To the applicant's credit, his Honour took into account his timely plea of guilty, his reasonable work history and his anxiety and depression.

[19] The learned sentencing judge stated that the comparable sentences to which he had been referred had guided him as to an appropriate sentence. The range was eight to nine years' imprisonment with the higher end more appropriate for deliberately reckless driving with an element of foolish behaviour. As that was not a feature of the applicant's dangerous driving, his Honour adopted an eight year sentence. In his view, a prison term of that duration was appropriate for the totality of the offending conduct for which the applicant was being sentenced. Conformably with that approach, the short prison sentences imposed were ordered to be served concurrently with the head sentence.

The grounds of appeal

[20] The applicant relies on the following two grounds of appeal:

1. the learned sentencing judge erred in concluding that the sentencing range was one of eight to nine years; and

2. the resulting sentence was manifestly excessive in all the circumstances.

It is convenient to consider both grounds together.

[21] **Applicant's submissions**: The applicant referred to the three decisions of this Court put before the learned sentencing judge, namely, *R v Hopper* [2011] QCA 296 and *R v Blackaby* [2010] QCA 84 by the prosecutor, and *R v Thomas* [2015] QCA 20 by defence counsel. It was submitted that these cases show that the range for offending of the type before his Honour extends below eight years.

[22] It was contended for the applicant that insufficient recognition had been given to his youth or his PTSD. No mention had been made of his remorse.

[23] The applicant further submitted that, given his youth, the absence of deliberate recklessness or excessive speeding in his driving on 6 February 2015 and the mental anguish he has suffered through the death of his friend, and notwithstanding his prior traffic history, a head sentence of between six and seven years was appropriate.

[24] **Respondent's submissions:** The respondent referred to the observations of Fraser JA in *R v Goodwin; Ex parte Attorney-General (Qld)* [2014] QCA 345; (2014) 247 A Crim R 582 at [5], that whether or not a sentence is manifestly inadequate or manifestly excessive is not to be decided by reference to a predetermined range of available sentences but by reference to all the factors relevant to sentence. Reference was also made to the clear statement made by French CJ, Keane and Nettle JJ in *R v Pham* [2015] HCA 39; (2015) 256 CLR 550 at [28] that appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that had been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.

[25] The respondent submitted that, having regard to the importance of general and personal deterrence where a fatality had occurred, the applicant's antecedent poor history of traffic offending, the continuation of traffic offending on bail after this fatality, and the imposition of concurrent, and not cumulative, sentences for the summary offending, the sentence of eight years was within sound discretion. It did not bespeak a misapplication of principle. Nor was it within the category of discretionary error described in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 at 505 as "unreasonable or plainly unjust".

[26] **Discussion:** Turning first to the sentencing decisions put before his Honour, I would accept the applicant's contention that they disclose a range of sentences for dangerous driving causing death which extends below eight years' imprisonment. In *Hopper*, a 20 year old offender who drove recklessly, stubby in hand, at speeds up to 130 kph in a 60 kph zone and ignored requests from passengers to slow down, lost control of his vehicle. It clipped a power pole and collided with a fence. A passenger was killed instantly. The offender's blood alcohol content was 0.144 per cent. He had prior convictions for driving under the influence, careless driving and speeding. His sentence of eight years' imprisonment with parole eligibility after three years was not disturbed on appeal.

[27] The offender in *Blackaby* was 22 years old with a dysfunctional background. She drove with a blood alcohol content of 0.227 per cent. As she was driving, she reached for an object in the centre console and lost control. Her car veered off the road and under the tray of a parked truck. Her partner suffered fatal head injuries.

The offender had a history of street and stealing offences and convictions for unlicensed driving, driving while disqualified and driving under the influence of liquor. She was sentenced to seven years' imprisonment with parole eligibility after 18 months. On appeal it was acknowledged by this Court at [53] that, while some comparable decisions might have suggested that the sentence was severe, it was not manifestly excessive.

[28] In *Thomas*, the offender, aged 26, was collecting his three children and the child of a friend from school and day-care. He failed to negotiate a curve. His car left the road and hit a tree. The friend's child died of a broken neck and his children were injured, one seriously. The offender was a regular user of methylamphetamine and on this occasion had a concentration of 1.22 mg/kg, which adversely affected his ability to drive. He had an antecedent traffic history including convictions for driving under the influence of liquor, speeding, unlicensed driving and driving while disqualified. After the subject offending, he committed further traffic offences for speeding, unlicensed driving, disqualified driving and failing to fulfil the duties of a driver after a crash. He was sentenced to nine years' imprisonment with parole eligibility after three years. On appeal, the sentence was reduced to a sentence of seven years' imprisonment with parole eligibility after two years and four months. The appellate court regarded it as significant that the dangerous operation of the vehicle in that case was "of limited duration and did not involve any element of deliberately reckless driving".

[29] Thus in two of these sentencing decisions, the sentence imposed was seven years' imprisonment. However, I do not understand his Honour to have propounded a range of eight to nine years' imprisonment for dangerous operation of a motor vehicle causing death. Properly understood, his Honour was expressing a conclusion that he had drawn from the comparable cases put before him, including sentencing decisions referred to in those cases, as to the sentencing range that would reflect the totality of the criminality in the offending conduct for which the applicant was being sentenced. That included not only the offending on 6 February 2015, but also the offending on 2 August 2015 when the applicant was on bail.

[30] The central question for the Court then is whether the sentence imposed was manifestly excessive. I am unpersuaded that it was for the following reasons.

[31] Whilst the applicant's driving did not have features of foolish recklessness, it was plainly dangerous. He drove with a substantial blood alcohol level when, for his licence, the requirement was 0.0 per cent. The dangerousness of the driving was heightened by the poor condition of the vehicle's tyres, the torrential rain and the fogged windscreen.

[32] In my view, it is highly significant that the dangerous driving had continued over some time. He had veered onto the wrong side of the road before they stopped at the leagues club and continued after they resumed the journey when the vehicle skidded in the left-hand bend. In this respect, the applicant's driving resembled the driving of the similarly-aged offender in *Hopper*, and is clearly distinguishable from the much shorter spans of dangerous driving in *Blackaby* and *Thomas*. Moreover, the applicant twice ignored the request of a passenger to correct his driving.

[33] It is true that whilst his Honour referred to the applicant's depression and anxiety, he did not refer specifically to remorse. That, I think, is understandable, given the serious subsequent offending in August 2015. His Honour referred to that

offending as demonstrating a lack of insight into the seriousness of his earlier offending.

[34] It is important to keep in mind that the applicant was also being sentenced for that later offending. It was serious in itself but the more serious for having been committed while the applicant was on bail.

[35] For these reasons, I am of the view that the sentence imposed, though arguably a stern one, was within the bounds of a proper exercise of the sentencing discretion. It does not bespeak a misapplication of principle.

[36] In the circumstances, I would refuse leave to appeal against the sentence.

Order

[37] I would propose the following order:

1. Application for leave to appeal against sentence refused.

[38] **NORTH J:** I agree with the reasons of Gotterson JA and with the order his Honour proposes.

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thomas* [2015] QCA 20
PARTIES:	**R** **v** **THOMAS, Joshua Adam** (applicant/appellant)
FILE NO/S:	CA No 144 of 2014 DC No 99 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	27 February 2015
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2014
JUDGES:	Holmes and Morrison JJA and Mullins J Joint reasons for judgment of Holmes JA and Mullins J; separate reasons of Morrison JA dissenting
ORDER:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The sentence imposed below is varied by substitution of a sentence of seven years imprisonment on count 1, with parole eligibility on 23 September 2016.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of dangerous operation of a motor vehicle causing death and grievous bodily harm, whilst adversely affected by an intoxicating substance, namely methylamphetamine – where the applicant was sentenced to nine years imprisonment, with eligibility for release on parole after he had served three years – where the accident resulted in the death of one child and caused grievous bodily harm to another child – whether the driving involved any element of deliberate recklessness – whether the sentence was manifestly excessive in all the circumstances *R v Clark* [2009] QCA 361, considered *R v Frost; ex parte Attorney-General* (2004) 149 A Crim R 151; [2004] QCA 309, considered *R v Hallett* [2009] QCA 96, considered

R v Hopper [2011] QCA 296, considered
R v Kelly [1999] QCA 296, considered
R v Nikora [2014] QCA 192, considered
R v Ross [2009] QCA 7, considered

COUNSEL: S R Lewis for the applicant/appellant
B J Power for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA AND MULLINS J:** In this application we have had the advantage of reading the judgment of Morrison JA in draft, and gratefully adopt his setting out of the facts and submissions. We have, however, reached a different conclusion as to the proper result, largely because we take a different view of the guidance which can be obtained from judgments of this Court in other cases involving either dangerous driving causing death or manslaughter.

[2] It is, in our view, of some importance that the dangerous operation of a vehicle causing death and grievous bodily harm to which the applicant pleaded guilty was of limited duration and did not involve any element of deliberately reckless driving. As to the first factor, there is a distinction to be drawn between the time and distance for which a defendant drives while his faculties are impaired and the duration of his driving which is actually dangerous and which results in death; the latter conduct, of course, being the gravamen of the offence. The offence for which the applicant stood to be sentenced was the failure to control his vehicle, so that it mounted the kerb, crossed the nature strip and collided with a tree. The context in which that occurred is of course relevant, to the extent that the applicant must have known he had to travel 3.5 kilometres in an impaired condition with the children in his car, and that impaired condition created an inherent danger in the act of driving; but there is no evidence that any of the driving up to the point at which the applicant lost control of his vehicle was overtly dangerous.

[3] As to the second factor, there is a significant difference between the case of an intoxicated driver who deliberately undertakes dangerous manoeuvres and one who is overcome by the effects of his intoxication so that he loses control of his vehicle. *R v Hallett*,[1] which falls into the second category, seems on its facts the most closely analogous to the present of the comparable decisions cited. As here, it involved, not deliberately reckless driving, but driving which was dangerous because of the effect of methylamphetamine in impairing that applicant's ability to drive safely. It was accepted that he had consumed the methylamphetamine some days earlier, but the concentration of methylamphetamine in his system was significantly higher (.36 mg per kg) than that affecting the applicant here (.22 mg per kg). It seems unlikely that Hallett was any less aware than the present applicant of the deleterious effects of his condition on his capacity to drive competently.

[4] Presumably, too, whatever adverse impact that level of methylamphetamine had on the applicant in *Hallett* prevailed for the entirety of his driving. According to the judgment in *Hallett*,

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1 [2009] QCA 96.

> "The judge...took into account in the applicant's favour that the driving occurred over a short distance only".[2]

It seems probable, in context, that that was a reference to the dangerous driving in that case, which entailed swerving three or four times between lanes of the Bruce Highway before the car veered off the road and hit a pole, killing the applicant's 84 year old father. The judgment does not provide any detail of how far they had travelled before the effects of his intoxication manifested themselves and the collision occurred.

[5] The applicant in *Hallett* did not, of course, have responsibility for small children, although he was driving his elderly father. His criminal and traffic history, however, were much worse. He had been sentenced to three years imprisonment for unlawful wounding. More significantly for present purposes, on two separate occasions he had been sentenced to six months imprisonment for offences including dangerous driving. After he committed the offences the subject of his application for leave to appeal against sentence, he was twice sentenced to imprisonment for disqualified driving. His traffic history was described as "appalling".[3] The only issue in *Hallett* was whether seven years imprisonment with parole eligibility after two years and four months, to be served concurrently with existing sentences for unrelated offences, was a manifestly excessive sentence. The case is of some use as a yardstick, however, because of the similarity of the kind of dangerous driving involved and because the court did not regard the sentence as at the other extreme, of being manifestly inadequate; indicating that it was "within the range of sentences open".[4]

[6] The facts here are to be distinguished from those in *R v Frost; ex parte A-G*,[5] in which the respondent actually drove dangerously – not simply while his faculties were impaired by intoxication – for 14 kilometres. There are other features of that case which make the offending worse: the respondent there continued to drive dangerously, swerving between lanes of traffic, despite repeated requests by his passenger to slow down and let him out; he ignored a warning that there were three pedestrians ahead of him; he killed three people walking on the shoulder of a well-lit road; and, told that he had struck a person, he drove on and later abandoned his car. He had in common with the applicant here a bad traffic history before and after the offence, but it is more significant that, having committed the offence in his case whilst heavily intoxicated, he was convicted while on bail of an offence of driving with a blood alcohol concentration in excess of the prescribed limit.

[7] The case of *R v Ross*,[6] in our view, also falls into a different category from the present one, because it entailed deliberately dangerous driving over almost a kilometre. That applicant performed a number of dangerous manoeuvres: burn-outs, tailgating, accelerating so as to make his vehicle fishtail and speeding at an estimated 138 kilometres per hour. The subsequent collision killed the applicant's two infant children; his response was to abscond and subsequently to tell various lies about who had been driving and how the accident had occurred. That absence of remorse was no doubt a factor in the decision to make no parole recommendation.

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2 At [17].
3 At [15].
4 At [31].
5 [2004] QCA 309.
6 [2009] QCA 7.

[8] *R v Clark*[7] and *R v Kelly*[8] both involved mitigating factors not present here: in the case of *Clark*, the applicant's mental health problems, which led to the reduction of her sentence on appeal from ten to nine years imprisonment; in that of *Kelly*, whose sentence of eight years was not disturbed, the fact that the applicant demonstrated considerable rehabilitation before he was charged. On the other hand, there were features of those cases which were worse than the present: in *Clark*, the applicant through impatience drove onto the footpath in order to pass another vehicle, killing two boys, and later lied about what had occurred. In *Kelly*, the applicant drove a stolen vehicle dangerously for 23 kilometres at excessive speed, evading police and driving onto the wrong side of the road, ultimately killing the driver of an oncoming vehicle and injuring his passenger. Most importantly, both *Kelly* and *Clark* were convicted not of dangerous driving, but of manslaughter, the maximum penalty for which is life imprisonment, as opposed to the 14 year maximum applicable in the present case.

[9] The respondent referred to two other cases, *R v Nikora*[9] and *R v Hopper*,[10] in each of which this Court refused an application for leave to appeal made on the ground that the sentence imposed was manifestly excessive. The applicant in *Nikora* drove for at least 15 minutes at about 130 kilometres per hour through urban streets in the early hours of the morning, running a red light in the process. The end result was that he lost control of his vehicle, failed to negotiate a roundabout, travelled on the wrong side of the road, crossed another intersection and crashed through the front yards of two houses, killing both his passengers. He had a blood alcohol reading of 0.17 per cent, although as a P-plater he was not supposed to have any alcohol in his blood. On the other hand, he was only 18, was remorseful and had only a minor criminal history. He was sentenced to seven years imprisonment with parole eligibility after two and a half years. The applicant in *Hopper*, also a youthful driver, was sentenced to eight years imprisonment with parole eligibility after three years. He drove, swerving, at excessive speeds – between 120 and 130 kilometres per hour – with a blood alcohol reading of 0.144 per cent, eventually losing control of his vehicle and killing a passenger. He had disregarded his passengers' requests that he slow down; as he admitted, he was speeding for the thrill of it. Given the element of deliberately dangerous driving involved in both *Nikora* and *Hopper*, and the lower sentences imposed in those cases, neither seems to us to support the argument that the present applicant's conduct was deserving of a nine year sentence.

Conclusion

[10] The context of the dangerous driving in the present case warranted a severe sentence. The applicant drove over some distance, with small children in the car, in an impaired condition which he had induced in himself although knowing of his responsibilities. Nonetheless, considering all of the authorities, the conclusion that we come to is that the sentence imposed was manifestly excessive. A term of nine years imprisonment might have been appropriate if there had been some element of deliberate or protracted recklessness in the applicant's manner of driving, or had he, like the applicants in *Clark* and *Kelly*, been facing sentence for manslaughter. In our view the application for leave to appeal should be granted, the appeal allowed, and the sentence varied by substitution of a sentence of seven years imprisonment for the nine year sentence imposed by the sentencing judge, with eligibility for

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7 [2009] QCA 361.
8 [1999] QCA 296.
9 [2014] QCA 192.
10 [2011] QCA 296

release on parole on 23 September 2016; that is, after two years and four months. The order of absolute disqualification from holding or retaining a driver's licence should remain.

[11] **MORRISON JA:** This is an application for leave to appeal against a sentence imposed, on the applicant's plea of guilty, on one count of dangerous operation of a motor vehicle causing death and grievous bodily harm, whilst adversely affected by an intoxicating substance, namely methylamphetamine. The offence was committed on 14 August 2012 and the sentence was imposed on 23 May 2014. The applicant was sentenced to nine years imprisonment, with eligibility for release on parole after he had served three years.

[12] The sole ground of the application for leave to appeal is that the sentence imposed was manifestly excessive in all the circumstances.

Circumstances of the offence

[13] A schedule of facts was tendered by the respondent. In the end there was no dispute as to the contents, though both the applicant and respondent added some matters during sentencing submissions. I will come to them in due course.

[14] Just prior to 3.00 pm on 14 August 2012, the applicant left his home to collect his three children,[11] and the daughter of a friend, from school and day care. The friend's daughter, was just on seven years old and she, and her mother, and sisters, had been staying at the same house as the applicant's family.

[15] The applicant drove about 3.5 km to the school, collected the children and started to drive home. He was travelling in a northerly direction along Henty Drive at Redbank Plains when he reached the intersection of Henty Drive and Evergreen Place. He travelled through a roundabout at the intersection and continued on Henty Drive.

[16] Further along Henty Drive, the road curved and was intersected by a small concrete island. The applicant commenced to travel through the curve, but his vehicle did not continue to follow the curve. Instead, it moved at a tangent to the left, mounted the left hand side concrete kerb, travelled across a grass nature strip and collided head on with a tree.

[17] The applicant's vehicle contained eight seats. The friend's daughter was sitting in the very rear of the vehicle, in the middle of a bench seat. She was wearing a seat belt that buckled across her lap, but not across her chest. As a result of the collision, she suffered a broken neck and was pronounced dead at the incident location. The applicant's children also suffered injuries of varying degrees of seriousness.

[18] One of the applicant's children sustained a craniocervical dislocation of C1 and C2. She underwent a posterior fusion of her spine. She also had a laceration on her forehead, which required some surgical repair. She had a number of follow up appointments to assess the fusion of the C1 and C2 vertebrae. By April 2013 she was well, very active, with normal neurology and no pain. As at that time, there was a good fusion of the C1 and C2 vertebrae. However, as a result of the surgery she will have some permanent loss of range of motion in her cervical spine, particularly that of rotation. A medical expert assessed the loss of range to be between 30 - 40 per cent of

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[11] Aged six, four and two.

her rotation. She has a scar from the top of her forehead above her left eye, which runs diagonally through the top of her right eyelid.

[19] Another child suffered three moderately sized haematomas to his forehead and a small area of bruising of the abdomen consistent with a seatbelt bruise. He did not have any broken skin, nor did he suffer any other obvious injuries. He stayed in hospital overnight for observation and was discharged two days later.

[20] The third child sustained grazes over her forehead and cheeks and a laceration over the lower abdomen, consistent with a seatbelt injury. She also complained of tenderness to the pelvis. X-rays were undertaken of her chest, cervical spine and pelvis, but no fractures were detected. Her liver and renal function also presented as normal. After an orthopaedic review of her injuries, she was discharged.

[21] The applicant himself sustained a closed fracture to his arm and thigh. He also had some pain in his sternum.

[22] Whilst he was at the hospital, the applicant had a specimen of blood taken. It showed a concentration of methylamphetamine of 0.22 mg/kg. A medical expert gave the following opinion in relation to that concentration:[12]

> "The effect seen with methylamphetamine depends on the pattern of use and the tolerance of the user to the drug. Symptoms range from excessive stimulation with acute use to excessive tiredness if one is coming down off methylamphetamine. The reported driving behaviour in this case of leaving the road and crashing has been described with methylamphetamine use.
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> The methylamphetamine level of 0.22mg/kg is well within the range associated with toxic effects and driving impairment. An individual with a methylamphetamine level of 0.22mg/kg would have impaired powers of attention, concentration, judgement and muscle coordination. Their ability to safely control a motor vehicle would be impaired."

[23] A forensic examination of the accident scene established that the applicant's vehicle had mounted the kerb, travelled over the grass nature strip and collided with the tree. There was no evidence of braking on the road prior to or in the area where the vehicle mounted the kerb. Tyre scuff marks observed on the kerb were consistent with having been caused by the vehicle travelling from the road, up over the concrete kerb, without braking.

[24] At the location of the incident Henty Drive is a two lane road, travelling in a north/south direction. Opposing lanes of traffic south of the area of the incident are separated by a dotted white centre line. The road is bordered on both sides by concrete kerb and channel, adjoined by a grass nature strip with trees. It is a residential area, with driveway access. The speed limit at the location was 50 kmph.

[25] At the time of the incident the road surface was dry and in good order, with no obstructions such as potholes, oil or debris. The weather was fine and clear and visibility was good.

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12 AB 44.

[26] A map of the area shows that after leaving the school the applicant travelled on School Road, then turned right onto Redbank Plains Road. After about 1.4 km and passing six T-intersections, he turned left into Henty Drive. From that point he travelled about 1.7 km, passing about 10 intersections, three of which had roundabouts. The total journey covered by the applicant from when he left Redbank Plains Primary School to the crash site, was about 3.5 km.

Additional facts added without objection

[27] At the scene of the offence paramedics described the applicant in this way:[13]

> "I noticed his behaviour to be unusual. He seemed detached and distracted and showed no real emotion for what had happened and was unable or unwilling to answer any questions I posed to him about what had happened."

[28] The prosecutor accepted that such behaviour could be consistent with shock as well as methylamphetamine use. The applicant was a regular user of methylamphetamine, telling one of his friends that he smoked it "as it makes him feel smashed".[14] On the day of the offence, it was the applicant's responsibility to collect the children from school and day care. Prior to that offence, but on the same day, he was seen to be smoking "ice"[15], having smoked it throughout the night, and he was seen to be high on ice. Other witnesses said that he "seemed fine in the morning" when he dropped the children off to day care and school, but when he came back at around midday he was "very tired", but decided to smoke some more ice. One of the applicant's friends described him in this way:[16]

> "By the time 2.30 came around on Tuesday afternoon, it looked to me like [the applicant] was absolutely fucked."

[29] The applicant was asked by one of his friends whether he was in a condition to drive and he said he was.

[30] As to the effect of the methylamphetamine, the learned sentencing judge was told that if the concentration is between 0.01 and 0.05, it will produce dilated pupils, euphoria, increased sense of wellbeing, heightened mental activity, decreased fatigue and enhanced wakefulness. However, the level becomes toxic once it reaches 0.1. Depending on the tolerance of the user, at that level one might experience confusion, restlessness, paranoia, delusions, violence, hyperactive reflexes, tremor, flushing and profuse sweating. Further, the ability to pay attention, concentrate on exercise and apply appropriate judgment is reduced.

[31] The prosecutor also referred to what occurs when the effects of methylamphetamine wear off. They are consistent with excessive fatigue, which the prosecutor proffered as a possible explanation for what had occurred at the time of the offence.

[32] Counsel for the applicant gave this explanation to the learned sentencing judge:[17]

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13 AB 11.
14 AB 12.
15 A term used to refer to methylamphetamine.
16 AB 12.
17 AB 22.

> "My instructions are he came round the roundabout. He remembers navigating the roundabout, coming onto the road and the next thing he's hit the tree. The only reasonable and logical inference that can be drawn from that is that he's actually nodded off and that is a consequence of coming down from amphetamine and that's the fatigue that my learned friend has described and his explanation is, 'I have nodded off.'"

The applicant's circumstances

[33] The applicant was born on 8 January 1986 and therefore 26 years old at the time of the offence. He was 28 years old at the time of sentence. The applicant's criminal history prior to the offence was quite minor, consisting of two offences in 2003 for trespass and entering or remaining in or upon a building without lawful excuse. Each resulted in a small fine. Subsequent to the offence but prior to sentencing, the applicant had been fined for failing to appear in accordance with his undertaking and breaching a bail condition and, in February 2014 the applicant was convicted of dishonestly obtaining property from another by fraud, for which he was sentenced to a suspended two months period of imprisonment, as well as being fined.

[34] The applicant's traffic history was extensive and poor. Commencing in 2003 when the applicant was 17 years old, there have been quite a number of offences. Leaving aside offences which occurred when he riding a bicycle, the motor vehicle offences concerned driving under the influence of liquor in 2006, speeding in 2007, unlicensed driving in 2008, disqualified and unlicensed driving in 2009, driving while using a phone and speeding in 2010, and a variety of offences including speeding, driving a vehicle in a defective state and failing to wear seatbelt in 2011 and 2012.

[35] At the time of the offence, the applicant was the subject of a 12 month good behaviour driving period, following the accumulation of demerits points.

[36] Of more concern is the fact that after the offence, the applicant committed repeated driving offences. They include: two occasions of failing to display L plates, two occasions of riding a motorbike as a learner but not under the direction of another person and two occasions of excessive speed, all in 2012; speeding, unlicensed driving and two occasions of disqualified driving, all in 2013; and failing to fulfil to the duties of a driver involved in a crash, in June 2013.[18]

[37] The learned sentencing judge was told, without objection, something of the applicant's background. He attended school until grade 10, then worked at McDonalds for two years. After that he started, but did not complete, a carpentry apprenticeship. He commenced a relationship which, by the time of sentencing, had lasted some 11 years. He had six children aged from eight years down to 10 months. Because of the number of children he had, he could not continue with the apprenticeship. He took other employment and had been working as a handyman and for a framing and trussing company.

[38] From the age of 11 the applicant had been using marijuana and his drug taking increased to the point where he was taking amphetamines when he was 17. At one time he had been admitted to a mental health unit with suicidal tendencies and was diagnosed with severe depression.[19] However, a doctor's certificate was tendered

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18 AB 36–41.

19 This was not the subject of any proof beyond the statement by the applicant's counsel.

revealing that the applicant had suffered from anxiety and depression for several years, both before and after the offence in 2012. It also noted the applicant's previous illicit drug use.

[39] The applicant managed to stay off drugs for six or seven months after the accident, but had retuned to them. The learned sentencing judge was addressed by the applicant's counsel on the basis that he was still reliant upon drugs other than prescribed medication.

References and victim impact statement

[40] A number of references were tendered on behalf of the applicant. They are all personal references, coming from his parents, his partner and several people who have known him for some time. All of them emphasise the deep remorse exhibited by the applicant and the change in his nature as a consequence of the offence. All of them refer to the applicant having become a depressed, unhappy, sad and angry person as a consequence of what occurred. His partner, in particular, describes him as being previously a "loving, kind, caring, helpful person", but afterwards a "sad angry depressed man who is so remorseful and very regretful of his actions and desicions (sic) that lead up to the fatel (sic) car accident".[20]

[41] A victim impact statement from the mother of the deceased child was tendered. As may be expected, she deposes to the deep grief and sense of loss which she had experienced as a result of the death of her daughter. In addition, she referred to the more general impact of what occurred, being that her ex partner took their other two children home with him after the accident, but when the applicant's methylamphetamine intoxication became evident, it led to a custody battle. She expressed it as being "it looks like because of what [the applicant] did, Im (sic) getting the blame and probably wont (sic) get them back".[21] That had caused her further suffering and depression because "that day I lost everything my whole life-what I lived for and was my world he tore that away because of his actions and not informing anyone that he was unfit to drive that day (sic)".[22]

Applicant's contentions

[42] The applicant relied on five factors in relation to the contention that the sentence was manifestly excessive. Those factors were: the early plea of guilty; the demonstrable remorse; the statement by the applicant's father;[23] the content of a letter from Dr McEniery;[24] and that the manner of driving was not "reckless" as considered in other cases.[25]

[43] The applicant also referred the Court to a number of cases which were said to be comparable, and from which it could be demonstrated that the sentence was manifestly excessive. Those cases were: *R v Frost; ex parte Attorney-General (Qld)*;[26] *R v Ross*;[27] *R v Hallett*;[28] *R v Clark*;[29] and *R v Kelly*.[30]

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20 AB 55.
21 AB 48.
22 AB 49.
23 AB 51.
24 AB 50.
25 Applicant's outline, paragraph 15.
26 [2004] QCA 309. (***Frost***)
27 [2009] QCA 7. (***Ross***)
28 [2009] QCA 96. (***Hallett***)
29 [2009] QCA 361. (***Clark***)
30 [1999] QCA 296. (***Kelly***)

The approach of the learned sentencing judge

[44] A number of matters were referred to by the learned sentencing judge. They included:[31]

- that there was a plea of guilty and it was to be taken into account;[32]
- the fact that the maximum penalty for the offence was 14 years imprisonment;
- that the level of methylamphetamine was such that "an individual with a reading of that nature would have impaired powers of attention and concentration, judgment and muscular coordination. Such a person's ability to safely control a motor vehicle would be impaired";
- the nature of the driving including that there was no evidence of speeding and no evidence of braking;
- the fact that the traffic history was of greater concern than the applicant's criminal history; his Honour reviewed the sequence of offences in some detail;[33]
- that the breaches of the traffic laws subsequent to the offence meant that the applicant "continued to display contempt for the traffic laws";[34]
- that the applicant was undertaking "an extremely responsible task" by picking up the children and driving them home;
- that the applicant was "highly remorseful for [his] actions";
- that it had been submitted that the applicant's driving "could not be categorised as completely reckless as that expression is sometimes used in other cases where there is evidence of excessive speeding or swerving or losing control"; nonetheless the applicant's offence fitted that category of dangerous operation of a motor vehicle where someone drives whilst affected, either heavily or not, by alcohol or drugs;
- even though the applicant was not driving at an excessive speed, "your level of dangerousness, in my opinion, and the irresponsibility of your driving, is extremely serious indeed";
- the letter from Dr McEniery, and particularly the diagnosis of anxiety and depression over a period of time;
- that the applicant had six children, family responsibilities, and a series of references that spoke very highly of him, as well as the impact that the offence would have;
- that the applicant's offence was "a very serious instance of dangerous driving causing death … [and] in addition to the death of a young child, grievous bodily harm was caused to another young child …".

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31 AB 29–32.

32 The prosecutor had made a submission that: "It must be, however, accepted that the plea comes at an early stage and it should be treated as such …": AB 13. The applicant's counsel also submitted that the "plea is timely": AB 23.

33 AB 30–31.

34 AB 31.

Discussion

[45] It will be apparent from the recitation of the factors taken into account by the learned sentencing judge, in paragraph [44] above, that all of the separate factors to which the applicant refers were, in fact, taken into account by the learned sentencing judge. Some of them were referred to in terms, whilst others were mentioned indirectly.

[46] In the latter category was the reference by the applicant's father. The learned sentencing judge referred to the references that were tendered, but did not mention the father's reference specifically. However, his Honour clearly had regard to it because it was the source of the description of the scar on one child's forehead. That fact, and that it came from the letter by the applicant's father, was mentioned specifically by the learned sentencing judge in the course of his remarks.[35]

[47] Also in the latter category is the reference to the plea of guilty. Whilst his Honour did not specifically refer to it as an early or timely plea, that was the way it was urged upon him, and his Honour was told that the applicant was not charged for the offence until July of 2013, and the 11 month delay was not the fault of the applicant.[36] The mere fact that his Honour did not expressly say that the plea was early or timely, it should not then be assumed that his Honour treated it as a late plea. Had that been the case, one would have expected some remark to have been made as to the advantage of pleading of guilty being watered down by the fact that it was a late plea.

[48] That leaves the applicant's contentions focused on the real issue, which is the level of seriousness of the applicant's driving in the circumstances, and whether such guidance as may be obtained from comparable cases compels the conclusion that the sentence was manifestly excessive.

[49] The applicable test has been established by the High Court, namely that the question is whether the sentence is "unreasonable or plainly unjust", such that it may be inferred "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance".[37]

[50] It is well to note the guidance offered by this Court in *R v Tout*,[38] where Fraser JA[39] said:

> "As to ground 1, a contention that the sentence is manifestly excessive is not established merely if the sentence is markedly different from sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle, or that the sentence is "unreasonable or plainly unjust": *Hili v The Queen* (2010) 242 CLR 520 at [58], [59]."

[51] It is true to say that the applicant's manner of driving was not reckless in the sense that it involved high speed, swerving, travelling on the wrong side of the road, running red lights, tailgating, or any of the other ways in which reckless driving is

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35 AB 29.
36 AB 7.
37 *House v The King* (1936) 55 CLR 499, at 505; *Barbaro v The Queen; Zirilli v The Queen* (2014) 88 ALJR 372, at 380 [43].
38 [2012] QCA 296, at [8].
39 With whom Muir and Gotterson JJA agreed.

often exhibited. However, there are a number of factors which, in my view, properly characterise this as an extremely serious case of reckless driving.

[52] First, the applicant had been smoking methylamphetamine before he took the children to school and day care in the morning. Secondly, by midday the applicant was very tired, and decided to smoke some more methylamphetamine. The inference is that he did so, at least in part, to overcome his tiredness. Thirdly, by 2.30 pm he was so badly affected that a friend described him as "absolutely fucked". Fourthly, that person questioned whether the applicant was fit to drive. In other words, there was a form of warning against him driving. Fifthly, during the course of that day and when he was taking further methylamphetamine, the applicant knew that it was his responsibility to collect the children after school, and deliver them safely home. Sixthly, the applicant had been a methylamphetamine user for some time. It is not difficult to infer from that fact, and the evidence as to the effects of methylamphetamine when it is wearing off, that the applicant must have known that he would be excessively fatigued when that occurred. Even his own counsel acknowledged that the inference to be drawn from the circumstances was that the applicant fell asleep as a consequence of "coming down" from methylamphetamine and experiencing the fatigue referred to.

[53] Whilst the actual event which constituted the offence occurred when the car mounted the kerb, crossed the grass strip and hit the tree, the lead up to that was much more prolonged. The circumstances characterising the manner of driving commenced earlier in the day when the applicant drove the children to school, at the time being affected by methylamphetamine which he had been smoking "throughout the night". Having dropped the children off, and being hit by the fatigue which comes with methylamphetamine wearing off, he smoked some more to the point where his appearance led to a friend describing him as being "absolutely fucked". The point had been reached, at the time when he went to pick the children up from school, the level of methylamphetamine in his blood was double that where it becomes toxic.

[54] In my view, it would be quite wrong to characterise the applicant's driving as involving some momentary nodding off or by pointing to how far the applicant had safely navigated the roads prior to nodding off. What occurred was the accumulation of repeated events of intoxication by methylamphetamine. During the course of that day, and even the night before, the applicant engaged in what could be called a persistent intake of methylamphetamine. That, done in the face of the known responsibility that he had to collect the children and deliver them safely home, makes this an extremely serious example of reckless driving.

Comparable cases

[55] In reviewing the cases put forward it must be accepted that most cases will be factually different to one degree or other – it is a rare thing for two cases to be perfect factual matches. This Court recently expressed the caution that must be used in the comparison of cases, in *R v Hopper*:[40]

> "The court in *R v Wilde; ex parte A-G* [2002] QCA 501 (de Jersey CJ, Jerrard JA, and Mullins J) answered the applicant's submission. It said at [26]:

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[40] [2011] QCA 296 at [24], per Chesterman JA, with whom Muir JA and M Wilson AJA agreed. (***Hopper***)

> **"The variety of circumstances confronting sentencing courts in cases like this means it can be especially difficult to translate the result in one case to another.** What is abundantly clear is that the community expects, and rightly expects, appropriately deterrent penalties..."

To the same effect McPherson JA and Thomas J said in their joint judgment in *R v Conquest; ex parte A-G (Qld)* [1995] QCA 567 at pp 10-11:

> "It would certainly be an error for a sentencing court to treat the normal rough range of sentence in roughly comparable cases as if it were the statutory maximum. But equally it would be an error for a sentencing Judge to set his ... own level of sentence in a manner inconsistent with other judicial decisions. **The only escape from this dilemma is through recognition of the fact that no two cases are exactly alike, and that in general the level of sentence in one case can only be a rough guide to another. To speak of a "normal range" may give the sentencing court some feeling of comfort, but it is often a dangerous generalisation."**[41]

[56] Though the Court in *Hopper* was speaking of sentencing judges, the same applies to an appeal court when comparable cases are pressed as showing that a sentence is manifestly excessive.

[57] *Frost* was an Attorney-General's appeal against a nine year sentence with a recommendation for parole release after three and a half years. The offender was 24 years old and seriously intoxicated. The evidence was that his blood alcohol level would have been at least 0.237 per cent at the time he collided with three pedestrians, killing them all. Having consumed serious quantities of alcohol between dinner and 3.00 am, he drove his vehicle in an erratic and dangerous manner over a prolonged period, covering about 14 kilometres. He was swerving, and refused repeated requests that he stop or let his passenger out. He was warned to the presence of the pedestrians, but still moved onto the road shoulder and hit them. Having done so, he did not remain at the scene, but drove on, hitting a guide barrier and travelling on the wrong side of the road. He continued to drive dangerously and erratically until eventually abandoning the car.

[58] Jerrard JA[42] described it as "plainly a very bad case of dangerous driving" and identified that "[t]he only feature of dangerous operation of a motor vehicle commonly present but absent is that he was not speeding".[43] Aggravating features were the poor driving record and the fact that he exhibited no remorse when he committed the offence, even though by the time of sentencing the impact of what he had done had sunk in and he was experiencing "an immense sense of guilt at the fact of causing the death of three people".[44]

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41 Emphasis added.
42 With whom MacPherson JA and Helman J agreed.
43 *Frost* at [13].
44 *Frost* at [14].

[59] The Court did not disturb the sentence of nine years imprisonment but did remove the recommendation for parole. In my view, *Frost* provides some limited support for the sentence imposed on the applicant. The limitation is the fact that it was an Attorney-General's appeal, and therefore the Court was simply determining that a nine year sentence was not manifestly inadequate. Like the applicant's case, *Frost* involved a similarly aged driver who was badly intoxicated and drove knowing that he was intoxicated and in circumstances where he must have known he was incapable of safely operating a motor vehicle; in *Frost* it was alcohol, in the applicant's case, methylamphetamine. Whilst the applicant did not drive as far or as erratically as Frost, in my view the real factor which made the driving dangerous in each case was the level of intoxication. In fact, on one view the applicant had a more prolonged period in reaching the state of intoxication than was the case in *Frost*. On one point, *Frost* was worse than the applicant, and that was the callous way in which he drove away from the scene. Further, three people were killed in *Frost*, whereas there was only one in the applicant's case. Acknowledging the different features, there is some support from *Frost* for the sentence imposed on the applicant, but limited in the way I have mentioned above.

[60] *Ross* involved a sentence of eight years, with no recommendation as to parole, for the dangerous operation of a vehicle causing the death of two infant children, who were passengers in the vehicle. The offender was intoxicated, speeding and left the scene knowing of the death and injuries. He was 25 and had a short criminal history which did not involve imprisonment, and a traffic history which included unlicensed driving on four occasions and two occasions of drink driving. His driving at the time of the offence involved doing burnouts, tailgating another car out of a car park, accelerating heavily and fishtailing. He travelled about a kilometre, negotiating three bends in the street, before he lost control, mounted a median strip and collided with some trees. His speed at the time of the crash was about 138 km/h, in a 70 km/h zone. His blood alcohol reading at the time of the crash would have been about 0.163. Once the vehicle came to a rest, the offender looked inside and then absconded. He later lied to some friends as to who had been driving, and lied to police about the circumstances of what happened. The learned sentencing judge described it as "grossly irresponsible driving", and "[a] bad case of dangerous driving by any measure".[45]

[61] The Court[46] refused to interfere with the eight year sentence. In doing so *Frost* was reviewed, and found to be a more severe case. The Court also observed that the nine years imposed in *Frost* fell "at the lower end of the appropriate range", and that *Frost* could have been sentenced to 10 years imprisonment.

[62] The Court ultimately determined that the eight year term, without the embellishment of any recommendation, was within the judge's discretion. The Chief Justice stated in that respect:

> "It is very important in this case to acknowledge the gravity of the offence: dangerous driving over a substantial distance in a suburban area at high speed, with a high blood alcohol concentration in the driver; the consequence – the death of the two infant children; the very circumstance that the applicant drove in this way and while intoxicated with his infant children as passengers in the vehicle; his attempts at

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45 *Ross* at pg. 4.

46 de Jersey CJ, Fraser JA and P Lyons J concurring.

> avoiding detection; and all of this in the context of the applicant's not insubstantial past traffic history, including alcohol related driving offences, and his being a disqualified driver at the time. A strongly deterrent sentence was obviously appropriate and called for."[47]

[63] *Ross* is a more severe case than that of the applicant, at least to the extent that two children were killed and the offender went to some effort to abscond from the scene and avoid detection. However, he drove a shorter distance, albeit with some of the classic reckless driving features such as high speed and lack of control. However, even though *Ross* is worse than the applicant's case in some areas, the contrary is also true. The prolonged period during which the applicant became intoxicated with methylamphetamine, that being the feature that caused the driving to be reckless, was not a feature in *Ross*, albeit that there was intoxication. *Ross* did not involve the added feature of responsibility for someone else's child, and the pre-warning that the applicant had, both that he may be adversely affected and that he had the particular task of collecting all the children from school and delivering them safely home. In that sense, it can be said that the applicant's case and driving, is more serious than *Ross*.

[64] I am not persuaded that *Ross* was so far from this case that the sentence here was manifestly excessive, or "unreasonable or plainly unjust".[48]

[65] *Hallett* involved a plea of guilty to the offence of dangerous operation of a motor vehicle causing death with the circumstance of aggravation, that the driver was adversely affected by an intoxicating substance. He was sentenced to seven years imprisonment, with parole eligibility fixed at two years and four months. The offender in that case was 48 years old, and driving his 84 year old father on a highway. The driver had a concentration of methylamphetamine in his blood at such a level that it was likely to have caused an impairment of his ability to safely drive his car. He swerved between the northbound lanes on the highway, on three or four occasions, before veering off to the left and hitting a pole. The offender had an extensive criminal history and traffic history, over more than 30 years. He had previously been in prison for offences of dangerous driving, unlawful use of a motor vehicle, driving a motor vehicle whilst under the influence of liquor or a drug, and driving without a license.

[66] After the offence the subject of the appeal, the offender committed other offences, including drug offences and traffic offences. Fraser JA[49] described the traffic history as "appalling".[50] Reference was made to remarks by the sentencing judge that the driving had only occurred over a short distance and that the "applicant's culpability in driving under the influence of drugs consumed some days earlier was not as bad as that of a person who drives immediately after consuming an intoxicating substance". Further, Hallett was the carer for his father, and the accident occurred when he was taking his father out for a drive.[51]

[67] The Court did not disturb the sentence of seven years.

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47 *Ross* at pg. 7.
48 To use the formulation in ***(Hili)***.
49 With whom Muir JA and White J agreed.
50 *Hallett* at [15].
51 *Hallett* at [17].

[68] In my view, *Hallett* is of little assistance. The offender there was 48 years old, with an extensive criminal and traffic history. The driving was only over a short distance, and the inability to drive safely, caused by methylamphetamine in the blood, was the consequence of consuming drugs some days earlier. Those factors are different from the applicant's case, where the inability to drive safely was the consequence of prolonged, deliberate use of methylamphetamine, knowing the applicant was due to fulfil a task calling for particular responsibility, not only for his own children but someone else's child as well. True it is that in *Hallett* the offender was responsible for his father, but there was no suggestion in that case that the reason for driving was the fulfilment of a particular task, of which the driver was aware at the time the drugs were taken. That is the case with the applicant.

[69] *Clark* involved a 10 year sentence imposed on a plea of guilty to two counts of manslaughter. The offender was a 35 year old woman who took her husband's car and drove to a suburban shopping centre. She was in a hurry to keep an appointment, and drove onto the footpath in order to get past a car in front of her. In doing so she struck two teenage boys who were standing on the footpath.

[70] The offender had a blood alcohol concentration which was estimated to have been 0.04 per cent at the time of the offences. However, she had a significant intake of prescription drugs, including twice the therapeutic dose of valium. She had also ingested oxazepam, temazepam, cannabis, morphine and codeine. All except the oxazepam were present in concentrations higher than the therapeutic range of the drugs. She was also diagnosed with Bipolar Affective Disorder and was likely experiencing a Manic Phase Disorder at the time. Those conditions would have deprived her of the normal ability to makes rational decisions.

[71] Keane JA[52] described the conduct of driving the motor vehicle onto the footpath as "extraordinarily reckless".[53] His Honour referred to the fact that the irrational behaviour was a consequence of her mental disorder which tended to lessen her moral culpability.[54] Further, his Honour recognised that whilst she had killed two innocent boys, "[t]here must nevertheless be recognition that her behaviour was irrational, rather than deliberately anti-social".[55] He concluded that nine years imprisonment was the appropriate sentence.

[72] *Clark* is a significantly different case from that of the applicant. The presence of the mental disorder and ingestion of overdoses of therapeutic drugs, led to what was described as irrational and extraordinarily reckless driving. The characterisation of her behaviour as irrational, rather than deliberately anti-social, also puts *Clark* in a different category to the applicant; his drug use on the day was deliberately anti-social behaviour. I do not consider that *Clark* is of any assistance.

[73] *Kelly* is also unhelpful. That involved a 22 year old who absconded with a bakery van and then drove erratically and at speed for over 23 kilometres. During that time, the driver was pursued by a police officer who drove up to the vehicle with the lights of the police car and the siren activated. The driver took no notice. During the chase the bakery van was driven onto the incorrect side of the road and into the path of an oncoming car, and later again onto the incorrect side of the road, crossing

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52 With whom Holmes JA and Atkinson J agreed.
53 *Clark* at [20].
54 *Clark* at [23].
55 *Clark* at [27].

double white lines and into the path of another vehicle. Some time later, and while the pursuit was still in progress, the driver moved onto the incorrect side of a road at a bridge, as a result of which he collided with an oncoming vehicle, killing that driver.

[74] At the time Kelly had a blood alcohol level of 0.187 per cent. He absconded to South Africa, ultimately being extradited some years later. In the interim he had undergone significant rehabilitation, including giving up alcohol, marrying and becoming an active member of the church.

[75] The circumstances just recited demonstrated why *Kelly* is of no real assistance. Whilst the ages of the drivers are roughly comparable, the driving is quite different. The applicant's did not have the features of speed, swerving or driving on the incorrect side of the road. Kelly's blood alcohol level at 0.187 per cent was certainly such as to render him substantially unable to safely drive a motor vehicle, but there is no indication of the same sort of prolonged and deliberate ingestion as features in the applicant's case. Nor are there present, the aspects of known responsibility for the task which the applicant was undertaking when the vehicle crashed, and that the particular responsibility included the safety of a child from another family. Those are features which, in my view, render the seriousness of the applicant's driving as equal to, if not worse than, that in *Kelly*.

[76] In reviewing these cases, one must bear in mind the guidance given by this Court in *Hopper*: see paragraph [55] above. In my view one can come to the conclusion that the seriousness of driving can be just as bad where it is over a short distance and without speed or other erratic behaviour, as it is where those factors are present. It all depends on the proper characterisation of the nature of the conduct, an assessment of the reason why the driving was dangerous or reckless, and why that feature manifested itself. It is for that reason that, in my view, the applicant's driving is properly to be considered as serious as the driving in *Frost*, *Ross* or *Kelly*.

[77] In my view it has not been demonstrated that the sentence imposed on the applicant was manifestly excessive in the circumstances. Even though the sentence is different from sentences in other cases, I do not consider that it has been demonstrated that there must have been a misapplication of principle or that the sentence is unreasonable or plainly unjust, to use the test in *Hili*.

Conclusion

[78] I would refuse the application.

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hopper* [2011] QCA 296
PARTIES:	**R** **v** **HOPPER, Benjamin Lloyd James** (applicant)
FILE NO/S:	CA No 173 of 2011 DC No 42 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED ON:	21 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	7 October 2011
JUDGES:	Muir and Chesterman JJA and Margaret Wilson AJA 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 refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one charge of dangerously operating a motor vehicle causing death whilst adversely affected by an intoxicating substance and excessively speeding – where the applicant was sentenced to eight years' imprisonment – where parole eligibility was set at three years – whether the sentence was manifestly excessive *R v Blackaby* [2010] QCA 84, considered *R v CAN* [2009] QCA 59, considered *R v Conquest; ex parte A-G (Qld)* [1995] QCA 567, considered *R v Frost; ex parte A-G* [2004] QCA 309, considered *R v Hallett* [2009] QCA 96, considered *R v Ross* [2009] QCA 7, considered *R v Vessey; ex parte A-G (Qld)* [1996] QCA 11, considered *R v Wilde; ex parte A-G (Qld)* [2002] QCA 501, considered
COUNSEL:	R A East for the applicant T A Fuller SC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that the application for leave to appeal should be refused for the reasons given by Chesterman JA.

[2] **CHESTERMAN JA:** On 15 June 2011 the applicant pleaded guilty in the District Court at Bundaberg to a charge of dangerously operating a motor vehicle causing death when he was adversely affected by an intoxicating substance and was excessively speeding. The offence occurred on 24 July 2010. The applicant was sentenced to eight years' imprisonment. Parole eligibility was set at three years. The applicant was disqualified absolutely from holding or obtaining a driver licence. He was 20 at the time of the offence and 21 when sentenced. The applicant applies for leave to appeal against his sentence claiming it is manifestly excessive.

[3] The driving and the death occurred at Moore Park Beach near Bundaberg. The applicant and three friends drank at the local bowls club between about 8.00 pm and midnight. He had driven three friends to the club in his mother's Honda CRV. The applicant admitted drinking between six and 12 stubbies of beer at the club. When leaving the applicant telephoned his mother and was heard to say "I'm a bit pissed but I will be okay." One of the applicant's friends offered to drive but the applicant refused the offer. The four friends left the bowls club in the Honda which the applicant drove, with the apparent intention of taking his friends to their respective homes, the closest of which was about 300 metres away. The applicant neglected to turn on the vehicle's headlights. His friends pointed out the omission and after about 200 metres the applicant turned the lights on. Over the short distance from the bowls club to the first residence the applicant drove very fast, at speeds of between 120 and 130 kmph, and swerved over the roadway. The speed limit was 60 kmph. As he drove the applicant held an open stubby of beer in his right hand and steered with his left hand.

[4] On his way to the next residence the applicant drove off the carriageway and onto a rough dirt track that gave access to the beach. He drove very fast along the track and one of his passengers told the applicant to slow down. The applicant did not slow down, nor did he reply but turned up the volume of the car radio. After driving for an un-stated distance the applicant left the track and returned to the sealed roadway. He again drove very fast and the same passenger again told him to slow down.

[5] The applicant did not do so and when driving at a speed which he admits to be 120 kmph he lost control of the vehicle. It skidded onto the wrong side of the road, struck a parked vehicle a glancing blow and then collided with a power pole and then a wooden boundary fence. The force of the impact drove a fence beam through the chest of the passenger seated behind the driver. He died instantly.

[6] Skid marks left by the Honda were measured at 116.3 metres. The applicant was obviously intoxicated. He was unsteady on his feet, his eyes were bloodshot and he smelt of liquor. When tested his breath alcohol concentration was 0.144 per cent. Such a concentration would cause impairment to his powers of observation and inappropriate or delayed reactions. The applicant admitted that his driving was "over the road sort of", and that he was "swerving a little bit". He attributed his manner of driving to his intoxication. He admitted driving fast for the "thrill" of it.

[7] The applicant had a relatively minor criminal history. He had committed a public nuisance on three occasions on each of which he was fined a small sum. He was found in possession of cannabis for which he was put on a good behaviour bond which he breached by a further offence of public nuisance. He was dealt with for those offences collectively by a period of six months' probation which he completed satisfactorily on 15 February 2009.

[8] The applicant's traffic history is more relevant. There is an entry for careless driving in March 2008, one for driving whilst under the influence of liquor in June 2008 and another for driving at a speed more than 20 kmph in excess of the limit in April 2009. On two occasions the applicant's driver licence was suspended by reason of an accumulation of demerit points. On 17 May 2010 the applicant's licence was restricted by an order prohibiting him from driving between 11.00 pm and 5.00 am. On one occasion prior to 24 July 2010 he drove in defiance of the restriction which was in effect when the applicant committed the present offence.

[9] In passing sentence the learned primary judge said:

> "If it is possible to grade the seriousness of this type of offence ... your circumstances must be in the upper range of criminality in that:
>
> (a) you had consumed a large quantity of alcohol;
>
> (b) you had a night driving restriction on your licence because of your traffic history ... ; and
>
> (c) [y]ou deliberately drove at an excessive speed even when asked to slow down on several occasions thus acting in a reckless and callous manner with complete indifference to the safety of your passengers. ... .
>
> ...
>
> As I see it the only redeeming feature ... is your timely plea of guilty to a strong Crown case and such plea will ... be reflected in the sentence to be imposed.
>
> While you have a criminal history it is not significant, but is symptomatic of your contempt for authority and your obligations under the law ... demonstrating an absence of any commitment to rehabilitation or reform. Simply your traffic history is symptomatic of your absence of remorse by persistent offending, albeit of a minor nature at times."

[10] His Honour noted the applicant's relatively young age, his plea of guilty which was regarded as significant, and his co-operation with the administration of justice which extended to agreeing to an interview with investigating police officers in which he made frank disclosures about his manner of driving. The judge noted also the applicant's conscientiousness as an employee and his commitment to his work. He was an apprenticed fitter and turner with good prospects for long term employment as a tradesman.

[11] The argument for the applicant conceded the objectively serious features of the case i.e.:

(i) The loss of a young man's life;

(ii) The applicant's marked intoxication at the time, his recognition of his state of insobriety but determination to drive nevertheless;

(iii) Two occasions on which he had driven at an extremely high speed in a suburban street;

(iv) Driving in breach of the restriction on his licence which was imposed for the express purpose of reducing the risk he posed to himself and others by driving late at night;

(v) Resisting demands by his passengers that he slow down, and an offer from one of them to drive.

To these may be added the respondent's observations:

> "The applicant was the subject of a restricted licence due to his poor driving record ... . He had previously (been) convicted of driving under the influence of alcohol, speeding, careless driving and breaching the restriction placed upon his licence. That restriction was designed to keep him off the road at the time at which he was most at risk to himself and others.
>
> The applicant was by his own admission not in a fit state to drive ... at the time of the offence. He was severely affected by alcohol and continued to consume alcohol as he drove. He acknowledged the risk he posed prior to getting into the vehicle.
>
> The applicant engaged in deliberate and reckless conduct despite his high level of intoxication and the obvious impairment to his ability to drive ... . He drove erratically and at excessive speed ... which placed himself and his passengers at risk."

[12] The applicant nevertheless submitted that the sentence of eight years was excessive because it was "beyond the range of penalty considered by the Court of Appeal" since the maximum penalty for the offence was increased to 14 years in March 2007, and parole eligibility was deferred "beyond the usual level (of one third) for no stated reason." A third of eight years is 32 months. Parole eligibility was set at 36 months.

[13] The essence of the applicant's submission was that:

> "A review of Court of Appeal authorities since ... March 2007 ... shows that a head sentence of up to 7 years imprisonment has been imposed ... in what are ... similar or worse examples."
>
> In addition it is said to be "a common practice of sentencing courts in Queensland to recognise the value of an early plea of guilty and other mitigating circumstances by ordering eligibility for parole after serving one third of the head sentence imposed."

The additional circumstances of mitigation were said to be the applicant's:

(i) Co-operation in a full hand-up committal without cross-examination;

(ii) Youth;

(iii) Good prospects of employment;

(iv) Co-operation with police;

(v) Immediately calling for an ambulance; and

(vi) Remorse at the death of a close friend.

[14] The authorities on which the applicant relies for his submission that a sentence of more than seven years was excessive are *R v CAN* [2009] QCA 59; *R v Hallett* [2009] QCA 96 and *R v Blackaby* [2010] QCA 84, in each of which a term of imprisonment for seven years was imposed.

[15] The submission assumes that the cases decided that the penalty in similar cases could not exceed seven years, and that it is possible to make exact comparisons between cases so as to be able to discern, with complete confidence, what cases are the same in point of seriousness and what are more, or less, serious. The submission should not be accepted. Both assumptions are unjustified. The *ratio* in each case was that the seven years' imprisonment imposed was not manifestly excessive. The cases did not decide that a sentence greater than seven years would have been excessive. The assumption that an exact comparison can be made between cases overlooks the facts that no two cases are exactly alike, and that there is legitimate scope for a difference of opinion in making the comparisons.

[16] In order to consider the applicant's submission it is necessary to look at the facts of the cases relied on.

[17] The driver in *CAN* had a breath alcohol concentration of 0.154 per cent. At the time of the offence he was on bail on a charge of dangerous operation of a motor vehicle whilst intoxicated. He failed to turn a corner because he was driving too fast. His car slid out of control for about 80 metres before colliding with a power pole. His passenger was killed. He falsely denied being the driver. He had a very significant criminal history and a substantial traffic history including unlicensed driving, disqualified driving, speeding and driving under the influence. His sentence of seven years' imprisonment after a plea of guilty, with no recommendation for early parole, was not disturbed on appeal.

[18] Hallett caused the death of his 84 year old father who was a passenger in a car he drove erratically on a highway. He changed lanes and swerved between other vehicles before veering off the side of the road and hitting a pole. He was affected by drugs. He had a criminal history for dishonesty, violence and drug offending. His traffic history was appalling. There were 17 entries for disqualified driving, 10 for driving under the influence of liquor or a drug, and separate entries for dangerous driving, the dangerous operation of a motor vehicle and speeding. He pleaded guilty and was sentenced to seven years' imprisonment. Parole eligibility was set at the one third mark. An application for leave to appeal against sentence was refused.

[19] Blackaby was very drunk. Her breath alcohol concentration was 0.227 per cent. She had a number of criminal offences and a truly dreadful traffic history. She had never held a driver licence but had six convictions for driving while unlicensed; five for driving whilst disqualified and three for driving under the influence of liquor. She had been sentenced to nine months' imprisonment for driving whilst disqualified and had been released only two and a half months prior to the offence.

She drove a friend at his request from one township to another. She did not drive fast or dangerously but was clearly unable to control a motor vehicle by reason of her lack of qualification and intoxication. She lent over to pick up an object from the centre console of the car and while distracted drove into the back of a stationary truck. Her sentence of seven years' imprisonment was upheld on appeal.

[20] The applicant also referred to a case in which eight years' imprisonment was imposed, *R v Ross* [2009] QCA 7. It was said to be a "far worse … case." Ross's dangerous driving killed his two infant children. He was drunk and driving at about 138 kmph in a 70 kmph zone. The car failed to take a turn and became airborne, crashing heavily. He fled the scene and initially blamed his de facto partner for the crash and the deaths. He had a substantial traffic history and had driven aggressively and recklessly before losing control of the car.

[21] The applicant submitted that in all the cases two aspects are relevant for the purposes of making comparisons. They are the nature and quality of the dangerous driving itself and the offender's prior traffic history which, if lengthy or serious, will exacerbate the gravity of the particular offending. The submission should be accepted. Both aspects are important in determining the seriousness of the offending and the appropriate penalty. The existence of the two features, and their combination makes an exact comparison between cases difficult. There is no one "right" answer from the comparison.

[22] *Hallett* illustrates the difficulty. The driving occurred over a short distance and Hallett's culpability in driving under the influence of drugs consumed some days earlier was said to be not as bad as that of a person, like the applicant, who drives immediately after consuming an intoxicating substance. The applicant drove a considerable distance knowing he was drunk and ignoring pleas from friends not to drive and to slow down. Hallett's driving was not as culpable as the applicant's but his record was far worse.

[23] The same observation applies to Blackaby's manner of driving which was not as culpable as the applicant's or Hallett's or even CAN's. What made her offending serious was her extreme intoxication and her appalling traffic history demonstrating a determination to drive whenever she pleased regardless of disqualifications and the lack of a licence. Her case was said to be worse than the applicant's and to some minds it might be, though not to all.

[24] The court in *R v Wilde; ex parte A-G* [2002] QCA 501 (de Jersey CJ, Jerrard JA, and Mullins J) answered the applicant's submission. It said at [26]:

> "The variety of circumstances confronting sentencing courts in cases like this means it can be especially difficult to translate the result in one case to another. What is abundantly clear is that the community expects, and rightly expects, appropriately deterrent penalties …".

To the same effect McPherson JA and Thomas J said in their joint judgment in *R v Conquest; ex parte A-G (Qld)* [1995] QCA 567 at pp 10-11:

> "It would certainly be an error for a sentencing court to treat the normal rough range of sentence in roughly comparable cases as if it were the statutory maximum. But equally it would be an error for a sentencing Judge to set his … own level of sentence in a manner inconsistent with other judicial decisions. The only escape from this dilemma is through recognition of the fact that no two cases are

> exactly alike, and that in general the level of sentence in one case can only be a rough guide to another. To speak of a "normal range" may give the sentencing court some feeling of comfort, but it is often a dangerous generalisation."

[25] The applicant's submission asserts that seven years was the maximum that might have been imposed. But in *Hallett* the sentencing judge expressed the opinion that the appropriate range of punishment for the offence was between seven and nine years' imprisonment. That range was not expressly endorsed by the Court of Appeal but the judgment noted the observation and there is nothing in the reasons of the court which suggests any criticism of it.

[26] The case of *R v Vessey; ex parte A-G (Qld)* [1996] QCA 11 makes the applicant's submission that seven years' imprisonment was the maximum permitted for offending of a like nature difficult to accept. The court allowed an Attorney-General's appeal and imposed a sentence of nine years' imprisonment with a recommendation for release on parole after four years, in substitution for a sentence of six and a half years with a recommendation for parole after 26 months. The court described the circumstances in these terms (at 1):

> "The offence had very serious features. (Vessey) was under the influence of alcohol at the time. A sample of urine … demonstrated that … (Vessey) had at least a concentration of .2 per cent alcohol in his blood. (Vessey's) vehicle … had been observed making a U-turn sometime before the collision and was observed to travel on the wrong side of the road for about 150 metres causing another vehicle to take evasive action. After it turned a corner into the street where the fatal collision occurred the left-hand indicator remained on, the vehicle was driven to the intersection … without any sign that the brakes had been applied … through a "give way" sign colliding with the victim's vehicle in the middle of the driver's side and overturning it. It was not suggested that the speed of (Vessey's) vehicle had … been excessive … ."

[27] Although Vessey was grossly intoxicated, more so than the applicant, his manner of driving does not appear to have been as culpable as the applicant's, nor as prolonged. He had a worse history of disqualified driving and driving under the influence of liquor. He was disqualified at the time of the offence.

[28] Another comparable, though much worse case, was *R v Frost; ex parte A-G* [2004] QCA 309. Frost drove about 14 km when he was very drunk indeed. He drank huge amounts at a restaurant over many hours and insisted on driving home. His blood alcohol concentration at the time he ran over three pedestrians at 3.00 am was at least 0.237 per cent. He was observably and demonstrably intoxicated. His passenger repeatedly but unsuccessfully requested that Frost stop and let him out. Frost's driving was so erratic and uncontrolled that his vehicle swerved several times across the width of the road and moved onto the shoulder hitting and killing three pedestrians. After the collision Frost asked his passenger whether he had hit "a person". When told he had he continued to drive, colliding with a barrier at the entrance to a roundabout and crossing a bridge on the wrong side of the road. Frost was sentenced to nine years' imprisonment. A recommendation for early release on parole was set aside on appeal. The court described the sentence as being "at the lower end of the appropriate range" and that the offending "would have justified a 10 year sentence".

[29] The cases do not establish that the maximum appropriate penalty was seven years. The permissible range of penalty extends higher. A comparison with other cases does not provide only one "right" sentence. The sentence imposed on the applicant had to be appropriate to the seriousness of the offending and act as a deterrent to others. The sentence imposed on the applicant was certainly substantial but it was within the permitted range. His offending was very serious and there was a concerning traffic history.

[30] Fixing a parole eligibility date after three years rather than two years and eight months did not make the sentence excessive. The difference is too small to have that effect. A reduction in the period by four months would amount to unwarranted "tinkering" with the sentence. There is no invariable rule that following a plea of guilty parole eligibility will be fixed after the offender has served one third of the head sentence. The existence of such a rule, which could only be one of practice, would be inconsistent with the existence of sentencing discretion. The sentences in *CAN*, *Vessey* and *Frost* did not include such an order.

[31] The application for leave to appeal against sentence must therefore be refused.

[32] **MARGARET WILSON AJA:** I agree with the order proposed by Chesterman JA and with his Honour's reasons for judgment.