SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chmieluk; Ex parte Attorney-General (Qld)* [2018] QCA 271
PARTIES:	**R** **v** **CHMIELUK, Candice Lee** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 164 of 2018 DC No 27 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Southport – Date of Sentence: 28 May 2018 (Kent QC DCJ)
DELIVERED ON:	Date of Order: 1 August 2018 Date of Publication of Reasons: 16 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 August 2018
JUDGES:	Sofronoff P and Henry and Bond JJ
ORDER:	**Order delivered 1 August 2018:** **Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent pleaded guilty to one count of dangerous operation of a vehicle causing death while adversely affected by an intoxicating substance – where the respondent was sentenced to five years imprisonment to be suspended after three months with an operational period of five years – where the respondent caused the death of her sister after crashing a vehicle, whilst under the influence of alcohol, in which her sister was an occupant – where the respondent had a lengthy history of traffic infringements – where the respondent demonstrated genuine insight into her offending and had made substantial efforts at rehabilitation between the time of offending and sentence – where the killing of her sister had a significant effect on the respondent – where the appellant submits that the sentence imposed on the respondent is manifestly inadequate – where the appellant's submission is

primarily directed toward considerations of general deterrence, denunciation and comparison with previous sentences in cases of this kind – whether the lenience afforded to the respondent by the learned sentencing judge was not in the public interest, such that the sentence is manifestly inadequate and a more severe penalty ought to have been imposed

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40, applied
R v Blackaby [2010] QCA 84, discussed
R v Chong; Ex parte Attorney-General (Qld) (2008) 181 A Crim R 200; [2008] QCA 22, cited
R v Conquest; Ex parte Attorney-General (Qld) [1995] QCA 567, discussed
R v Etheridge [2016] QCA 241, discussed
R v Hannigan [2009] 2 Qd R 331; (2009) 193 A Crim R 399; [2009] QCA 40, cited
R v Hoad [2005] QCA 92, discussed
R v Hook [2006] QCA 458, cited
R v L; Ex parte Attorney-General (Qld) [1996] 2 Qd R 63; [1995] QCA 444, cited
R v Murphy [2003] QCA 128, discussed
R v Osborne [2014] QCA 291, discussed
R v Osenkowski (1982) 30 SASR 212, cited
R v Phillips & Woolgrove (2008) 188 A Crim R 133; [2008] QCA 284, cited
R v Purcell [2017] QCA 111, discussed
R v Thomas [2015] QCA 20, discussed

COUNSEL: M R Byrne QC, with M J Hynes, for the appellant
P Morreau, with A Boe, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Streeton Lawyers for the respondent

[1] **THE COURT:** The respondent pleaded guilty to a charge of dangerous operation of a vehicle causing death while adversely affected by an intoxicating substance. She also pleaded guilty to two summary offences but these are presently not material. The learned sentencing judge, Kent QC DCJ, sentenced the respondent to five years imprisonment to be suspended after serving three months with an operational period of five years. He also disqualified the respondent from holding or obtaining a driver's licence for a period of five years.

[2] The Attorney-General now appeals against this sentence on the ground that it was manifestly inadequate.

[3] The facts relating to the commission of the offence are not in dispute. On 29 May 2016 the respondent and her sister, Sammy-Jo, were at the Currumbin Beach Vikings Surf Club having lunch and drinking alcohol. Club security observed that Sammy-Jo was acting in an intoxicated manner. They intended to speak to her but,

before they could do this, she and the respondent left the Club. They remained in the car park of the Club for some time speaking to other Club patrons. Sammy-Jo tried to re-enter the Club but was refused entry. The two sisters got in and out of their car and alternated between sitting in the driver and passenger seats. The people with whom they were speaking urged them not to drive. Club staff even offered to organise a courtesy bus for them. One of the patrons took the keys of the car away from the respondent. Unfortunately, thinking that agreement had been reached that she would not drive, the keys were given back to her. Even at this stage Club staff attempted to prevent tragedy by calling police and advising them that a patron of the Club might attempt to drive from the Club premises while intoxicated.

[4] The respondent took the driver's seat of the car and her sister got into the passenger seat.

[5] They left the premises and turned onto Pacific Parade "at speed". The car hit a speed bump and became airborne.

[6] A witness saw the respondent drive onto the footpath on Pacific Parade and hit a concrete wall outside a residence about half a kilometre from the Club. The car "moved all over the roadway and into the left parking lane". The respondent was then seen driving over the speed limit along Duringan Street, Currumbin. She drove the car onto and along a median strip and ran over a sign. She then drove onto the Gold Coast Highway and over the Currumbin Creek Bridge. Witnesses said that she was travelling at high speed. They saw the car go off the road, raising a cloud of dust, before swerving back.

[7] As the respondent approached an intersection she almost collided with the passenger side of another car. The driver of this car was travelling at the speed limit and described the respondent's car as "speeding past them" and "travelling at extreme speed". The respondent then drove onto a traffic island leaving tyre friction marks.

[8] Finally, 17 minutes after leaving the Club, the respondent crashed the car into a pole.

[9] The impact was so violent that it cleaved the car into two pieces. The impact killed Sammy-Jo. Bystanders pulled the respondent from the car.

[10] Paramedics who attended the scene detected the smell of alcohol on the respondent's breath. She had fractured both her ankles and had suffered other scrapes and bruises.

[11] A blood sample taken at 8.05 pm, about two and a half hours after leaving the Club, revealed an alcohol level of 0.202 per cent.

[12] The respondent declined to participate in a recorded interview.

[13] The respondent had a bad traffic history. Between 2010 and 2016 she committed over 20 separate offences including speeding offences and one offence of driving a motor vehicle under the influence of liquor. On that occasion the blood alcohol reading had been 0.174 per cent. The offences also include driving after her learner's permit had expired. At the time of the accident the respondent was not licenced to drive.

[14] At the sentence hearing the respondent sought to explain the circumstances leading up to the commission of the offence. She swore an affidavit which was tendered during the sentence hearing. Her evidence was not challenged. The respondent was 29 years old when she committed this offence. She was 31 years old at sentence. She was the mother of four year old twins, a boy and girl. She had a stable job. Her relationship with the father of the twins lasted for almost six years. The end of the relationship was emotionally fraught. The children's father left the home in February 2016. In about March 2016 the respondent's sister moved from Tamworth to the Gold Coast to live with the respondent. Her arrival created a happy and orderly household. The sisters even decided to start some form of small business together.

[15] It was to celebrate this new plan that they went to the Club for lunch. Relevantly the respondent said:

> "It was never the plan to have a night out with excessive drinking; it was only the plan to have lunch with a glass of wine. We were having a lovely time at lunch and I was finally relaxing for the first time in a long while as I was back with my sister and [the children's father] was taking care of the kids.
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> I was having a difficult time at this point; my heart was breaking, and my family was falling apart, and I was struggling to cope with that. I also had more responsibility with the children as I didn't have [the children's father's] regular support. I wouldn't say I was living recklessly but I now understand that I was using escapism and numbing to cope with life at that point in time. Sometimes it was healthy, redirecting my energy into work and parenting. Other times, it was unhealthy coping mechanisms, like binge drinking.
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> My last memory of the day was around 4:30pm, Sammy-Jo and I were at the Currumbin and she came over to the table with another drink and I said to her, "if I have another drink we will have to get an Uber home." We were having a lovely time and I was happy and relaxed for the first time in a long time and remember thinking, I don't want to go home yet.
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> I have no idea why I decided to drive, I cannot even speculate why. I know now how high my alcohol reading was, which has disgusted me. It tells me that I would not have been able to make a rational, logical and responsible decision.
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> But drive is what I did. I decided to binge drink and then I decided to get into my car and drive home. I chose to do that. I have no memory of making the decision and that is difficult to come to terms with, but I know that for some extraordinary reason, I decided to do it and as a consequence, I killed my sister."

[16] Our review of the evidence suggests that there are three relevant matters that arise for consideration in this appeal.

[17] First, the respondent's upbringing and later her relationship with the father of her children was tumultuous and painful.

[18] According to her father, Gregory Paul Chmieluk, his children did not have a "very stable upbringing". He separated from the respondent's mother who then moved around the country taking the children with her. She had a drinking problem. Mr Chmieluk worked in the mining industry and was rarely at home. When the respondent's mother attended residential rehabilitation treatment, it was the respondent's older sister who looked after her. Sammy-Jo went to live with an aunty. In short, she grew up without the influence of a stable parent.

[19] The respondent's own history, as she related it to Professor Philip Morris, a psychiatrist who prepared a report for sentencing, was consistent with her father's evidence.

[20] In the respondent's affidavit tendered at sentencing she related these difficulties in great detail. They culminated in her leaving the family home, such as it was, at the age of 17 to live with her older sister.

[21] The respondent explained that she suffered from self-loathing. Like many others, she self-medicated with cannabis and alcohol. From the age of 17 until she was 24, she admitted, she was a "heavy cannabis user".

[22] Nevertheless, she pursued a hairdressing apprenticeship and then obtained employment as a buyer for a retailer in Noosa and, finally, began to work for a company specialising in skin care. She was working for this company at the time of the offence and until her imprisonment.

[23] When she was 24 she began her relationship with the man who would later be the father of the twins. She began to live with him and their relationship lasted, as we have said, for almost six years. The twins were born in May 2014. According to the respondent, as well as other witnesses who furnished statements, the children's father was unfaithful and took no interest in the respondent or their children.

[24] This history, which was not challenged at the sentence hearing, reveals the life of a troubled young woman whose circumstances worsened rather than improved when she formed her first serious relationship with a man. Her resort to drugs and alcohol as a girl did not abate in adulthood and culminated in the drinking binge that was the precursor to this crime.

[25] This is a personal history that is not uncommon in this Court and is not nearly as bad as the experiences of many who commit serious crimes and come before the Courts. It is the tale of mundane and almost conventional injurious influences that many people suffer. On their own, these are matters that, while mitigating, are not of the greatest moment in this appeal.

[26] As we have said, the offence was committed on 29 May 2016, but the indictment was not presented until 21 months later on 1 February 2018. The respondent was then sentenced two years after the commission of the offence – on 28 May 2018. She was not responsible for any of this delay and the learned sentencing judge accepted that the respondent's guilty plea was a timely one.

[27] This delay is the second matter of significance and raises two issues. First, there is the relatively minor consideration that the respondent had the peril of this charge hanging over her head for two years. Second, and of much greater significance, is that the respondent used this time to address her proclivities and to confront her responsibility for the crime she has committed.

[28] Professor Morris, to whom we have referred, observed that the respondent had not been suffering from any "formal psychiatric disorder" at the time of the offence. She did have a history of alcohol use disorder which was manifested by a pattern of binge drinking. This pattern had started in the respondent's mid-teenage years. Professor Morris reported that the respondent drank when she was anxious and was not a regular daily drinker of alcohol. Her binge drinking, when it happened, was to the point of deep intoxication. She might drink half a bottle of vodka in a session. She had a history of use of recreational drugs.

[29] Killing her sister has had a remarkable effect upon the respondent, according to Professor Morris. She has, predictably, suffered psychiatric disabilities. She suffers from post-traumatic stress disorder "including intrusion symptoms, avoidance and emotional numbing and hyper arousal symptoms". She suffers from "depressed mood in episodes that last three to four weeks at a time". According to Professor Morris these depressive mood episodes "have the quality of a major depressive disorder".

[30] According to accounts in statements before the learned sentencing judge, the respondent has stopped drinking alcohol. She attends an Alcoholics Anonymous Group twice a week. She attends counselling with a clinical psychologist on a regular basis. Her psychologist, Lynley Casey, furnished a report and we will refer to it later. She has been prescribed appropriate medication for her post-traumatic disorder and depressive conditions.

[31] The respondent has attended the Queensland TOP Drink Drivers Offenders' Program. This is a program (for which she had to pay) that educates offenders about traffic offences from the most minor to the most serious. It confronts offenders with the consequences of their actions.

[32] Professor Morris reported that, once a week for six weeks, the respondent attended an outpatient drug and alcohol use disorder program conducted at the Palm Beach Community Health Centre.

[33] Like other witnesses, Professor Morris observed that the respondent "expresses genuine remorse for the tragic situation that arose out of her drinking and driving her vehicle in a dangerous way" and that the respondent has accepted responsibility for her actions.

[34] The respondent's psychologist, Ms Casey, also reported the respondent's completion of these courses. She said that the respondent recognises the factors that led her to binge drink and, in particular, that led her to drink to the point of losing judgment and inhibitions on the day she committed the offence.

[35] In summary, both the respondent's psychiatrist and her psychologist have observed that the respondent has shown genuine insight into her offending and the reasons for it, that she has made an evidently genuine commitment to abstain from alcohol and that she has, to use the language of sentencing, gone a long way towards rehabilitation.

[36] The respondent's own affidavit is consistent with these reports. Her evidence does not contain any self-pity and, so it appears to us, her efforts to address her behaviour and her crime are genuine and not merely tactical or pretextual.

[37] A fellow member of Alcoholics Anonymous, to whom we will refer as Margaret, confirms both the sincerity and the efficacy of the respondent's efforts while attending Alcoholics Anonymous. She said, in part:

> "… I am pleased to have this opportunity to write the strongest character reference for Candice Chmieluk. I am aware of the severe charges that Candice Chmieluk is facing …
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> I have been an active member of Alcoholics Anonymous for 15 years and have maintained my sobriety from Alcohol with no relapse throughout this time.
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> I met Candice approximately 18months ago at an Alcoholics Anonymous (A.A.) meeting I attend most Monday's. The meeting is held in Coolangatta and starts at 12.00pm. I can confirm that Candice has attended this meeting every time I've attended from my best memory, I do not attend every meeting however I can confirm I attend no less than 3 times per month …
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> I remember quite clearly the first time I noticed Candice in attendance at our meeting, she appeared to be very nervous, shy, and withdrawn. I remember I approached Candice and introduced myself to her. This is when Candice first told me of the serious car crash that claimed the life of her younger sister Sammy, that she was responsible as she was driving her vehicle whilst extremely intoxicated. She also disclosed in this initial meeting the shame, remorse and heartache she felt and that she was struggling with life in general. It was very apparent to me that she was genuine."

[38] Margaret said that the respondent has since been able herself to offer valuable support, influence and instruction to others. She has, therefore, actually begun to turn her experiences into action that might benefit others.

[39] Evidence from friends and acquaintances, including her employer and friends she has known since primary school, confirms the respondent's fundamental decency as well as the sincerity and success of her attempts to turn her life around.

[40] The third matter that arises from the material at sentence concerns the attitude of the other victims of this offence, namely Sammy-Jo's relatives – who are also the respondent's relatives. They unanimously plead for her not to be imprisoned. We will deal with this aspect of the evidence in due course.

[41] The appellant rightly submits that this offence was a serious one committed by an offender with a bad traffic history. The respondent was highly intoxicated and drove her motor vehicle despite the efforts of well-intentioned people to prevent her doing so. She drove at a time when she was clearly incapable of controlling a motor vehicle. It was almost inevitable that her journey would result in a serious collision.

[42] The appellant's submissions concentrate upon four matters.

[43] The first of these was the delay between the date of the offence and the date of sentence. It is rightly pointed out that delay between the commission of an offence and sentence should ordinarily not be a mitigating factor unless it has resulted in

some unfairness to the offender. The Court has been referred to *R v L; Ex parte Attorney-General*.[1]

[44] The appellant points out, again correctly, that the respondent did not depose to any particular unfairness arising from the delay.

[45] That can be accepted; however, the delay in this case is significant not because of unfairness to the respondent but because it afforded her an opportunity, which she seized, to address her behaviour, its causes, its effects and her responsibility for the consequences.

[46] Second, the appellant points out that, although it can be accepted that their mother's absence while in prison will have a disadvantageous effect upon her young children, this consideration cannot be given undue significance. That submission must be accepted.[2]

[47] Third, the appellant points out that the learned sentencing judge took into account the wishes of the respondent's family, who were anxious to see the respondent face no incarceration or a minimum term of incarceration. The appellant accepts that Sammy-Jo's relatives were victims for the purposes of sentencing legislation but submits that the attitude of victims, whether in favour of leniency or severity, is only one factor to be taken into account. It is submitted that this prosecution was brought by the State in the public interest and not on behalf of a victim.

[48] That submission must also be accepted. The question remains, however, what is the weight that must be given to this factor in the circumstances of this particular case.

[49] Fourth, the appellant submits that the so-called extra-curial punishment suffered by the respondent, namely her injuries and the other direct sequelae of the crash, should, according to the authorities, be given little weight. The appellant refers to *R v Hook*.[3]

[50] It can be said at once that all of these matters were taken into account by Kent QC DCJ. The substance of the appellant's contentions is, therefore, that in a way that cannot be distinctly identified in his Honour's sentencing remarks, the learned sentencing judge must have overestimated the mitigating effect of one, some, or all of these factors in arriving at the sentence which he imposed.

[51] The ultimate submission which the appellant makes is that a sentence of five years imprisonment with a suspension of the sentence after only three months is shown to be inadequate because it is inconsistent with previous instances of sentences. It is submitted that, at the very least, a sentence of six years imprisonment with a parole eligibility after 18 months should have been imposed.

[52] It has been said by this Court repeatedly, and the appellant accepts, that whether or not a sentence is manifestly inadequate or manifestly excessive is not to be decided by reference to a pre-determined range derived from previous sentences but by

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1 [1996] 2 Qd R 63 at 66-67; *R v Phillips & Woolgrove* [2008] QCA 284 at [56].
2 *R v Chong; Ex parte Attorney-General (Qld)* (2008) 181 A Crim R 200 at 207.
3 [2006] QCA 458 at [14] and *R v Hannigan* (2009) 193 A Crim R 399 at [25].

reference to all the factors relevant to sentence.[4] As McPherson JA and Thomas J said in *R v Conquest; Ex parte Attorney-General (Qld)*:[5]

> "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 or her 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."[6]

[53] In the same case, McPherson JA and Thomas J also observed that:

> "The factors that would take a sentence further towards the maximum level would include the seriousness of the driving, callousness or attitude that falls in the murky area between recklessness and deliberate harm, the period for which the dangerous driving was sustained, the seriousness of the consequences to the victims, the seriousness of the offender's criminal record (with particular emphasis upon his driving history and his attitude to fellow citizens), and whether the offender has little prospect of rehabilitation."[7]

[54] With those principles in mind, the appellant points to six decisions of the Court of Appeal concerning sentences for dangerous operation of a motor vehicle causing death with the circumstance of aggravation of intoxication, in none of which was the period of actual imprisonment imposed one of less than nine months.[8]

[55] It is necessary to consider those cases in order to determine what they stand for.

[56] In *Murphy*[9] the applicant was a mature aged man who, with his wife in the back seat and another passenger in the front seat, drove home from his step-son's wedding with a blood alcohol level of over 0.185 per cent. He was travelling in wet conditions at or below the speed limit of 100 kph when he swerved off the road and crashed his car, killing his wife. He was sentenced to imprisonment for four years with a recommendation for post-prison community based release after 12 months. The applicant had three previous drink driving offences. He pleaded guilty to this offence. White J, who wrote the leading judgment, noted that the penalties imposed upon the applicant for his previous drink driving offences had not operated to deter him and, consequently, both personal and general deterrence were significant factors. The Court refused leave to appeal.

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4 *R v Purcell* [2017] QCA 111 at [24] and the cases there cited.
5 [1995] QCA 567.
6 *Ibid*, at p10-11.
7 *Ibid,* at p11.
8 *R v Blackaby* [2010] QCA 84; *R v Purcell* [2017] QCA 111; *R v Etheridge* [2016] QCA 241; *R v Thomas* [2015] QCA 20; *R v Hoad* [2005] QCA 92; *R v Murphy* [2003] QCA 128.
9 [2003] QCA 128.

[57] In *Hoad*[10] the appellant had been swallowing "speed and ecstasy" and had not slept for four days. Scientific evidence equated the level of her drug intoxication to a blood alcohol level of about 0.28 per cent. She drove her car into an oncoming vehicle and killed the driver. She had fallen asleep. At the time, the maximum sentence was one of 10 years imprisonment. Hoad was sentenced to five years imprisonment to be suspended after 18 months and applied for leave to appeal against that sentence. There were factors that mitigated her offence. She had cooperated in an interview with police and had pleaded guilty at an early point. She demonstrated remorse. She was suffering from bi-polar disorder and depression before the offence. She had been a rape victim. As a result of one of these rapes, she had given birth to a young daughter. The Court reduced the period until suspension to nine months.

[58] In *Blackaby*[11] the indigenous female appellant had had a rough upbringing which included having been the victim of sexual abuse. She became pregnant at 14 years of age. She had a series of relationships with violent men. She came to spend her time drinking alcohol. She had a history of robbery, stealing and breaking and entering. She had been given probation and a suspended sentence in the past with unsuccessful outcomes. She had a bad traffic history including three offences of driving under the influence of liquor, two of driving while disqualified and three offences of unlicensed driving. She had previously been sentenced to nine months imprisonment for driving while disqualified. Just before she turned 22, while driving with a blood alcohol level of 0.227 per cent, the applicant drove her vehicle under the rear tray of a truck, killing her front seat passenger. She was sentenced to imprisonment for seven years with a parole eligibility date of 18 months. She sought leave to appeal against that sentence. By then the maximum term of imprisonment for the offence had been increased from 10 years to 14 years. *Hoad* was distinguished by reference to that applicant's absence of relevant criminal or traffic history. The Court refused leave to appeal.

[59] In *Osborne*[12] the applicant had driven his truck past a group of cyclists moving in a single file along the side of the road. He drove so that his truck struck one of the cyclists, killing her and causing grievous bodily harm to two others. Alcohol was not a factor. The applicant had misjudged the width of his load relative to the space available on the road. He was cooperative and remorseful. He was sentenced to imprisonment for three years and six months, suspended after 14 months and was disqualified from driving for five years. Leave to appeal was granted and the Court reduced the sentence by reducing the period until suspension to nine months. Having regard to his occupation as a driver, his period of disqualification from holding a driver's license was also reduced from five years to two years. The reduction was based upon "the applicant's very favourable personal circumstances and very early indication of his plea of guilty". Henry J said:

> "[45] …The devastating consequences of the offence and general deterrence must be taken into account but so too must the offender's personal circumstances. In such cases, where it is concluded some period of actual custody must be served, sentences of imprisonment suspended after serving a minority

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10 [2005] QCA 92.
11 [2010] QCA 84.
12 [2014] QCA 291.

> of the terms have obvious utility in meeting the competing demands of deterrence and mitigating circumstances.
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> [46] The timing of the suspension should not be pre-determined arithmetically for the same reason there should not be a judicially determined sentencing starting point for the duration of imprisonment prior to parole or a parole eligibility date. Nor do the cases suggest the existence of a norm for the timing of the suspension relative to the duration of the head sentence. For instance, while the sentence was suspended after the service of one-third of the head sentence in *Huxtable*, the relevant proportion was one-quarter in the case of *R v Murphy* and two-sevenths in the case of *R v Maher*."
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> (Footnotes omitted)

[60] In *Thomas*[13] the applicant had driven while heavily intoxicated with methylamphetamine. In that condition he collected his three children and the young daughter of a friend from school and from day care. On his return journey he failed to negotiate a curve and killed the friend's daughter. He was sentenced to imprisonment for nine years with eligibility for parole after three years. Distinguishing his case from one in which a drunk offender deliberately engages in dangerous manoeuvres, Holmes JA (as her Honour was then) and Mullins J reduced his sentence to one of seven years imprisonment with a parole eligibility date after two years and four months. Morrison JA would have dismissed the application.

[61] In *Etheridge*[14] the applicant was a 20 year old man who, having consumed alcohol and cannabis at a party, and while disqualified from driving, drove his car in a manner said to involve "speeding, causing periods of rapid deceleration and turning corners at significant speeds". Music was playing loudly in the car and the applicant frequently had his head out of the window, yelling. He then hit and killed a pedestrian who was himself very drunk. He was then travelling between 78 kph and 90 kph in a 50 kph zone. It did not swerve to avoid the pedestrian. Etheridge had a bad traffic history and a few other convictions including unlawful use of a motor vehicle. He was sentenced to imprisonment for six years with a parole eligibility after two years. The Court reduced the sentence to one of five years with court ordered parole after one year and eight months.

[62] In *Purcell*[15] the applicant and his long-time friend drank at a pub for several hours. They then got into the applicant's car to drive home. To the applicant's knowledge, the rear wheels of the car were bald. They bought some takeaway alcohol and then picked up a female friend. She called out several times to the applicant to slow down but he ignored her. The car lost traction on a bend, hit a pole and killed the applicant's friend. The applicant held a provisional license which prohibited driving with any alcohol in the blood. The applicant's blood alcohol level was 0.091 per cent. Subsequently, six months later, a car he was driving was stopped by police when he failed to give way. He had initially tried to escape them and resisted being handcuffed once apprehended. He had an open can of beer in his car and his blood alcohol level was 0.037 per cent. He was charged with several summary

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13 [2015] QCA 20.
14 [2016] QCA 241.
15 [2017] QCA 111.

offences. He had had a good work history and pleaded at an early point. He was sentenced to eight years imprisonment for the indictable offence and a parole eligibility date was set at one third of his sentence. In the Court of Appeal, Gotterson JA, who wrote the leading judgment, remarked on the seriousness of the fact that the applicant was also being sentenced for the later offending while on bail. The Court declined to interfere.

[63] These cases demonstrate that, unlike so many other offences in the *Criminal Code*, the offence of dangerous operation of a motor vehicle is one that anybody, of any age and in any walk of life, of previous good or bad character, and with or without any previous criminal history, might commit. There is no conventional or archetypal offender. Most other offences in the *Criminal Code* are constituted by acts in which, generally, law-abiding people never engage at all: robbery, indecent assaults and so on. But, almost everyone in this country over the age of 17 drives and many people also drink alcohol. It is the particular manner and circumstances of doing these common acts that can result in criminal liability for the indictable offence of dangerous operation of a motor vehicle and so this crime is frequently committed by people who have never previously committed a crime and never will again.

[64] There is another special feature about this offence, which it shares with manslaughter. The difference between cases in which the offender's deliberately dangerous or criminally negligent acts can constitute a serious offence involving a killing rather than a less serious offence because no death ensues is often a matter of chance.

[65] For these reasons, in cases of dangerous driving causing death there can be no standard range of penalty. The range of behaviour itself that can constitute the offence, the range of circumstances in which the offence has been committed and the range of personal circumstances of the offender are multifarious and without parallel in most other indictable offences and, together, they affect culpability and, therefore, penalty.

[66] Previous cases reveal a natural tendency to arrive at some general classifications of offences involving dangerous driving. The most obvious of these is the category that used to be referred to as cases of "momentary inattention". The courts have sought to find categories because, while the objective character of the driving might be the same in two cases, for example failing to give way, the differing surrounding circumstances may have fundamentally different outcomes in sentencing. A failure to give way because of "momentary inattention" is not the same as deliberate failure to give way while road racing.

[67] The personal circumstances of offenders can also be classified. The offender in *Osborne* was a mature professional driver who was going about his daily routine when he made a gross error of judgement. The offender in *Ethridge* was an immature young man who drank recklessly and then drove recklessly. The offender in *Thomas* was a mature man who ought to have known how lethal it could be to drive a car while high on methylamphetamine, yet he deliberately put four children at risk and killed one of them. The offender in *Blackaby* had had a wretched life and faced apparently insuperable obstacles to lead a life free of danger from substances, from violent men and from herself but had had the benefit of many earlier, more lenient penalties.

[68] The continuing risk to public safety that an offender may continue to present also varies.

[69] For the reasons that we have given, it is not enough to catalogue several cases involving the same offence with some similar aggravating factors and to point to the maximum penalty that has been imposed and the minimum penalty that has been imposed and then to advocate for a similar sentence in the instant case. There is much that such offenders may have in common but there is much that they do not have in common. The task is to identify the principle as applied to facts that guided a particular decision in order to determine its application to the case at hand.

[70] In this case Kent QC DCJ was evidently moved by the implications of two things. First, the respondent had used the period of two years between the offence and sentencing to sublimate and to convert her guilt, shame and remorse into genuine steps towards rebuilding her character and to create a moral and healthy foundation for her life, and it seems, a basis upon which to counsel and help others. In this, she has the full hearted support of her parents and siblings.

[71] Second, his Honour regarded it as a highly material fact that the victim of the respondent's offence was her sister. In almost every case, an offender expresses remorse and grief for killing another person. In almost every case where death is caused it can be taken that the offender will suffer a burden of guilt for life. It can hardly be doubted that the combination of an offender's having killed a beloved relative, together with the enduring shock and grief caused to other family members, intensifies and aggravates the offender's inescapable burden. Victims are sometimes heard to contend rightly that an offender will serve a few years of a sentence, but they will serve a life sentence of grief and loss. In this case the undisputed evidence is that, after serving her term of imprisonment, the respondent too will serve such a life sentence and one that carries inescapable guilt as well.

[72] There were also other, very serious, but relatively less important factors that his Honour specified. There was an early plea of guilty. There was actual remorse. There was a lack of criminal history other than the bad traffic history. The respondent had herself suffered physical injury. The respondent was the sole caring parent of two young children. The respondent suffered diagnosable psychiatric disorders as a result of the offence and as a result of killing her sister.

[73] The victim impact statements tendered at sentencing were from people who had lost a daughter and a sister. They were unanimous in seeking leniency concerning actual imprisonment for reasons that were clearly expressed. The respondent's sister, Kristy, said:

> "Candice has been given a life sentence for her offending behaviour. As have I, as have my parents, my brother and our aunts, uncles and cousins. We will never get over the loss of Sammy and we are forever changed.
>
> My sister has been punished so much the last two years, she has had to live with herself knowing what she has done and the harm she has caused to her sister and to others. This past two years has been worse than any jail sentence the court could impose on her.
>
> Candice has learnt her lesson in the hardest possible way. She killed her sister, her best friend, my sister and her mother and father's daughter. She must live with that for the rest of her life. I don't

think she will ever make a decision in life without thinking about that.

The last two years have also been the hardest two years of my life and my parents lives. This court case hanging over our heads has stopped us from being able to grieve for Sammy. Every day that goes by that I don't get to grieve, my memories become more faded of her, to the point that I am frightened that I will never be able to reconnect with those memories again. I do not know whether I have the mental capacity to look at my sister's face if she is to be sent to jail, I'll be losing my second sister."

[74] The respondent's aunt, Rebecca Blore, said:

"The effect the past 2 years of 'living in limbo' has been nothing short of hell for our families. Relationships have been torn apart, as all of our lives have remained on hold awaiting the court process to unfold.

In order for myself and other family members to heal, I would like to see Candice continue to be a loving mother to her children, who she loves so much. If she is sentenced to gaol, this will only cause more hurt, pain and trauma for all involved – particularly her children. The last thing needed is further re-traumatisation. We have all been through enough grief, loss and trauma to last a lifetime.

I pray that the Court understands that Candice has already been delivered the ultimate punishment – that is, living her life every single day with the loss of her baby sister. She now lives with a life sentence – and this will be forever."

[75] His Honour then said:

"So your physical injuries and your psychological injuries and the tragic loss of your younger sister and the guilt that you've been suffering are relevant to the sentencing process in the way described by Justice of Appeal Chesterman in *R v Hannigan* [2009] 193 A Crim R 399, quoted by Mr Boe at paragraph 19 of his outline:

> *The theory which underlies the relevance of extra-curial punishment to sentence is that it deters an offender from reoffending by providing a reminder of the unhappy consequence of criminal misconduct, or it leaves the offender with a disability, some affliction, which is a consequence of criminal activity.*
>
> *In such cases, one can see that a purpose of sentencing by the court – namely, deterrence or retribution – has been partly achieved.*

And those observations are apposite in this case."

[76] In concluding his sentencing remarks, Kent QC DCJ said:

> "I've taken into account all the other matters pressed upon me, including, in particular, those referred to by Mr Boe under the general heading of extra-curial punishment. And I accept – as I hope I've made clear – that you have suffered and continue to suffer to a very substantial degree as a result of these tragic events, as, of course, have others."

[77] As we understand the appellant's argument, it is that, first, a head sentence of five years was too lenient having regard to the seriousness of the offending acts. This is a submission directed to general deterrence and denunciation and a comparison of this sentence with previous sentences. Second, it was argued that the suspension of imprisonment after three months was "unreasonable and plainly unjust". That submission was also directed to comparability.

[78] Otherwise, the appellant submits by way of conclusion rather than reasoning to support that conclusion, that the order suspending the sentence "discloses error" and that the sentence as a whole "fails to give effect to principles of general deterrence and public safety".

[79] In a case like this one, it is necessary to ask the question, what is the purpose of a longer period of imprisonment? That raises the question: to what is a sentence in a case like this directed? The focus of a sentence for this offence must be to maintain public safety on the roads. That purpose is to be served by a sentence that operates as a sufficient general and personal deterrent and, in appropriate cases, as a denunciation of the offender.

[80] In this case, it seemed to be common ground on appeal, the head sentence of five years was directed towards the element of general deterrence, although the appellant said that was not enough. As to personal deterrence, the unchallenged evidence before Kent QC DCJ proved, in the words of Professor Morris, that if the respondent "remains abstinent from alcohol and follows the treatment recommendations mentioned above I think it is unlikely that she will reoffend". The respondent is not an alcoholic who craves daily alcohol. Her vice was "a pattern of binge drinking" which has been broken by the shock of the realisation of the crime she committed. She has also been disqualified from driving for five years. She has the task of caring for two children who demand her attention. She has the comfort of a supportive family. The appellant was therefore right not to submit that personal deterrence was of great significance in this case.

[81] What of denunciation? It is true, as the appellant submits, that the interests of the public are at stake here and not just the interests of the victim's family. The prosecution itself is brought in the public interest. What, then, is the public interest to be served in having the respondent, a young woman who has consciously and actively taken responsibility for her actions, serve a lengthier term of imprisonment than three months? It is not personal deterrence. Those who are most interested in denouncing her, Sammy-Jo's closest relatives, oppose any imprisonment. They do so for the good reason that, having suffered the catastrophe of losing one daughter, they strongly wish to avert and to avoid the further catastrophe to themselves that a lengthy imprisonment of their daughter and sister, a mother of young children, would bring. There is a desire that is founded on reason and not emotion, upon reality and not upon sympathy.

[82] The respondent presents no real threat to public safety, raises no demand for denunciation and we see no purpose that could be served by any greater imprisonment of her as sought by the appellant.

[83] The appellant submitted that the factors articulated by Kent QC DCJ were matters that "should properly have been afforded little weight as a matter of mitigation". However, that submission was really grounded upon a comparison between the results in the cases cited and the result in this case. Questions of weight are at the heart of the exercise of judicial discretion. A court reviewing an exercise of discretion will be slow to conclude that the decision maker has failed to give proper weight to a particular matter and a mere preference for a different result will not suffice.[16] A challenge to the exercise of discretion in sentencing is not an exercise in reviewing the merits of the sentence; it is an inquiry into whether there has been error. An examination of comparable sentences will usually be necessary and helpful but such a comparison is not the fundamental calculus that will determine the result of such a challenge and it must not subsume the application of sentencing principles in each case.

[84] In the context of a prosecution appeal, in *R v Osenkowski*[17] King CJ remarked:

> "It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform. The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience."

[85] The factors relevant to any particular sentence will almost always conflict with each other in their tendencies. It is for the judge sentencing the offender to perform the difficult task of synthesis in order to arrive at a coherent penalty that accommodates all such opposing factors. That is why a sentencing judge must have a wide scope within which to assess the weight to be given to factors that drive a decision in opposing directions. And that is why a sentence that is arithmetically out of line with earlier, somewhat similar, cases may still be the result of a proper exercise of discretion. There will be no error if leniency in sentencing is based upon a rational view that, in the particular offender's case, leniency would serve the public interest and a more severe penalty would not. In our respectful opinion, Kent QC DCJ's sentence was of that kind.

[86] For these reasons the Court dismissed the appeal.

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16 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42 per Mason J.

17 (1982) 30 SASR 212 at 212-213.