SUPREME COURT OF QUEENSLAND

CITATION:	*R v Palmer; Ex parte Attorney-General (Qld)* [2019] QCA 133
PARTIES:	**R** **v** **PALMER, Marc Antony** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 310 of 2018 DC No 748 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Cairns – Date of Sentence: 25 October 2018 (Morzone QC DCJ)
DELIVERED ON:	Date of Order: 11 June 2019 Date of Publication of Reasons: 4 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2019
JUDGES:	Sofronoff P and Morrison JA and Lyons SJA
ORDER:	**Date of Order: 11 June 2019** **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 grievous bodily harm – where the respondent was sentenced to two years imprisonment to be suspended forthwith for an operational period of three years – where the respondent was driving a prime mover and crashed into a line of cars that had stopped on a highway due to roadworks – where there were two signs signifying that there were roadworks ahead and that vehicles were to slow down – where the respondent claimed that he “zoned out” and failed to see the signs – where the respondent had .02 milligrams per kilogram of amphetamine and .2 milligrams per kilogram of methylamphetamine at the time of the crash – where toxicology experts for both parties agreed that the effect of these drugs upon a particular user could not be deduced from the blood concentration – where the learned sentencing judge found that the respondent was

not adversely affected by the drugs – where the learned sentencing judge found that the respondent's inattention was due to familiarity with the road as a professional truck driver – where the learned sentencing judge identified the respondent's remorse, early guilty plea and unremarkable traffic history as factors in mitigation – whether the learned sentencing judge erred in exercise of discretion when weighing up the factors in mitigation against the weight of the respondent's drug use – whether the sentence without a period of actual imprisonment was manifestly inadequate

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – where the respondent pleaded guilty to one count of dangerous operation of a vehicle causing grievous bodily harm – where the respondent was sentenced to two years imprisonment to be suspended forthwith for an operational period of three years – where the respondent was driving a prime mover and crashed into a line of cars that had stopped on a highway due to roadworks – where the respondent had .02 milligrams per kilogram of amphetamine and .2 milligrams per kilogram of methylamphetamine at the time of the crash – where it had been eight months since the respondent was sentenced to the hearing of the appeal – where the respondent had been in rehabilitation for his drug use –where the Attorney-General appealed against sentence and submitted that the respondent should be resentenced to serve a period of actual imprisonment – where the exercise of sentencing discretion miscarried and the sentence was manifestly inadequate – whether it would be contrary to the public interest and oppressive to the respondent to interfere with his rehabilitation by resentencing to a term of imprisonment – whether the Attorney-General negated any reason why the residual discretion not to interfere should be exercised

Director of Public Prosecutions (Cth) v Gregory (2011) 34 VR 1; (2011) 211 A Crim R 147; [2011] VSCA 145, applied
Everett v The Queen (1994) 181 CLR 295; [1994] HCA 49, cited
Green v The Queen (2011) 244 CLR 462; [2011] HCA 49, cited
R v Hopper; *Ex parte Attorney-General (Qld)* [2015] 2 Qd R 56; [2014] QCA 108, cited
R v Sprott; Ex parte Attorney-General (Qld) [2019] QCA 116, cited

COUNSEL: C W Heaton QC, with N Friedewald, for the appellant
M J Copley QC, with G T Hansen, for the respondent

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

[1] **THE COURT:** On 23 September 2016, Ms Carole Vis was driving along the Bruce Highway from Innisfail to Tully. She had made this trip frequently and was very familiar with the road. As she was leaving Innisfail she fell in behind a Kenworth T-408 prime mover that was towing a tri-axle trailer. Ms Vis followed this truck for some time. She later recalled that the driver of the truck had obeyed all the speed limits and the vehicle was being driven in a "very stable" manner. Soon the two vehicles caught up with a car towing a caravan at 80 kilometres per hour. The prime mover soon overtook the slower vehicle but Ms Vis remained behind it for some time. Later, when Ms Vis was able to overtake the car and caravan, she could see the prime mover in the distance once more.

[2] There is a straight stretch of road that extends for some distance between Midgenoo Road and Tully Mission Beach Road. At that point the highway is a two-lane road that is elevated above the fields on either side. There were roadworks being undertaken on that section of the highway. One lane was closed and a system was in place to allow traffic through under control. A substantial distance before the roadworks there was an electronic sign that signified that there were roadworks ahead. About 300 metres before the roadworks proper, the location of the traffic controller, was a sign that said "Roadwork ahead, reduce speed, 80kms/h".

[3] Ms Vis suddenly noticed that the trailer of the truck that she had followed for so long was "going flat sideways down the highway across both lanes." A cloud of smoke engulfed the truck, caused by its tyres sliding across the bitumen. Further ahead there was a stationary line of cars waiting for a signal to permit them to proceed. The last car in this queue was a utility vehicle driven by Ms Sari Hyytinen. The prime mover crashed into the utility and seriously injured Ms Hyytinen.

[4] A road worker approached the driver of the now-stationary prime mover, who was the respondent to this appeal. The respondent said, "I'm going to jail, I am going to jail". Later, while sitting on the side of the road, the respondent said that he could not see the vehicle in front and that he could not stop. He told police who attended the scene that he had not seen the cars stop and that when he did see them it was too late. He said that he had "zoned out" and that when he "snapped back to it" he "jumped" on the brakes.

[5] A sample of his blood that was taken about two and a half hours after the crash showed that the respondent had .02 milligrams per kilogram of amphetamine and .2 milligrams per kilogram of methylamphetamine in his blood.

[6] Ms Hyytinen was knocked out by the accident. Rescue officers had to pry open the doors of her car to get her out. She was taken by ambulance to Tully Hospital where, after some immediate care was administered to her, she was airlifted to Townsville Hospital. In Townsville she was diagnosed as bleeding between the two membranes of the brain, causing swelling and pressure on the lower part of the brain. This was a severe traumatic brain injury.

[7] Ms Hyytinen also suffered a scalp laceration, a partial collapse of the left lung, a nasal laceration, a broken nose as well as bruising to the chest and pelvic area. She underwent surgery that involved the removal of part of her skull in order to allow the brain swelling to expand without damaging the brain itself. She remained in intensive care for 12 days and was then transferred to the neurosurgical ward of the hospital where she underwent further surgery including having a hole drilled into

her skull and a tube inserted to drain the haematoma. She suffered post-traumatic amnesia for 48 days after the crash.

[8] A month after the crash Ms Hyytinen was admitted to a rehabilitation unit where she stayed for another two and half months. After leaving hospital she continued to attend there for three weeks of outpatient therapy. This included speech pathology, physiotherapy, occupational therapy and social work.

[9] At the time of her injury Ms Hyytinen was trying to start a newspaper in Tully. Afterwards she needed assistance to do easy tasks that she used to do herself. Her memory has been affected. She is unable to concentrate well enough to read. She lost muscle strength and dexterity and is no longer able to jog or dance for exercise, something that she used to do. She has gained weight. She is trying to work through these problems with psychological therapy but it has been hard to find the appropriate rehabilitation treatment in Tully. Ms Hyytinen suffers from PTSD. She frequently becomes agitated. Her business has suffered and her earnings have been reduced. She has had to cease her studies for a master's degree. There is no doubt that the injuries she suffered in the crash have impaired Ms Hyytinen's life considerably and some of this impairment will never disappear.

[10] The respondent was uninjured in the accident.

[11] The respondent was charged on indictment with dangerous operation of a vehicle causing grievous bodily harm with the circumstance of aggravation that he was adversely affected by an intoxicating substance. The Crown amended the indictment to delete the circumstance of aggravation, for reasons to be mentioned, and the respondent pleaded guilty to the amended indictment. Morzone QC DCJ sentenced the respondent to a term of imprisonment for two years. His Honour ordered that the whole term of imprisonment be suspended forthwith, conditioned upon the respondent not committing a further offence punishable by imprisonment within a period of three years. He was disqualified from holding or obtaining a driver's licence for nine months. The Attorney-General has appealed against this sentence.

[12] On 11 June 2019 the Court dismissed the Attorney-General's appeal and the reasons that follow are the reasons for that order.

[13] The respondent was 34 years old at the time of the offence. He was 36 years old at sentence. Until he committed the offence, the respondent had been a professional truck driver. He had no relevant criminal history. His traffic history showed four speeding offences between 1999 and 2016. These are of no moment.

[14] A Government Forensic Medical Officer, Dr Ian Mahoney, provided an expert opinion to the prosecution. His report was handed to Dr Michael Robertson, a Forensic Toxicologist retained on behalf of the respondent. Their professional opinions did not materially differ and the following is a summary of their views. Methylamphetamine exhibits a great variation in its effects upon drivers who use it. Its effects will depend upon the dose taken, the means by which it is ingested, the time between its ingestion and driving and the tolerance that a particular user might have developed by habitual use of drugs. For these reasons it is not possible to say what might be the effect of the drug upon a particular user as a matter of deduction from the concentration of the drug found in that person's blood. Consequently, the concentration of the drug found in the respondent's blood was not sufficient, on its

own, to sustain the circumstance of aggravation that had been pleaded in the indictment, and for that reason the indictment was amended to remove that allegation.

[15] Methylamphetamine at low concentrations may remove fatigue and improve driver behaviour for a time but it also causes restlessness and distraction. It may cause or contribute to risk-taking behaviour such as driving too fast or erratic driving or inappropriate overtaking. Its continued use over a period of days may result in profound fatigue and sleepiness.

[16] Such a driver may not be able to respond to changes in road conditions.

[17] Because of these effects, the use of methylamphetamine is incompatible with safe driving.

[18] A character reference tendered on behalf of the respondent at sentence provided the information that the respondent's former wife was "heavily involved in the drug world". The referee said that the respondent "has removed himself completely away from her to sort out his drug problem". A psychological report tendered on the respondent's behalf stated that the respondent claimed that he had ceased using methylamphetamine in November 2017. This was almost a year after the offence and just two weeks before the indictment was presented. It is a fair inference, therefore, that the respondent was a habitual user of methylamphetamine at the time of the accident although, as we have said, the Crown had no evidence that the presence of the drugs in the respondent's system was causative of the crash.

[19] The respondent had engaged cruise control in his prime mover and in this way he was travelling at 100 kilometres per hour. He did not see the lit electronic sign warning him that there were roadworks ahead or the sign that said "Roadwork ahead, reduce speed, 80kms/h". Although there was nothing to obstruct his view of the straight road ahead and although he had the advantage of a high driving position in his vehicle, he also did not see the roadworks at which traffic was stationary. About 85 metres from the line of stationary cars, when the truck was still moving at 100 kilometres per hour, the respondent became aware for the first time of the road conditions ahead of him. He applied his brakes but, because of his speed and the mass of his vehicle, his prime mover and trailer continued travelling for a further 85 metres before colliding with the back of Ms Hyytinen's vehicle. At the moment before the collision the speed of the truck was 58 kilometres per hour.

[20] In the course of his sentencing remarks, Morzone QC DCJ related the injuries suffered by Ms Hyytinen. His Honour then remarked upon the respondent's relative youth and the fact that he would be burdened for the rest of his life with the knowledge of his serious offending and the consequences for Ms Hyytinen. His Honour then said:

> "On that day, you did show some two and a half hours later the presence of drugs in your system, .02 milligrams per kilogram of amphetamine and .2 milligrams per kilogram of methylamphetamine. It is accepted by the prosecution, properly so because the evidence well demonstrates, that you were not adversely affected by the substance in relation to your capacity to drive and it has no bearing on the result and what led up to it. Indeed, if it had some effect, it would likely have made you more alert and therefore avoided the accident,

> rather ironically. And therefore while it's relevant to the surrounding circumstances, it is not a factor that I take into account in the causation of your offending. As I look at the aspect of your journey – no doubt travelling from well before this time – a place you approached at 100 kilometres an hour on cruise control, past the LED sign of "Road ahead", followed by the static sign of "Roadwork ahead – reduce speed – 80 kilometres an hour". But there was no other signage controlling your speed to the end of the queue of the eight cars. You were, it seems to me, then engulfed by a trap, once [*sic*] which you were not ready for because of your lack of proper attention, but another which was beyond your control much beyond that."

[21] His Honour then summarised the facts relating to respondent's late application of his brakes and observed that that it was "clear that you perhaps missed the LED sign – that it seems to me that the chances are, as it oscillated with its message, you only saw "Roadwork ahead" in its lit-up state". There was no evidence at all to support this surmise and the respondent's acknowledgment that he had "zoned out" implies that he saw nothing. His Honour then observed:

> "To put it in its real context, you only had, from the time of the 80 kilometre sign – that is the one that said "Roadwork ahead – reduce speed – 80 kilometres" – only up to eight seconds or thereabouts to reduce your speed from that sign to the point of impact. That is, there was no later signage regulating any further reduction in your speed to alert or prepare you for the necessary stop before the end of the long queue of eight cars that were waiting.
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> Sure, there was no doubt you were careless and there was inattention. It may even be argued that it was for a prolonged period – [*sic*], but this is a case where your inattention is really for the period or the moment that you had in sight the LED sign cart – the mobile sign – and then the static sign. It is not something I can work out how long that might have been, but to the extent you did, you did not keep a good and proper look out.
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> You described that you zoned out. Perhaps that is also consistent, it seems to me, as the expert evidence shows, with your familiarity with the journey and even the complacency that often comes from drivers who surrender their speed control to a cruise control feature.
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> Further, once you were in the inevitable predicament, it was brought to bear that you had not been trained to manage an emergency stop in a loaded prime mover with its mechanical attributes, and I rather suspect your chances of doing so, even if you were competent, would have been very slim in the time that you had."

[22] His Honour then noted several factors in mitigation. They included that the respondent had realised the consequences of the collision and was horrified by them, that his life had been changed as a result, that his guilty plea was an early one and that his traffic history was unremarkable. These are not great factors in mitigation. They constitute the absence of factors in aggravation, namely, lack of insight, lack of remorse and a bad traffic history.

[23] His Honour then turned his attention to the respondent's drug use. He referred to the respondent's "hard decision to distance [himself] from [his] ex-wife who was a drug user" and said that what was "even more remarkable is the effort that you have made to become clean from methylamphetamine and other amphetamine use". His Honour then said:

> "Sure, [the driving] was dangerous and sure, it caused grievous bodily harm and has impacted another person's life, but work hard – it is a professional driver like you that we need on the roads, not off."

[24] In our respectful opinion, the observation that there is a community need to keep on Queensland roads drivers of heavy vehicles who behave like the respondent behaved was an error. Indeed, the need to keep such drivers off the roads explains the legislative requirement to disqualify offenders from holding a driver's licence.

[25] On the subject of the respondent's drug use his Honour concluded:

> "Sure, there was a period in your life that you succumbed to drugs often associated with that job. Here, it has played no part whatsoever in the accident that evolved as a result of your dangerous driving. You have changed your work so as to manage the cattle property. You have successfully worked through significant issues to remain clean of the drug, and you were assessed and I accept that you are a low risk of relapsing in that regard."

[26] His Honour then referred to the need to "provide ways for you to rehabilitate" and also the need to deter others from similar offending. His Honour mentioned denunciation of the offending as a factor to be taken into account as well as the need to protect the community by the imposition of a proper sentence. His Honour concluded that the need to protect the community from the respondent himself was "very low". His Honour expressly took into account the early plea of guilty and "the cooperation with the police to the extent that you were able".

[27] His Honour then imposed the sentence of imprisonment of two years which he suspended immediately for an operational period of three years. His Honour disqualified the respondent from obtaining or holding a driver's licence for nine months.

[28] This Court has recently restated the principles that apply to an appeal by the Attorney-General under s 669A of the *Criminal Code* (Qld).[1] Relevantly for the purposes of this appeal, the jurisdiction exists so that the Court of Appeal can ensure that there will be consistency in sentencing. However, before the discretion to vary a sentence can be exercised the Attorney-General must demonstrate error on the part of the sentencing judge. Even if error has been demonstrated there may still be factors in a particular case that will constrain the exercise of the discretion to vary the sentence.

[29] An appeal against sentence by the Attorney-General is different from an appeal against sentence by an offender because the jurisdiction conferred upon the Court conflicts with the time-honoured concept that a person should not be put in jeopardy for a second time. An Attorney-General's appeal puts an offender in jeopardy of losing the freedom that has been promised beyond the sentence imposed at first

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1 *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116.

instance.[2] One way in which the oppression by reason of double jeopardy may be avoided is by the Court being astute to avoid injustice that might be caused to a convicted offender by reason of delay between sentence and the appeal.

[30] If a person who has been sentenced has been at large in the community for a considerable period of time before an appeal is determined, because the sentence did not require actual incarceration, a second sentence that requires imprisonment may be unjust for a number of reasons. Relevantly for the purposes of this case, imprisonment at that stage of the criminal process may interfere with an offender's rehabilitation to an extent that would be contrary to the public interest and would be oppressive to the offender. What is more, having been left "in a state of limbo and uncertainty"[3] during the pendency of the appeal process, an offender's life after sentence may have been built up in part upon the faith of the finality of the sentence imposed at first instance. It has been said that "except in unusual or egregious cases, [that would be] inimical to the proper administration of justice".[4]

[31] Reasons such as these inform what has been termed the Court's "residual discretion" to dismiss an Attorney-General's appeal even when there has been demonstration of error and despite showing that a sentence was wrong.[5] Mr Heaton QC, who appeared for the Attorney-General, has submitted that there were several errors which affected the exercise of the sentencing discretion. First, Mr Heaton points to his Honour's finding that the respondent was "not adversely affected by the substance [in his blood] in relation to your capacity to drive and it has no bearing on the result in what led up to it". Mr Heaton correctly submits that this was a factor that weighed heavily in the determination of a just sentence because his Honour mentioned it more than once. This was not a conclusion that was open on the evidence. The evidence demonstrated that, for a reason that the respondent himself never explained, he "zoned out" and, for the period during which he was in that state, he failed to see one conspicuous sign and a second sign and was entirely blind to a traffic situation that was perfectly visible. It is true that there was no evidence that he was actually affected by the drugs in his system in a way causative of the offending behaviour; however, the corollary was also not established. There was no evidence that he was *not* affected by the drugs and it was not open to find that he was not affected.

[32] This is not a mere logical distinction without significance. The erroneous finding appears to have caused his Honour to overlook the substantial factual element in this case. As Mr Heaton pointed out, the respondent was a professional driver in charge of a heavy vehicle. A specialised licence was required to drive that vehicle because the dangers associated with driving it require special skills. For the reasons offered by the respondent's expert, the use of amphetamine and methylamphetamine by the driver of a vehicle like this is utterly inconsistent with the duties accepted by such a driver when taking the wheel.

[33] While the Crown was unable to establish that the drugs in the respondent's bloodstream had "adversely affected" the respondent so as to sustain the statutory circumstance of aggravation, that did not mean that the drugs in the respondent's

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2 *Everett v The Queen* (1994) 181 CLR 295 at 299 per Brennan, Deane, Dawson and Gaudron JJ.

3 *Director of Public Prosecutions (Cth) v Gregory* (2011) 211 A Crim R 147 at [79].

4 *ibid*.

5 *Green v The Queen* (2011) 244 CLR 462 at [43] per French CJ, Crennan and Kiefel JJ; *Munda v Western Australia* (2013) 249 CLR 600 at [72]; *R v Hopper*; *Ex parte Attorney-General (Qld)* [2015] 2 Qd R 56 at [39] per Fraser JA.

body were irrelevant to the case. As Mr Copley QC, who appeared for the respondent, candidly acknowledged, the presence of those drugs goes to his attitude to his driving obligation. However, apart from mentioning that the dangerous drugs found in the respondent's body were "relevant to the surrounding circumstances" his Honour did not explain how they were relevant or how he took them into account and, it appears to us, his Honour ignored this relevant factor.

[34] Mr Heaton also pointed to other factors that his Honour took into account in mitigation of sentence but which were not, in Mr Heaton's submission, capable of being treated that way. In the passage quoted in [20] above, after referring to the absence of "other signage" beyond the two signs that warned of roadworks, his Honour said that, as it seemed to him, the respondent had been "engulfed by a trap, once [*sic*] which you were not ready for because of your lack of proper attention, but another which was beyond your control much beyond that". A little later his Honour observed that there was "no later signage" that could "prepare you for the necessary stop". His Honour also observed that the respondent had not been trained to manage an emergency stop and, even if he had been trained, the chances of his being able to stop his vehicle "would have been very slim in the time that you had".

[35] There was no basis upon which it could have been concluded that the respondent had been trapped by circumstances. He had simply failed to see things that he should have seen and that had been seen by the other drivers who had stopped. Two signs had been erected and, although a lay witness had expressed an opinion about their situation, there was no evidence to suggest that the signs were inadequate to warn the respondent in good time of the roadworks that lay ahead of him. In any event, the positioning or quantity of signage was irrelevant because the respondent saw none of it.

[36] Further, in our respectful opinion it was not open, on the evidence, for his Honour to conclude that the respondent's lack of awareness was consistent with familiarity with the road and mere complacency. The unchallenged facts were that the respondent was a habitual drug user. According to the evidence, the use of this drug was capable of causing distraction in a driver, causing profound fatigue and somnolence. Significantly, according to the respondent's expert, in the absence of alternate explanations such as (naturally induced) distraction or fatigue, the behaviour of the respondent described in the Agreed Schedule of Facts "could reasonably be due to the stimulating affect [*sic*] of methylamphetamine or drug-induced fatigue".

[37] Although the circumstantial evidence raised an inference that the drugs that the respondent had used had caused his state of unawareness, particularly in the absence of any other explanation from the respondent, the Crown elected not to advance such a case and, accordingly, the judge made no finding. Consequently, the cause of the respondent's inattention remained unexplained. However, the failure of the Crown to advance a case supported by the evidence did not mean that it was open to conclude, despite that evidence having been admitted, that for the purpose of arriving at a just sentence the respondent's behaviour could be explained by consistency with mere inattention due to complacency.

[38] Whether or not the respondent had been trained in emergency stopping procedures was also irrelevant. The essence of the respondent's offending was his culpable failure to keep a lookout and the consequences of his failure; whether or not he had been

trained to avoid the results of his own reckless inattention was irrelevant to his culpability.

[39] The substance of the case was that the respondent was a professional driver who had been entrusted with the safe operation of a vehicle which, by reason of its size and mass, was potentially much more dangerous than ordinary cars. The respondent's drug use while working as a paid driver of such a vehicle was so severe that his later attempt to cease his drug use was lauded by the sentencing judge as "remarkable". Further, the respondent was prepared to drive this potentially dangerous vehicle with a concentration of drugs in his system described as "moderate" when the quantity was measured two and a half hours after the offence. The respondent's mental and physical state at the time is unknown but only because the respondent declined to reveal what it was. Whatever caused his state, he missed not only two prominent signs warning him of danger ahead but was blind to the traffic stopped in front of him. At the very least, the respondent's willingness to drive while addicted to methamphetamine was evidence of his reckless disregard for risk to others, including Ms Hyytinen. His Honour's observation that the use of these dangerous drugs was something that was "often associated with that job" was a powerful factor calling for a sentence that had a strong generally deterrent effect.

[40] In these circumstances, the objective facts and the personal circumstances of the respondent meant that general deterrence and denunciation of such offending by professional drivers of heavy vehicles required actual incarceration.

[41] In our respectful opinion, the errors to which we have referred show that the exercise of discretion miscarried. Further, the weight given to the factors in mitigation at the expense of any weight being given to the respondent's drug use amounts to a failure to exercise the discretion entrusted to the Court.[6]

[42] Mr Copley invoked the "residual discretion" to which reference has been made. That expression is entrenched in this area of the law but, in order not to be misled, it must not be overlooked that a respondent to an appeal by the Attorney-General against sentence bears no onus to justify the sentence that was imposed at first instance. The burden of persuasion is entirely on the Attorney-General who has to demonstrate error and also has to persuade the Court of Appeal to exercise the discretion to impose a more severe sentence. The "residual discretion" refers to the requirement, in certain cases, for the Attorney-General to demonstrate not only error in the exercise of discretion and not only to establish that the sentence imposed was inconsistent with principle, but also that it would not be unjust to impose a fresh sentence that is more severe.

[43] In this case the respondent was convicted and sentenced on 25 October 2018. The Attorney-General's notice of appeal was filed on 23 November 2018. The hearing of the appeal took place almost seven months later. The respondent had been suffering from depression before the offence. He had been treated by a psychologist. His condition was so bad that he had attempted suicide and had been admitted to the Acute Mental Health Unit of Townsville Hospital in 2015. He had a drug habit. The unchallenged evidence was that the respondent had ceased using methamphetamine by the time he was sentenced. It is notorious that it is very difficult to fight an addiction to methylamphetamine. The respondent's mental health was frail at sentence. Various character references testified to his good character. His employer said that he had "turned his life around for his family". There is no

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6 *Lovell v Lovell* (1950) 81 CLR 513 at 519 per Latham CJ.

reason to think that the respondent has done anything other than to continue with his personal journey of rehabilitation since then. Mr Copley has also submitted that the respondent's offending behaviour did not amount to a deliberately dangerous act of driving. It was constituted by inaction. It is true that the danger presented by the respondent was passive rather than active. To that extent there is some force in Mr Copley's point, although the danger was created because of the respondent's active decision to drive when he was addicted to methylamphetamine, when he had used it recently and when he must be taken to have known the risks associated with that decision.

[44] Having regard to those matters we would regard the delay between the institution of the appeal and the hearing of the appeal as a reason to decline the exercise of discretion to resentence notwithstanding that the Attorney-General has succeeded in demonstrating error and has established that the original sentence was manifestly inadequate.

[45] The Court of Appeal endeavours to detect matters in which a very prompt hearing is desirable. An appeal by the Attorney-General is such a matter and appeals by the Attorney-General have been afforded prompt hearings. However, having regard to the reasons why this appeal should be dismissed, it is desirable that the Director of Public Prosecutions ensures that appeals by the Attorney-General in which such issues may arise are brought to the notice of the Court of Appeal promptly after the filing of the notice of appeal.

[46] For these reasons, the appeal was dismissed.