SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hoad* [2005] QCA 92
PARTIES:	**R** **v** **HOAD, Rebecca Kim** (applicant/appellant)
FILE NO/S:	CA No 434 of 2004 DC No 517 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	8 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2005
JUDGES:	McMurdo P, Jerrard JA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal against sentence** **2. Allow the appeal by varying the five year sentence suspended after 18 months so that it be suspended after the applicant has served nine months of it**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – applicant convicted of dangerous operation of a motor vehicle causing death while adversely affected by an intoxicating substance – applicant fell asleep at the wheel after four days without sleep due to drug use – applicant sentenced to five years imprisonment suspended after 18 months – whether the head sentence was too severe when assessed against comparable cases – whether applicant's mitigating personal factors required a further amelioration of the required period in custody *Criminal Code* 1899 (Qld), s 328A *R v Antoney* [2000] QCA 180; CA No 402 of 1999, 16 May 2000, considered *R v Breckenridge* [2001] QCA 448; CA No 194 of 2001, 16 October 2001, distinguished

R v Cusak; ex parte A-G (Qld) [2000] QCA 239; CA No 90 of 2000, 16 June 2000, considered
R v Merrill; ex parte A-G (Qld) [2002] QCA 263; CA No 86 of 2002, 25 July 2002, considered
R v Morgan, unreported, Judge Newton, District Court of Queensland at Southport, 26 April 2002, distinguished
R v Rahn [1998] QCA 338; CA No 180 of 1998, 6 August 1998, distinguished
R v Stephenson [1999] QCA 519; CA No 295 of 1999, 17 December 1999, considered
R v Thumm [1999] QCA 355; CA No 186 of 1999, 27 August 1999, considered

COUNSEL: A Boe (sol) for the applicant
C W Heaton for the respondent

SOLICITORS: Boe Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with the reasons of Jerrard JA and with the order he proposes.

[2] **JERRARD JA:** On 17 December 2004 Rebecca Hoad pleaded guilty to having dangerously operated a motor vehicle on 11 August 2003 in Frank Street, Labrador, thereby causing the death of Isabel Vickary, at a time when Rebecca Hoad was adversely affected by an intoxicating substance. She was sentenced to five years imprisonment to be suspended after she had served 18 months, for an operative period of five years; and she was disqualified from holding or obtaining a driver's licence for five years. Ms Hoad has applied for leave to appeal against that sentence, arguing that the learned sentencing judge had failed properly to determine the level of Ms Hoad's culpability, and that the sentence was manifestly excessive. The maximum term she faced was 10 years imprisonment.

The Offence

[3] The circumstances of the offence were that at around 3.30 pm on 11 August 2003 Ms Hoad was driving a vehicle in the southbound lane of Frank Street, a busy arterial road in the Gold Coast area, in heavy traffic. Her vehicle slowly veered into the northbound lane without indicating or braking, and collided with a northbound car in which Isabel Vickary (aged 92) was travelling with her husband and son-in-law, who was driving. Isabel Vickary sustained multiple massive chest and abdominal cavity injuries, and a compound fracture of the left femur, which injuries caused her death.

[4] Ms Hoad, who was 24, told a witness at the scene that she had fallen asleep at the wheel, and later told a police officer at the accident scene that she was heading to Broadbeach from Runaway Bay, and had not slept since the preceding Thursday, i.e. four days before Monday 11 August 2003. She explained her not having slept as being because she was currently taking "speed and ecstasy", and that she had been taking drugs since last December. She said that "I remember I was driving and I kept nodding off, I think because of the drugs".

[5] About an hour and a half later she was directed to provide a specimen of her blood at a hospital, and while there she again told police that she had not slept for several days and was currently taking non-prescribed drugs, and again said that she had kept nodding off whilst driving, probably because of the drugs. A small clip-seal bag was found in her vehicle containing an amount of white powder, which she admitted was amphetamine. Analysis of her blood demonstrated the presence of .04 mg per litre of amphetamine, .14 mg per litre of methylamphetamine, and .02 mg per litre of MDMA, the "designer" drug ecstasy.

[6] On 26 May 2004 she participated in a formal interview accompanied by a solicitor, and once again admitted to having taken non-prescribed drugs, to not having slept for four days, to feeling tired well before the collision, and to having fallen asleep at the wheel. She repeated that she had last slept on the Wednesday prior to the Monday of the collision, and that "I'd been out the night before … and that I had thought I'd fallen asleep while I was driving and I remember asking if everybody was alright". She said she had been feeling really tired as she was driving, and had been for about 15 minutes before the actual collision. She had wound her window down to get some fresh air. She also repeated that she had been taking non-prescribed drugs since her 24th birthday, which was on 15 December 2002.

[7] The Crown Prosecutor informed the learned sentencing judge, without challenge then or on this appeal, that the level of .14 mg per litre of methylamphetamine was well above the therapeutic range, described as being between .01 mg to .05 mg per litre. Her level was said to be around three times or more that which could be considered a normal concentration of the drug, and her level of concentration of that drug could be associated with poor concentration, anxiety and restlessness. The fact that she had not slept for at least four days was consistent with repeated use of the drug, leading to what was described as a "crash" when consumption of the drug ceased. The prosecutor submitted that significant deterioration of driving performance is not only present at high concentrations of methylamphetamine but also during the withdrawal phase, and withdrawal induced impairment is associated with the need of excessive amounts of sleep, fatigue and exhaustion.

[8] Accordingly, the prosecutor explained, Ms Hoad's driving performance would have been impaired not only by the continuing presence of the drug in her blood, but also due to the withdrawal affects superimposed upon a long period without sleep. Sleep deprivation itself was also a significant cause of driving impairment, being associated with decreases in vigilance, reaction time, memory, psycho-motor functioning, information processing, and decision making. The prosecutor informed the Court that professionally provided opinion was that impairment in a person's ability to drive begins after 17 to 19 hours without sleep, and then increases incrementally. At 17 hours the decrease in driving performance could be equated with having a blood alcohol concentration of .05 per cent; after four days it would equate to an equivalent of about .28 per cent. None of this information was contested.

[9] I observed that Ms Hoad had explained that she had driven from her unit at Broadbeach to a friend's residence at Runaway Bay, and it was on the way back that she had the accident. Her impaired driving was therefore effectively over the whole of that distance. The prosecutor spoke of a distance calculated to be well in excess of 10 km, being the distance over which she drove when she had been aware that she felt really tired. She said that was for the last 15 minutes of the driving. That

realisation would have been fully anticipated at the start of her journey by anybody not affected by the drugs she had been taking. Any unaffected person would have understood that after four nights without sleep she was in no condition at all to drive.

[10] The matters adverse to her are therefore that her dangerous driving in fact occurred over a quite lengthy course of travel between Broadbeach and Runaway Bay and involved at least 15 minutes of driving when actually aware of her own dangerously depleted capacity to drive, which capacity would have been in reality dangerously impaired before she began her original journey from Broadbeach. Her dangerous driving cost another person's life. It is accordingly a serious case of driving while adversely affected by an intoxicating substance and thereby causing the death of another. In her favour is the circumstance that there is no evidence of actual adverse behaviour by her vehicle before the fatal driving across into the oncoming lane, and no evidence of any untoward speed. It would appear she was travelling at the same speed as her line of traffic, and the oncoming line was travelling very slowly.

The head sentence

[11] Mr Boe submitted that both the head sentence of five years, and the period of 18 months to be served before suspension of that sentence, were manifestly excessive. Regarding the head sentence, Mr Boe submitted that the assertedly comparable cases the Crown relied upon before the learned sentencing judge, namely the sentences imposed in *R v Rahn* [1998] QCA 338 and in *R v Morgan* (unreported, District Court at Southport, 26 April 2002), and the case the prosecution principally relied on before this Court, by way of comparable culpability, namely *R v Breckenridge* [2001] QCA 448, were each more serious and readily distinguishable. Mr Boe's own submissions before the learned sentencing judge had relied on single judge decisions in the last century; in this Court he chiefly relied on the matters of *R v Cusak; ex parte A-G* [2000] QCA 239, *R v Murphy* [2003] QCA 128, and *R v Ekstrom* [1999] QCA 171. I consider *R v Murphy* of little assistance to Mr Boe as that applicant's wife was killed, and the applicant's spine was fractured, in a one vehicle accident occurring when the intoxicated applicant (.185) was driving home from their son's wedding. His sentence of four years imprisonment, to serve 12 months, was not altered. That decision shows the general severity of sentences in like cases.

[12] I consider Mr Boe correct in the submission that *Rahn*, *Morgan*, and *Breckenridge* are all distinguishable. *Rahn* was a case of dangerous operation of a motor vehicle while affected by an intoxicating substance (amphetamine) and causing death, and accordingly carried the like maximum 10 year term of imprisonment to Ms Hoad's offending behaviour (see s 328A(4)(a) of the *Criminal Code*). Mr Rahn was also sentenced for a variety of other offences committed by him between July 1997 and January 1998. These included the offence of dangerous driving causing death while adversely affected, as well as an offence of threatening violence, and 14 offences of dishonesty. He received a sentence of eight years imprisonment with a recommendation for consideration for parole after three years; of that total period of imprisonment he had received a sentence of six and a half years for the dangerous driving causing death.

[13] The circumstances were similar to Ms Hoad's in that his vehicle had moved to its incorrect side of the road and collided with an oncoming car. A blood sample revealed he had .035 mg per litre of amphetamine and .64 mg per litre of methylamphetamine in his blood; a government medical officer explained that the methylamphetamine level was more than 12 times the upper limit of what was considered a normal concentration of that drug in the blood for a user. (It was 400 per cent higher than Ms Hoad's). After being released on bail Mr Rahn had committed the offence of threatening violence, in which he held a gun to the head of his de facto spouse and pulled the trigger, and then a variety of property offences, including burglary and uttering counterfeit money. The judgment of this court records that the burden of the submission (of the applicant) was that the combination of the sentences, taking account of the cumulative sentences, made the overall result excessive. That submission was rejected. This Court also recorded the view that in relation to the principal offence of the fatal driving, the approach now taken in this Court, since its decisions in *Byrne* [1995] QCA 124 and *Vessey* [1996] QCA 11, is plainly more severe than what was indicated in those cases, and that among other matters there is a considerable emphasis upon public safety. Accordingly the major sentence in the combined sentencing exercise was not manifestly excessive.

[14] Mr Rahn was described in a psychiatric report as perhaps suffering from a personality disorder with antisocial and dependant traits. That disorder was not responsive to psychiatric treatment. The further offences he committed whilst on bail for driving, including a violent offence, make it difficult to rely with confidence upon the high head sentence for that driving offence, as a reliable guide to appropriate sentences for a driving offence when dealt with as an offender's only crime. The percentage of drugs in his blood was much higher than Ms Hoad's, and that too is relevant.

[15] In *Morgan* that offender was 18 years old with no prior convictions, and she pleaded guilty to an ex officio indictment in the Southport District Court. She was 17 weeks pregnant when sentenced. The vehicle she had been driving was seen to become "airborne" at an intersection, and it then proceeded along a footpath hitting a bench seat, a palm tree, and a number of pedestrians. It ultimately collided with the rear of a parked van. All up she hit 11 people with her vehicle. One was a child who died, while seven other people each suffered grievous bodily harm. For some distance before it had became airborne and left the road surface, her car was seen to be speeding, weaving from lane to lane while overtaking, travelling in parking lanes, and to be "wiggling". It transpired in the investigation that she and other occupants of that vehicle had been inhaling butane gas both at her residence and in the car. She had then attempted to pervert the course of justice by concocting a story to explain what had occurred. The learned judge sentencing her found that she had demonstrated a very marked lack of remorse until her deception was discovered, although the judge accepted that she was now genuinely sorry for what she had done. Her total sentence was one of six and a half years, of which the dangerous driving causing death contributed a six year sentence, and she was recommended for release on parole after two and a half years.[1]

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[1] That description of *R v Morgan* is taken from the transcript of the judge's sentencing remarks in *Morgan*; it accords with the applicant's written outline in this court

[16] In *Morgan* plainly dangerous driving had been demonstrated in a number of other ways before the driving which was the immediate cause of death. The manifest dangerous driving was much worse than Ms Hoad's. Both were cases where the maximum penalty was 10 years imprisonment.

[17] In *R v Breckenridge* [2001] QCA 448 that applicant pleaded guilty to a charge of dangerously operating a motor vehicle causing grievous bodily harm whilst having a blood alcohol concentration exceeding .15 per cent, meaning he faced a maximum penalty of 14 years (see s 328A(4)(b)). He was sentenced to five years imprisonment, to be suspended after two years and his application for leave to appeal was dismissed. He was 42 when sentenced, had convictions for minor drug offences between 1980 and 1985, and between 1981 and 1997 had been convicted on six separate occasions of driving a motor vehicle whilst under the influence of alcohol. He had also been convicted on a number of other traffic offences. At the time of commission of the offence for which he was sentenced to the five year term his blood alcohol concentration was .235 per cent. It had been suggested to him, at a hotel, that he not drive the motor vehicle prior to the relevant collision because he was affected by alcohol, but he disregarded that advice. That resulted in another person being caused grievous bodily harm. I consider Mr Breckenridge's very high blood alcohol concentration comparable to the asserted and unchallenged effects of Ms Hoad's lack of sleep. Like her, Mr Breckenridge collided with another vehicle on his incorrect side of the road. This Court's judgment does not record how far he had driven with that BAC before the collision. Considering only his driving, his case is comparable to Ms Hoad's but he was older and his seriously bad driving history is far worse than hers, which consisted of four speeding offences recorded over a five year period. She had no prior criminal convictions, and there is no evidence of any other person warning her not to drive.

Cases where more moderate sentences have been imposed

[18] The matters upon which the prosecution relied can therefore be distinguished, but that of itself does not make the head sentence manifestly excessive. In *R v Antoney* [2000] QCA 180, that applicant had pleaded guilty to dangerous operation of a motor vehicle causing death while the applicant's blood alcohol concentration exceeded 150 mg of alcohol per 100 ml of blood. He faced a 14 year maximum. He was sentenced to four years imprisonment with a recommendation that he be considered for parole after 15 months. His offence was committed when he drove through a stop sign at a railway crossing, although aware of the sign, and his vehicle collided with the train. His passenger was killed. Two hours after the collision his BAC was .174. He had two previous convictions for drink driving five years earlier, and had on another occasion been sentenced to a suspended term of two years imprisonment.

[19] The Chief Justice remarked, and the other judges agreed, that on no view could that sentence be said to be manifestly excessive, or indeed at all excessive. The distance over which Mr Antoney drove with his capacity impaired is not recorded in the judgment, but Mr Antoney's period of manifestly dangerous driving was no shorter than Ms Hoad's. He had relevant prior convictions, and faced a higher maximum. Accordingly, the four year head sentence upheld on appeal supports the argument that the five year head sentence for Ms Hoad was manifestly excessive, but the quoted statement by the Chief Justice suggests that a five year head sentence in *R v Antoney* might have been upheld.

[20] In *R v Thumm* [1999] QCA 355 the respondent to an Attorney-General's appeal had pleaded guilty to the offence of dangerous driving causing death, with the circumstance of aggravation that the offender was adversely affected at the time by alcohol. He had been sentenced originally to four and a half years imprisonment with a recommendation for eligibility for parole after 15 months, which recommendation this Court varied by substituting a recommendation for eligibility after 21 months. Mr Thumm had driven his unregistered and uninsured motor cycle into the driver's side of a car turning into a driveway, causing the motor cycle to go out of control and kill a person standing on the footpath. Mr Thumm had accelerated heavily and consistently over the 300 metres or so after he had entered that street and was travelling at an estimated 90 kph to 100 kph by the time he reached the point of collision. He refused to provide a specimen of blood for analysis, but blood taken for diagnostic purposes produced an approximation of .18 per cent alcohol in his blood. He had convictions for unlicensed driving and driving with a BAC of .142 per cent from an incident in April 1995.

[21] This Court considered that the non-parole period of 15 months was unduly generous, while accepting that Mr Thumm was genuinely remorseful, and this Court remarked that the head sentence was at the bottom of the range which might have been imposed. In the result the non-parole period was increased. The distance of the unbroken journey during which Mr Thumm drove with impaired capacity is not recorded in the judgment, but his manifest dangerous driving was no less than Ms Hoad's. The sentence imposed on him and this Court's remarks both suggest that the five year maximum imposed here was high, but not excessive. Mr Thumm had faced a 10 year maximum sentence, like Ms Hoad.

[22] In *R v Stephenson* [1999] QCA 519 that offender faced a 14 year maximum sentence for the offence of dangerous operation of a motor cycle causing death, when his blood alcohol concentration exceeded .15 per cent. It was actually .157 per cent, and his blood contained as well .005 mg per kg of the drug alprazolam, the pharmacological name for a tranquilizer sold as Xanax. He had left a night club in Bundaberg at around 3.00 am in the morning, and had ridden the motor cycle through two separate intersections when facing red lights at both before he approached the Burnett River traffic bridge. On the bridge he accelerated and failed to take the sharp left turn at its northern edge; it crashed and Mr Stephenson's leg was broken, and his pillion passenger was killed. Mr Stephenson told another patient in the hospital to which he was admitted that he was doing "160 km an hour".

[23] He was sentenced to four years imprisonment with a recommendation that he be eligible for release on parole after serving 15 months. His traffic history contained seven convictions for speeding, two for disobeying a red light, and one for careless driving. He had a minor criminal history. This Court held that the sentence imposed was well within the range of comparable cases. His manifest bad driving was exhibited over a longer period than Ms Hoad's, although he apparently drove for a much lesser distance in the unbroken journey in which his judgment and capacity to drive was at all times adversely affected.

[24] In *R v Cusak*, where the maximum penalty was 14 years imprisonment for dangerous driving causing death with a BAC exceeding .15 per cent, this Court increased a sentence of three years imprisonment wholly suspended to one of three years imprisonment suspended after nine months. That respondent had no prior

criminal convictions, but a traffic history which included two speeding offences and one failure to stop at a red light, and 16 demerit points received between 1994 and 1999. That respondent left a club at Mt Isa and drove his utility away, carrying a number of passengers in the open tray of the vehicle, in such a fashion that its wheels squealed when negotiating the first corner near the club; it then travelled to the incorrect side of the road, veered back to its correct side and attempted to take the next corner. On rounding that one the vehicle rolled over and one of the passengers in the tray was killed. The respondent got out of the vehicle, saw what had happened and left the scene, but returned fairly quickly with his mother. His BAC was .17 per cent.

[25] This Court described his driving as "deliberately reckless driving with a high blood alcohol level", and concluded that the sentence was manifestly inadequate. The three year head sentence was unchanged. I observed that the distance over which that respondent drove with impaired capacity in an unbroken journey was far less than Ms Hoad's, although her obviously dangerous driving was for a shorter distance than his.

[26] Finally, there is a matter of *R v Merrill; ex parte A-G (Qld)* [2002] QCA 263, where that offender faced a maximum of 10 years imprisonment for the offence of dangerous operation of a motor vehicle causing death while adversely affected by alcohol. He had an extensive record for breaches of the *Traffic Act* 1949 (Qld), including eight offences for driving in excess of the speed limit, and some for driving at least 30 kph over the speed limit. He also had one prior conviction for driving under the influence of alcohol, imposed on 3 November 2000. He had been disqualified for driving for three months, and that disqualification had expired shortly before he committed the offence, the subject of his application for leave to appeal.

[27] That offence was committed by his travelling at 150 kph or thereabouts down a hill in an 80 kph zone, when his vehicle failed to hold the road in a sweeping bend. It slid across it, and a head on collision occurred in the middle of his incorrect lane with a car driven by a young woman of 30, who was killed instantly. Mr Merrill's BAC reading was .097 per cent. His vehicle had been on the incorrect side of the road for some 60 metres before the impact.

[28] He was sentenced to four years imprisonment and recommended for consideration for post imprisonment release after he had served nine months. This Court regarded that recommendation one which made the sentence imposed manifestly inadequate, and White J remarked that had she been at liberty to set the sentence, she would have thought that five years was more apt for Mr Merrill's conduct. However, bearing in mind his youth, good work history, his clear expressions of remorse, and his attempt at rehabilitation, the head sentence was left alone; and the sentence varied by ordering that the four years be suspended after Mr Merrill had served 15 months, with an operational period of four years. Since that offender's distance over which he drove with impaired capacity (which started when he left a hotel) was not described in this Court's judgment, it may have approximated the distance over which Ms Hoad drove dangerously, although the distance of manifestly bad driving by Mr Merrill was longer than Ms Hoad's. Considering only their manifest dangerous driving and his actual BAC compared to the effect of her sleep deprivation, the sentence he received accords with the head sentence imposed on her, when account is taken of the remarks of White J with whom Davies JA agreed.

[29] The disparity in the described sentences can largely be reconciled with hers and with each other if the unchallenged effect of her sleep deprivation is considered, and the relevant driving and criminal history of those other offenders. In her case, there is the admitted period of 15 minutes in which she drove knowing she was in obvious danger of falling asleep. Equating the effect of her sleep deprivation to a BAC of .28, and considering she drove so far in that condition before crashing, justifies the head sentence of five years. It follows that Mr Boe's attack on the head sentence must fail, although well made.

Matters in mitigation

[30] Ms Hoad had many of these. She pleaded guilty to an ex-officio indictment, having been first charged with the offence about nine months after she committed it. She was not responsible for the delay in the matter coming to the District Court, and had indicated preparedness to plead at her first appearance. The sentencing judge accepted that she had demonstrated genuine remorse, and the judge added that that was to a remarkable degree:

> "because I do not think I have ever seen such honesty in your responses to the investigating police officers. Whatever may be said of your irresponsibility, you strike me as being an extremely honest young woman and you should take pride in that matter, if not in your driving. You gave full and frank statements, admitting what you had done to the police, at the scene, in the hospital, and some months later when you were formally interviewed by the investigating police officers. Your story never changed. You did not seek to place any gloss on what you had done. You courageously faced up to your responsibilities and the community should be thankful for that at least."

[31] Those matters in mitigation would ordinarily have resulted in Ms Hoad receiving either a recommendation for consideration for early post-prison community based release, or a suspension of her sentence, after approximately one third had been served. That would accord with common sentencing practice in Queensland. The order actually made suspending her sentence after 18 months was accordingly slightly more generous than that common enough practice, but Ms Hoad had other personal matters also significantly mitigating her criminal behaviour.

[32] The sentencing judge was assisted by reports from each of a forensic and a treating psychologist. Those described how Ms Hoad had been adopted as an infant, and how she had difficulty coping with feelings of abandonment and rejection resulting from that fact. She had been diagnosed as suffering from a major depressive disorder, and possibly bipolar disorder. She had suffered from depression since aged 13, and been taking prescribed mediation ever since. Her disorder had been exacerbated by a number of traumatic experiences throughout her life time which included:

- Having been raped by her daughter's father, and by friends of his, from when she was 13 until when she turned 15; just prior to falling pregnant. She gave birth when very young to her daughter, who is now nine years old;

- Having suffered domestic violence at her daughter's father's hands, including repeated bashing. He had threatened to kill her adoptive parents, whom she loved, and she did not take out a domestic violence restraining order for that reason;

- Suffering post natal depression after her daughter's birth, when she was a single mother;

- Meeting her biological mother when 16, and finding out her biological mother suffered from bipolar depression, as well as failed attempts at continued contact with her biological parents, neither of whom were interested in it;

- Emotionally abusive relationships into which she entered after the break-up of the relationship with her daughter's father;

- In earlier years, difficulties at school which led to her being expelled from one;

- The loss of her grandmother, with whom she had been very close in 2002; that loss resulted in her immediately beginning her drug use thereafter.

[33] Despite those challenges to a well balanced or happy life, she had persisted with efforts to educate herself after leaving school in grade 10. Those included completing two TAFE courses, and beginning both a journalism course by correspondence with the University of Southern Queensland, and a Bachelor of Justice studies at QUT. She began the latter one in 2003. She is reportedly a generally good mother to her child, has played representative competitive netball, and has combined being a single mother with employment.

[34] She had begun illicit drug use in December 2002 when given ecstasy as a birthday present, and then became an amphetamine user and addict. The forensic psychologist's report described chemical substance abuse as a defence mechanism Ms Hoad engaged in to suppress feelings of inadequacy and distress, that usage being reinforced by the superficial mateship and camaraderie of others in the drug scene.

[35] Ms Hoad throughout has had the benefit of strong and loving support from her adopting parents, who are now caring for her daughter. She was treated by a psychologist for depression between 13 May 2002 and June 2003; she returned to that psychologist on 2 December 2004. In June 2004 she admitted herself to Narconon, a drug rehabilitation and education service in Melbourne, but it is clear she did not complete the residential program offered by that service, which has an average length of stay of between four and six months. Had she actually done that she would thereby have demonstrated a greater likelihood of success in challenging her drug addiction than has been demonstrated by the interrupted periods of counselling and by the uncompleted courses in which she has enrolled.

[36] The submissions and material put forward on her behalf to the learned sentencing judge and this Court do not demonstrate that she has as yet succeeded in living without non-prescribed drugs or in achieving a settled and healthy life. It does demonstrate that she has genuinely tried to. To that can be added the circumstance

that on the evening she was sentenced to imprisonment she discovered she was pregnant, and this Court was informed that her second child is due on 12 August 2005. While her drug usage after December 2002 was inconsistent with her acting in the best interests of her first child, she seems otherwise to have provided for that child in very challenging circumstances, from her own mid-teens onwards.

[37] I consider the learned sentencing judge ought to have taken the mitigating personal factors applicable to Ms Hoad more into consideration, and to have ameliorated further the required period in custody. It is significant that counsel for the respondent was unable to refer this Court to any comparable Court of Appeal decision that clearly supported the sentence imposed here, in the light of these mitigating offences. Other than by drug usage Ms Hoad has shown great courage in many aspects of her life, and she had been very honest about that usage. I consider the 18 months non-suspended term to be manifestly excessive, and would vary that by ordering instead that the five year sentence be suspended after Ms Hoad has served nine months of it.

[38] **HOLMES J:** I agree with the reasons of Jerrard JA and with the order he proposes.