SUPREME COURT OF QUEENSLAND

CITATION:	*R v MacDonald* [2014] QCA 9
PARTIES:	**R** **v** **MacDONALD, Ross Graham** (applicant)
FILE NO:	CA No 233 of 2013 DC No 204 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	11 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2013
JUDGES:	Fraser and Morrison JJA and Applegarth J Joint reasons for judgment of Fraser and Morrison JJA; separate reasons of Applegarth J dissenting
ORDERS:	**1. Application for leave to appeal refused.** **2. A warrant be issued for the arrest of the applicant, such warrant to lie in the Registry for 48 hours.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to a charge of dangerous operation of a motor vehicle causing grievous bodily harm – where applicant sentenced to 18 months imprisonment to be suspended after serving three months and disqualified from holding a licence for 12 months – whether the sentencing judge erred in finding that the case was not one of momentary or brief inattention – whether the sentencing judge erred in finding that the applicant must serve some period of actual custody *Criminal Code and Civil Liability Amendment Act* 2007 (Qld), s 4 *R v Allen* [2012] QCA 259, cited *R v Damrow* [2009] QCA 245, cited *R v Gruenert; ex parte A-G (Qld)* [2005] QCA 154, considered *R v Harris; ex parte A-G (Qld)* [1999] QCA 392, cited *R v Hart* [2008] QCA 199, cited *R v Iaria* [2008] QCA 396, cited *R v Maher* [2012] QCA 7, cited *R v Price* [2005] QCA 52, cited

R v Proesser [2007] QCA 61, considered
R v Towers [2009] QCA 159, cited
R v Wilde; ex parte A-G (Qld) (2002) 135 A Crim R 538; [2002] QCA 501, cited

COUNSEL: C F C Wilson for the applicant
G J Cummings for the respondent

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

[1] **FRASER and MORRISON JJA:** We have had the benefit of reading the reasons prepared by Applegarth J. His Honour has comprehensively set out the circumstances of the offence and the background facts. We gratefully adopt, generally, paragraphs [37] to [40], [42] to [44] and [49] to [63] of his Honour's reasons. There are some qualifications to which we will refer to in these reasons.

[2] We do not accept that the applicant necessarily believed that the approaching cars were going to exit the Ipswich-Boonah Road left onto Beaudesert-Boonah Road. We say that because the evidence of the applicant's belief was not direct; its source was an elliptical comment from counsel for the applicant as to what was said by the applicant to the police,[1] and the prosecutor's recollection of what was said at the roadside interview.[2] As to the latter, it was that the applicant said he "thought they had their indicators on and so that's why he believed them to be in the slip lane".[3] Such a belief could have had no reasonable basis in fact as the lead car was going straight ahead, and there was no evidence to suggest any other car was indicating to go left.

[3] Nor does the evidence permit any degree of certainty about the time available to the applicant to see the other cars approaching. All that can be said is that the maximum distance over which vehicles could be seen in either direction, was 177 metres. Therefore the time that was available to both the applicant and the injured driver, was the time taken to cover 177 metres.

[4] The speed of each vehicle would dictate the answer to the question of time available – the faster each went the less time there would be. The best estimate of the injured driver's car was that it was travelling at 90 kilometres per hour, but the applicant's speed was a matter of speculation. It presumably varied as the applicant slowed to the point where he commenced the turn but there was no evidence of his average speed over any specified distance. Therefore we do not consider that the evidence allows for a reliable calculation of the time available to the applicant in seconds. It is however correct to say that the evidence showed that the maximum distance that could be seen was 177 metres, and if that distance was closed at a rate of 100 kilometres per hour the time to close it would be about six seconds.

Ground 1 - momentary or brief inattention

[5] The primary judge was pressed with authorities that were said to establish that there is a separate category of case where the driver's inattention can be categorised as "momentary". They included *R v Gruenert; ex parte A-G (Qld),*[4] and *R v Proesser*.[5]

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1 AB 34.
2 AB 25.
3 Counsel for the respondent was pressed to identify the evidentiary source of that comment but could not do so.
4 *R v Gruenert; ex parte A-G (Qld)* [2005] QCA 154 ("***Gruenert***").
5 *R v Proesser* [2007] QCA 61 ("***Proesser***").

[6] In *Gruenert* a truck was being driven on a highway heading towards Mackay. The driver had a clear view for a length of highway which permitted him to overtake safely. He overtook a car pulling a caravan, which was travelling at between 70 and 80 kilometres per hour. The truck moved alongside the car and caravan, then veered back into the lane before the truck had fully passed it. The driver of the car moved left to avoid a collision, and was forced off the road. The momentum of the caravan flipped the car over and the driver was killed. There was evidence from a witness (in a vehicle coming in the opposite direction) that there was insufficient room for the truck to overtake without creating a danger of a collision with that car.

[7] The essence of the case was that the dangerous driving was the manner in which the truck driver had pulled back on to his correct side of the road, rather than in undertaking a dangerous manoeuvre when he moved out to overtake. The substance of the Crown case was that the driver of the truck failed to keep a proper lookout when he was returning to his correct side of the road.

[8] The sentencing judge in *Gruenert* had described the case as "one of momentary inattention".[6] On the appeal Keane JA[7] referred to what was said by Thomas JA in *R v Harris; ex parte A-G*:[8]

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

[9] Keane JA then reviewed decisions in which dangerous driving had caused death, and drew a number of conclusions from them:[9]

> "[I]t emerges that in a case of dangerous driving which causes death:
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> (a) a head sentence of 18 months imprisonment is at the bottom end of the range;
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> (b) the considerations of deterrence, and of the gravity of the consequences involved in the offence, mean that it will be a rare case that does not attract a custodial term;
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> (c) the imposition of a custodial sentence is not, however inevitable in every case; and
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> (d) cases of "momentary inattention" are among rare cases of dangerous driving which may attract a non-custodial sentence because, in such cases, the claims of the consideration of deterrence are less compelling."

[10] Keane JA went on to say that, in his view, the characterisation of the truck driver's offence as one of "momentary inattention" was correct.[10]

[11] In *Proesser* the driver of a vehicle was travelling at 70 kilometres per hour along a suburban street, towards an intersection. He looked down to adjust his radio, and when he looked back up he saw that the lights had turned amber, and that the car in

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6 *Gruenert* at [9].
7 With whom Williams JA and Fryberg J agreed.
8 *Gruenert* quoting *R v Harris; ex parte A-G* [1999] QCA 392, at [42].
9 *Gruenert* at [16].
10 *Gruenert* at [17].

front of him was stopped at the intersection. In an attempt to avoid colliding with the rear of that vehicle, he applied the brakes and swerved into the adjacent left lane. His vehicle skidded and hit a pedestrian. Jerrard JA, in the course of reviewing comparable sentence decisions, referred to *Gruenert* and to the passage cited above. He also referred to Thomas JA's statement in *Harris* referred to above. He went on:[11]

> "However, the learned sentencing Judge in this matter was not referred to the further observations by Keane JA concerning the less compelling nature of the consideration of deterrence in matters of momentary inattention. In passing sentence the learned Judge did observe that the deterrent was more than ordinarily important for offences of dangerous operation of a motor vehicle and correctly observed that this Court had held that in some cases in which there had been momentary inattention, that the range of appropriate sentences included both non[-]custodial and a short custodial period.
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> …
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> Despite all of those matters the Judge imposed the short custodial sentence described. The applicant's apparently brief period of inattention when driving, generally good previous character and conduct and his distress at what he had done make that sentence of actual imprisonment in those circumstances an unnecessarily hard one. The general circumstances point, in my opinion, to a non[-]custodial sentence being appropriate in this matter."

[12] One further decision to which reference was made is that of this Court in *R v Hart*.[12] In that case a taxi driver was driving on the Bruce Highway approaching an intersection of the highway and another road. He followed another vehicle which executed a right hand turn into the other road. The taxi driver then executed his own right hand turn, but did not see that there was an oncoming motorcycle until it was too late to avoid a collision. The passenger in the taxi suffered fatal injuries and the motor cycle rider suffered grievous bodily harm. The intersection was described as "hazardous"[13] because: at the time it was dark; the road was wet because it had been raining; there were no traffic lights at the intersection, and the overhead lighting was deficient. The driver of the vehicle ahead of the taxi saw the headlight of the motorcycle but proceeded through the intersection before the motorcycle reached it. There was no explanation advanced as to why the taxi driver failed to see the oncoming motorcycle.

[13] In the course of arguing for a sentence which was wholly suspended, reference was made to *Gruenert*. Keane JA[14] considered that *Gruenert* was not of assistance, stating:[15]

> "In that case, it was said that a head sentence of 18 months imprisonment is at the bottom end of the range for a case of dangerous driving causing death. Further, the gravity of the consequences involved in such an offence means that it will be a rare case that does not attract a custodial term. Nevertheless, a custodial

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11 *Proesser* at pp 6-7.
12 *R v Hart* [2008] QCA 199 ("***Hart***").
13 *Hart* at [6].
14 With whom de Jersey CJ and Fraser JA agreed.
15 *Hart* at [15] (emphasis in original).

> sentence is not inevitable, and cases of "momentary inattention" are among the rare cases which **may** attract a non-custodial sentence. In *Gruenert* this Court upheld the learned sentencing judge's decision to impose a wholly suspended sentence of 18 months imprisonment. The point to be made here is the obvious one: it is quite wrong to regard the observations in *Gruenert* as supporting the view that, in a case of momentary inattention, the discretion of the sentencing judge **must** be exercised by fully suspending the sentence of imprisonment which is imposed."

[14] Keane JA went on to identify the crucial issue in such a case. Thus:[16]

> "The crucial issue is, as Thomas JA said in *R v Harris*; *ex parte A-G (Qld)*, "the level of seriousness of the actual driving of the offender." While the applicant's driving may be aptly described as a case of "momentary inattention", it was, as he acknowledged, inattention of a relatively serious kind. The applicant's turn should not have been made without attending to whether there was oncoming traffic. The applicant gave no explanation for turning right across the highway without proper vigilance. To emphasise, as the applicant does, that the intersection was hazardous in the prevailing conditions serves only to highlight the need for vigilance on the applicant's part as to the possible approach of traffic from the opposite direction of the Bruce Highway. To say this is not to say that the applicant was obliged to exercise greater than proper care and attention: it is simply to say that the care and attention necessary when a driver is negotiating a dangerous intersection may require greater vigilance than would otherwise be the case."

[15] A passage from the learned sentencing judge in *Hart* was cited with apparent approval, as relating to the necessity for greater vigilance. The passage[17] is as follows:

> "One can have a momentary inattention when driving a vehicle and one suddenly looks away momentarily, say whether to change the radio station in the car or whatever and then look up. This situation was that you knew you were to slow down or become stationary and not enter the intersection for executing the right-hand turn until you kept a proper lookout to satisfy yourself it was safe so to turn, one might say with particular care on this evening with a road surface that was wet."

[16] Keane JA went on to say:[18]

> "The circumstances of the applicant's driving were such as to entitle the learned sentencing judge to regard the applicant's failure adequately to attend to the possible approach of oncoming traffic as a serious fault, and, indeed, a significantly more serious fault than that involved in the decisions involving suspended sentences on which the applicant relied by way of comparison."[19]

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16 *Hart* at [17].
17 *Hart* at [17].
18 *Hart* at [18].
19 Referring to *Gruenert* and *Proesser*.

[17] Three things are evident from that review of the authorities. First, the decisions in *Gruenert* and *Proesser* do not lay down any empirical formula by which one can say that one offence is an offence of momentary inattention such as to merit a non-custodial sentence, and another is not. Every case will depend upon its own facts. Furthermore, in every case the crucial issue is not what category ("momentary inattention" or otherwise) best fits the facts. Rather, the crucial issue is, as Thomas JA said in *Harris*, "the level of seriousness of the actual driving of the offender". Secondly, the circumstances of the offending in *Hart* involved a turn across a highway at an intersection without sufficient vigilance to ensure that it was safe to do so. That involved a level of fault more serious than the fault characterised as "momentary inattention" in *Gruenert* and *Proesser*. Thirdly, the circumstances in *Hart* bear a reasonably close relationship to those in the present case, allowing for the differences in vehicles. The turn was similar, as was the chance to observe the oncoming traffic.

Level of seriousness of the actual driving of the offender

[18] We now consider the seriousness of the applicant's dangerous driving. The applicant was driving a tanker north along Ipswich-Boonah Road. At the intersection of that highway and Beaudesert-Boonah Road, the applicant intended to turn right, across the path of the highway. Clearly the applicant had to give way to all other traffic when executing that turn. As one approached the intersection the maximum view of approaching traffic (each way) was about 177 metres. As we have mentioned, just how quickly that distance would be closed depended upon the speed of the traffic approaching in each direction. It also depended on whether (from the applicant's point of view) the oncoming traffic was going straight ahead on Ipswich-Boonah Road, or using the slip lane to go left into Beaudesert-Boonah Road.

[19] The maximum speed was 100 kilometres per hour in each direction. Obviously one could not turn right across the path of oncoming traffic at that speed so the expectation is that a vehicle such as the applicant's tanker would have slowed considerably before attempting the turn. However, assuming that the applicant slowed down, and assuming that the injured party's vehicle was travelling at 90 kilometres per hour, the applicant still had a significant period of time to observe the oncoming traffic. That is so even if, as our colleague's calculations might suggest, the time available was about four seconds.

[20] The applicant was confronted by a number of circumstances that dictated a much more circumspect approach to crossing the intersection than actually occurred. First, he was driving a heavy tanker, which was not as manoeuvrable as a car. Secondly, he had more than sufficient time to observe the approach of the oncoming cars and determine what they were doing. Thirdly, it was not suggested that any of the oncoming cars had indicated to turn left, moved to the left of their lane, or otherwise given any other indication that any of them intended to turn left. Fourthly, there were several approaching cars, which would make it more difficult to be sure all of them were turning left, rather than driving on. Fifthly, even if they were taking the slip lane, the applicant would still be manoeuvring his very large vehicle potentially into the path of much smaller vehicles. Sixthly, it should have been obvious to the applicant that, whatever the speed of the oncoming cars, that speed would have been greater than his speed in taking the corner.

[21] The applicant made a serious mistake about the cars' direction of travel, and he failed to keep a proper lookout. The seriousness of the applicant's mistaken assumption that the cars were turning left is demonstrated by the submission made by the applicant's counsel to the primary judge, in answer to the question, "when should your client have been aware that the complainant's vehicle was travelling straight ahead and not turning left?"[20] The answer was:

> "Immediately upon seeing her. He ought to have assumed that all vehicles coming in the opposite direction might be travelling straight ahead. He certainly ought to have assumed that immediately upon seeing them."

[22] The statements quoted from *Hart* are applicable. In particular we agree with what was said by Keane JA in *Hart*, as to the level of seriousness attached to a turn such as that carried out by the applicant.

Extent of harm caused by the dangerous driving

[23] In addition to the seriousness of the driving, the extent of the harm caused by the dangerous driving is a relevant consideration. Two people were injured. The injured driver was about 18 years old. She sustained life threatening injuries, a severe traumatic brain injury with extradural and subdural haematomas, and a fracture at the base of her skull. She required an urgent decompressive craniectomy[21] to relieve the pressure. She also had injuries to her spine; fractures to her ribs, left wrist and left ankle; fluid in her right lung; and a haematoma in her left kidney. Surgery was required on the left ankle. She did not emerge from a period of post-traumatic amnesia until some 34 days after the accident. She had to wear a protective skull helmet for some time and it was four months later that she finally had a cranioplasty. She required ongoing therapy for cognition, as basic cognition was not intact, and physiotherapy to improve her gait, balance, and the range of movement in her ankles.

[24] The nature of the brain injury was described by the relevant medical practitioner as "a severe traumatic brain injury which required an urgent craniotomy for decompression in order to preserve her life and health".[22] The driver's victim impact statement[23] reveals the wider impact of the injury. Over a year later she still had trouble remembering things, which affected her ability to find a job. She has various scars, and there is a prospect of further surgery on her ankle. She has had to give up her particular sport. The passenger in the oncoming vehicle also sustained injuries, though these were quite confined when compared with the driver. She suffered a broken arm and some bleeding. There was a psychological impact from the accident which has required counselling.

[25] The primary judge rejected the submission that the applicant's lapse was "momentary".[24] That must be understood as responding to and rejecting the particular submission made, namely that the conduct indicated "brief, short or momentary inattention" of a kind which called for a non-custodial sentence as exemplified in *Gruenert* and *Proesser*. For the reasons we have given, that was open to the sentencing judge.

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20 AB 39.

21 Also referred to in the medical evidence as a craniotomy: AB 65.

22 AB 65.

23 AB 67.

24 What his Honour said is in paragraph [50] of Applegarth J's reasons.

[26] We conclude that it has not been demonstrated that the primary judge erred in his approach. Ground 1 is not made out.

Grounds 3 and 4 – sentence manifestly excessive?

[27] We agree with paragraphs [77] to [79] of Applegarth J's reasons. Given that it was conceded that the head sentence of 18 months imprisonment was both within range and appropriate[25] the focus of the appeal was whether the primary judge erred in imposing a period of actual custody. The applicant's counsel conceded in the District Court that a short custodial sentence was within range:[26]

> "Your Honour, I'm not saying that a short custodial sentence is not in range. I'm saying that both sentences that allow him to remain in the community and ones that impose short custody are in range."

[28] No doubt recognising the impact of that concession, the applicant's contention was that the primary judge had, in effect, concluded that he was bound to impose a period of actual custody. The focus of that contention was the following passage in the sentencing remarks:[27]

> "In all of the circumstances and having closely examined the various authorities cited, I accept the submission by Mr O'Connor of counsel for the Director of Public Prosecutions that a penalty in the order of 18 months imprisonment, including some actual custody, is appropriate."

[29] There is nothing in those remarks that would justify the conclusion that the primary judge felt **bound** to impose a period of actual custody.

[30] Other contentions were raised in respect of these grounds, including that the primary judge placed too much emphasis on the injuries sustained by the oncoming driver, and may have been (or was) overly influenced by repeated submissions by the Crown Prosecutor that a period of actual custody was appropriate. There is nothing of substance in either of those points. The injuries to the oncoming driver were very serious, and in the case of the brain injury, life threatening. There is no reason to conclude that the primary judge placed any improper emphasis upon those injuries. As for the second point, all that occurred was that the prosecutor made submissions that a period of actual imprisonment was called for. There is nothing to suggest that the primary judge was overborne by that submission.

[31] The fourth ground of appeal was that the sentence was manifestly excessive in all the circumstances. The applicant's concession that it was open to impose a period of actual custody makes it difficult to sustain this ground. The central point of the submission was that the primary judge should have characterised the applicant's driving as being an occasion of momentary inattention, and thus in line with cases such as *Gruenert* and *Proesser*, where non-custodial sentences were imposed. We have already explained why we do not accept that argument.

[32] Further, sentences before 2007, when the penalty for dangerous driving causing grievous bodily harm was increased from seven to 10 years, should be treated with a degree of caution. *Gruenert* is one such case, and so is *Proesser*.[28] This Court

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25 Applicant's Outline of Submissions, filed 13 November 2013, para 11.

26 AB 43.

27 AB 56.

28 The amendments occurred under the *Criminal Code and Civil Liability Amendment Act* 2007 (Qld), Act No 14 of 2007. Assent was give on 20 March 2007. Section 4 of that Act increased the maximum penalty to 10 years imprisonment.

observed as early as *R v Price*[29] that there had been a marked upward trend in the penalties imposed in cases of dangerous driving causing death or grievous bodily harm, since the Court of Appeal's decision in November 2002 in *R v Wilde; ex parte A-G (Qld)*.[30] The legislature increased the maximum penalty from seven to 10 years in 2007, and it presumably did so mindful of the decisions of this Court such as *Wilde* and *Price.* As this Court has remarked before, that is a clear indication of the legislative intent that dangerous driving causing death and grievous bodily harm was to attract a greater level of penalty that might previously have been the case.[31]

[33] As the applicant rightly recognised, consideration of cases involving dangerous driving causing death is not helpful in terms of establishing a range of penalty for dangerous driving causing grievous bodily harm.

[34] Applegarth J has reviewed a number of comparable cases put forward on the appeal, in paragraphs [86] to [93] of his reasons. We respectfully adopt his synopsis of those cases, subject to our conclusion that the present case should not be characterised as one of "brief inattention" or "momentary or brief inattention". A consideration of those cases does not suggest that a period in actual custody was outside the range of sentences open to the primary judge. Given the very serious nature of the driving in this case; the period of time available to the applicant to ascertain the proper position in relation to oncoming traffic; the need to wait until it was clear what the oncoming cars were going to do; and the various serious injuries caused as a consequence, the primary judge's approach to sentence did not miscarry.

[35] Beyond the contention that the primary judge was wrong to characterise the case as not being one of momentary inattention, no attack was made on the primary judge's analysis. A short period of actual custody was open. So much was conceded by the applicant below and before this Court. In the circumstances it cannot be demonstrated that the sentence imposed was manifestly excessive.

Disposition

[36] We would refuse the application for leave to appeal. A warrant should issue for the arrest of the applicant, such warrant to lie in the registry for 48 hours.

[37] **APPLEGARTH J:** On 10 September 2013 the applicant pleaded guilty in the District Court at Ipswich to a charge of dangerous operation of a motor vehicle causing grievous bodily harm on 5 June 2012. He was sentenced to 18 months' imprisonment, suspended after he had served three months with an operational period of two years. He also was disqualified from holding a driver's licence for a period of 12 months. The applicant contends, among other things, that the learned sentencing judge erred in finding that the case was not one of momentary or brief inattention. Having rejected the applicant's submission that it was such a case, the judge then accepted a prosecution submission that a period of actual custody was required. The applicant challenges that conclusion, and submits that the sentence should have been immediately suspended.

Circumstances of the offence

[38] Shortly before 6.00 pm on 5 June 2012 the applicant was driving a prime mover towing a tanker north along Ipswich-Boonah Road. He was intending to turn right

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29 *R v Price* [2005] QCA 52 ("***Price***"), at p 5.

30 *R v Wilde; ex parte A-G (Qld)* (2002) 135 A Crim R 538; [2002] QCA 501 ("***Wilde***").

31 *R v Maher* [2012] QCA 7, at [43].

into Beaudesert-Boonah Road. The road he was on curved near the intersection to the left from the applicant's viewpoint, so that the maximum distance that it was possible for drivers to see each other was 177 metres. Drivers travelling south on the Ipswich-Boonah Road could turn into the Beaudesert-Boonah Road using a slip lane.

[39] The applicant saw two vehicles coming towards him and mistakenly thought that they were going to use the slip lane. He turned his vehicle into the intersection. The victim of his mistake had little opportunity to brake or avoid the collision. She had only a brief time to react and only applied her brakes momentarily before the collision. Her car collided with the front of the truck. She suffered severe injuries and her passenger broke her arm. The applicant went to render assistance, but other people on the scene saw that he was in shock and about to fall over, so told him to go back to his truck. He spoke to police at the scene and explained what had happened.

[40] The roadside interview was not in evidence upon the sentence. The prosecutor's recollection of it was that the applicant told police that he thought the approaching cars had their indicators on and that was why be believed them to be in the slip lane. But there was no further reference at the sentencing hearing to the applicant's belief about the indicators.

[41] Clearly the applicant believed that the approaching car was going to exit the highway on the slip lane. Given the circumstances which I will further describe, he could not have had a different belief otherwise an accident with the vehicle travelling south was inevitable. His action in turning into the path of the ongoing vehicle is only explicable on the basis that he believed it was going to exit via the slip lane.

[42] Important issues are how he came to make that serious mistake, and the time within which the relevant conduct occurred.

[43] The collision happened on a curved road which is depicted in a plan and in photographs that became exhibits. The slip lane commences about 80 metres north of the intersection. Because both vehicles were travelling on a curved section of the road, the applicant would not have had a direct view up the road. As he approached the intersection he would have had to make a judgment about whether the other vehicle (and any vehicle following it) was travelling on an arch aligned with the single lane of the southbound road or a slightly different arch in line with slip lane.

[44] In mistakenly thinking that the other vehicles were taking the exit lane the applicant was inattentive as to their precise direction of travel. The prosecutor upon sentence submitted that the applicant entered the intersection "without keeping a proper lookout as to their path".

[45] The speed limit on this part of the highway was 100 kph. The approaching car was estimated by another driver to be travelling at 90 kph. The applicant would have slowed to between 5 and 15 kph to take the corner. On this basis, just before the truck executed a turn the vehicles would have been approaching each other at about 100 kph or about 28 metres per second. The driver of a stationary vehicle intending to turn right at the intersection might first see a vehicle coming in the opposite direction when it was 177 metres away. At a rate of 100 kph a distance of 177 metres closes in about six seconds.

[46] If the applicant was travelling faster than 10 kph before reaching the intersection and the oncoming car was able to be seen from 177 metres away at that point then the closing time would have been less than six seconds. The submissions before the judge proceeded on the basis that the maximum distance that the applicant could have seen the approaching car was 177 metres and the time to cover that distance was in the order of six seconds. In sentencing the applicant the judge remarked that he was about 170 metres away from the cars when he noticed them. After the sentence was passed the prosecutor pointed out that the prosecution could not say that the car entered the applicant's view at 177 metres distance or that he was watching it for the entire time. The judge said he would correct his remarks to say "they were more than 100 metres away" when the applicant noticed the approaching cars.

[47] There was no precise evidence on this point, but a reasonable conclusion is that the applicant could have seen the approaching cars from a distance of more than 100 metres away and that there is no reason to suppose that he did not do so. If he saw them as far away as 177 metres then there was a period of at most six seconds before the collision to assess matters.

[48] Adopting a maximum period of six seconds, one cannot say when during that six second period the applicant made the mistake of thinking that the cars were going to exit on the slip lane; and how long he had to realise his mistake.

[49] Had he been more attentive he would have realised his mistake. This would have happened some time after it became apparent that the approaching car was not exiting via the slip lane. The slip lane is marked by an unbroken line and that was said to be about 80 metres from the intersection. Assuming a closing speed of 100 kph, 80 metres equates to about 2.8 seconds.

The consequences of the accident

[50] The driver of the oncoming car had only a brief time to react and only applied her brakes momentarily before the collision. She received multiple injuries including head injuries which required emergency surgery. She had a lengthy period of recovery and rehabilitation. She was in hospital for three months, and upon her discharge her family cared for her. She has trouble remembering certain things. She was not able to work for a period, but returned to employment and driving. She was almost 18 at the time of the accident, and has not been able to resume her sport of netball due to her injuries.

[51] Her passenger, with whom she was returning after a netball game at the time of the accident, suffered a broken arm. The accident affected her emotionally and she saw a counsellor regularly.

The applicant's circumstances

[52] The applicant was aged 49 at the time of his offence, and is now 50. He has driven heavy vehicles for a living for 27 years and, until he lost his licence as a result of this offence, drove about 200,000 kilometres a year. For someone who drives such distances it is unremarkable that he has some traffic infringements in his history. They include two infringements for having exceeded the speed limit by less than 13 kilometres an hour in early 2012. He committed other minor traffic infringements in 2004, 2007 and 2008. A traffic history of five infringements over a period of ten

years or more is unsurprising for someone who drives about 200,000 kilometres a year. The applicant has a minor criminal history in New South Wales, which was described by the prosecutor as "very short and very old". He had been in steady employment as a driver of heavy vehicles and was highly regarded by his employer. His licence was endorsed for carrying dangerous goods.

[53] At an early age he became aware of the consequences of dangerous driving, having as an eight year old been a passenger in a truck in which his then 12 year old brother was killed as a result of a collision.

[54] The applicant has two children from a former relationship and two children with his present wife. He and his wife have fostered children over the years.

[55] There is no suggestion that the applicant was speeding, affected by alcohol, drugs or fatigued at the time he drove into the intersection and caused his victim grievous bodily harm. He was distressed at the scene of the accident and offered to help, despite his own state of severe shock. He pleaded guilty and was remorseful. He served eight days' imprisonment in September 2013 before being granted bail.

Submissions at sentence

[56] The prosecutor who appeared on the sentence submitted for a sentence of between 18 months and two years' imprisonment and contended that a short period in actual custody was appropriate. His submissions relied on a number of authorities of dangerous driving causing death, but did not refer to a relevant case in this Court, *R v Proesser*[32] which involved a charge of dangerous operation of a motor vehicle causing grievous bodily harm. In that case a sentence of 18 months' imprisonment suspended after serving three months was found to be excessive and varied by ordering that the period of imprisonment be suspended immediately. The prosecutor acknowledged that in this matter, unlike others, there was not a prolonged period of dangerous driving.

[57] Counsel for the applicant upon sentence sought a wholly suspended sentence. After referring to the facts he submitted that one might categorise the dangerous driving as "either brief, short or momentary inattention, or a mistake"[33]. Reference was made to *R v Gruenert; ex parte A-G (Qld)* in which a misjudgement by the driver of a large truck in failing to keep a proper lookout was characterised as "momentary inattention", justifying a wholly suspended sentence in a case of dangerous driving causing death.[34] Cases in which drivers were required to serve an actual period of custody were distinguished on the grounds that they were in a different and more serious category because, for example the dangerous operation was protracted, death resulted or the driver had a bad driving history. Considerations of deterrence were said to not loom as large in a case of brief or momentary inattention as a case of prolonged conduct such as driving whilst fatigued, or dangerous driving by someone with a bad criminal or traffic history.

[58] In the course of submissions by defence counsel the judge, having had regard to the factors identified in *Proesser*, said that the case turned on whether the applicant's conduct could be categorised as "an apparently brief period of inattention when driving". The judge was taken to authorities in which "momentary inattention" was discussed.

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32 [2007] QCA 61.

33 AB 33 l 48 – AB 34 l 1.

34 *R v Gruenert; ex parte A-G (Qld)* [2005] QCA 154 ("*Gruenert*").

[59] In reply the prosecutor did not concede that this was a case of "momentary attention" but acknowledged that the distance of 177 metres would have been travelled in six to seven seconds, and did not contest the submission that during the brief period the applicant would not have been solely looking ahead, but would have looked in the direction in which he wished to travel to see if cars were approaching from the road terminating on his right.

The sentencing remarks

[60] After considering certain facts the trial judge stated:

> "As a professional driver of a very heavy vehicle you were under a special duty to exercise care when driving and to obey the traffic rules: see *R v Price* [2005] QCA 52 at p 4. In my view, you were plainly careless when you executed that turn and you breached that special duty. Contrary to Mr Wilson of counsel's submissions, I do not regard your conduct as momentary inattention. You had ample time to have seen that the complainant's approaching car was not turning left but going straight ahead. You should then have waited for it to pass."

[61] His Honour accepted that the applicant was extremely remorseful for what had happened and had gone to assist at the scene. His guilty plea obviated the need for a trial and for the driver and her passenger to give evidence about their terrible experience. Without discussing the authorities which had been cited to him, the judge said that he accepted the submission of the prosecutor that a penalty in the order of 18 months' imprisonment, including some actual custody, was appropriate.

[62] There is no challenge to the finding that the applicant was plainly careless as the driver of a heavy vehicle making the turn. If the applicant was in any doubt about the direction in which the cars were travelling he should have waited.

Did the judge err in concluding that the case was not one of momentary or brief inattention?

[63] In the passage that I have quoted from the sentencing remarks the judge misstated defence counsel's submission. The conduct was submitted to be a case of "brief, short or momentary inattention or mistake," not simply "momentary inattention", and during submissions the judge had identified a major consideration as whether the case was one of "brief or momentary inattention". Accordingly, the remarks that I have quoted should be understood as a rejection of the submission that this was a case of brief or momentary inattention.

[64] In rejecting that submission the judge makes no finding about the period of inattention, save for saying that the applicant had "ample time" to have seen that the approaching car was not turning left but was going straight ahead. It was not stated that the "ample time" was a few seconds or as many as six seconds.

[65] The judge did not adequately explain his reasons for rejecting the submission by reference to the facts or to cases in which the term "momentary inattention" has been considered by this Court. To fairly consider the applicant's complaint of error in the judge's rejection of his submission, it is necessary to address the facts and the authorities on this aspect.

Facts

[66] The judge proceeded on the basis that the applicant had the car "in full view for about six seconds before the collision". I leave aside the fact that after the sentence was passed the prosecutor corrected the judge and clarified that the prosecution could not say that the vehicle came into view when it was 177 metres away and that the applicant "was watching it for that entire time." The prosecution had not made such a contention. Ignoring brief periods when the applicant may have looked away at the road he proposed to enter, one might assume that he could have kept the approaching car under observation for up to six seconds.

[67] The critical point, however, was not necessarily when he first could have seen the car and, one might say, should have seen it if he was keeping a proper lookout, including looking to see if traffic was approaching from his right. In terms of timing, the critical point was when he made the mistake in thinking that the cars were heading in the direction of the slip lane or were travelling on the slip lane. If this misjudgement or failure to keep a proper lookout as to their path occurred when the first car was at the start of the slip lane, about 80 metres from the intersection, it occurred about three seconds before the collision.

[68] The six second period was relevant because it was the maximum amount of time the applicant might have kept the car under observation. Some time during this period he made the serious mistake of thinking the car was exiting via the slip lane. One cannot say precisely when that was. In the few remaining seconds after the mistake was made and before the collision he did not realise his mistake, possibly because he assumed that the cars were taking the slip lane and looked in the direction in which he intended to travel. That said, he could and should have kept the cars under his attention.

[69] The serious mistake that he made about the cars' direction of travel and his failure to keep a proper lookout occurred over a brief period. It was less than six seconds, and possibly as short as a few seconds.

The authorities

[70] In *R v Harris; ex parte A-G (Qld)* Thomas JA said:

> "In a case such as this it becomes very important to identify the level of seriousness of the actual driving of the offender." [35]

In that regard, sentencing judges and this Court have categorised cases and distinguished between cases of momentary or brief inattention and conduct committed over a prolonged period, such as driving whilst fatigued.[36] Also, the authorities distinguish between inattention or misjudgement and reckless driving, such as pursuing another driver in a dangerous way along a narrow carriageway as a means of venting frustration.[37]

[71] Momentary inattention is not a term of art. It is the term that has been applied to circumstances in which a driver has failed to keep a proper lookout over a short period of time.

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35 [1999] QCA 392 at [42].

36 *R v Maher* [2012] QCA 7.

37 *R v Iaria* [2008] QCA 396 at [10], [13].

[72] In *Gruenert* the driver of a truck overtook another vehicle and then veered back into the lane before his truck had fully passed the other vehicle. The following vehicle, which was towing a caravan, left the road and its driver was killed. The essence of the prosecution case was that the truck driver failed to keep a proper lookout when he was returning to the correct side of the road. This Court concluded that the learned sentencing judge was correct to characterise the truck driver's offence as one of "momentary inattention".[38]

[73] Keane JA (with whom Williams JA and Fryberg J agreed) reviewed authorities in cases of dangerous driving which causes death. The following was said to emerge from the authorities in such cases:

> "(a) a head sentence of 18 months imprisonment is at the bottom end of the range;
>
> (b) the considerations of deterrence, and of the gravity of the consequences involved in the offence, mean that it will be a rare case that does not attract a custodial term;
>
> (c) the imposition of a custodial sentence is not, however inevitable in every case; and
>
> (d) cases of 'momentary inattention' are among rare cases of dangerous driving which may attract a non-custodial sentence because, in such cases, the claims of the consideration of deterrence are less compelling."

This, of course, is not a case of dangerous driving causing death. The present relevance of *Gruenert* is its adoption of the term "momentary inattention" in circumstances in which a driver failed over a short period to keep a proper lookout when executing a dangerous manoeuvre.

Conclusion on first ground of appeal

[74] In this matter the applicant observed the car, mistakenly thought it was taking the slip lane and began to turn into the intersection within a matter of seconds. His mistake, due to inattention, in thinking that it was taking the slip lane must have occurred a few seconds before the collision. His failure to keep a proper lookout for the other car's path of travel occurred over a brief period.

[75] If the truck driver's failure in *Gruenert* in failing to keep a proper lookout whilst completing an overtaking manoeuvre was correctly characterised as "momentary inattention", then it is hard to see why the applicant's conduct should not be similarly characterised. This was a case of momentary or brief inattention about the direction in which another vehicle was travelling.

[76] To conclude that this was a case of momentary or brief inattention is not to devalue the seriousness of that conduct by a driver of a heavy vehicle executing a turn on a highway. It is the seriousness of the driving that is important in determining the appropriate sentence, and the applicant's conduct was very serious. However, the judge should have found that this was a case of momentary or brief inattention. The applicant has established the first ground of appeal.

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[38] [2005] QCA 154 at [17].

Other grounds

[77] The applicant does not press his second ground of appeal. The applicant next submits that the learned sentencing judge erred in finding that he must serve some period of actual custody. It is unnecessary to consider this ground at length because the judge's error in concluding that this was not a case of momentary or brief inattention requires the sentencing discretion to be re-exercised. However, for the reasons which follow, I conclude that if the judge had accepted that this was a case of brief or momentary inattention, it was open to him to impose some period of actual custody. So much was conceded during defence counsel's submissions to the judge, and the concession was rightly made. It also was open to the judge to not require a period of actual custody, as the prosecution correctly conceded upon the sentence.

[78] The judge's sentencing remarks should not be interpreted as meaning that he was bound to impose a period of actual custody. If he had expressed such a view, then he would have been in error. Fairly interpreted, the remarks were that a sentence of 18 months imprisonment, including some actual custody, was the most appropriate sentence in the circumstances. I do not interpret them as meaning that some actual custody was the only sentence that was open in the circumstances. The third ground of appeal fails.

[79] The fourth ground of appeal is that the sentence was manifestly excessive in all the circumstances. It was open to impose some period of actual custody, and so much was correctly conceded below. I would not regard such a sentence as manifestly excessive.

The most appropriate sentence in the circumstances

[80] The judge needed to consider a number of factors, as does this Court in re-exercising the sentencing discretion. One was the seriousness or quality of the actual driving. Another was it consequences. The personal circumstances of the applicant needed to be considered and compared with the circumstances of offenders in comparable cases. General principles of sentencing, including personal and general deterrence, must be applied in the circumstances. Comparable cases need to be considered, and the most comparable are *Gruenert*[39] and *R v Proesser*.[40]

Seriousness of the driving

[81] In sentencing in a case such as this it is very important to identify the level of seriousness of the actual driving of the offender.[41] The quality of the offender's driving is important.[42] As a result, cases of momentary or brief inattention are in a different category to cases of a more serious kind, such as:

(a) driving recklessly and dangerously over a sustained period to vent frustration;[43]

(b) dangerous driving whilst intoxicated; or

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39 [2005] QCA 154.
40 [2007] QCA 61.
41 *R v Harris; ex parte A-G (Qld)* [1999] QCA 392.
42 *R v Damrow* [2009] QCA 245 at [18]; *R v Maher* [2012] QCA 7 at [35].
43 *R v Iaria* [2008] QCA 396 at [10]; [21].

(c) driving dangerously "by prolonged inattention, whether resulting from fatigue, distraction from passengers or some other reason".[44]

A "continuing serious failure to take proper care when driving a motor vehicle" which amounts to criminal conduct resulting in death warrants a sentence "to reflect the community's disapprobation of this conduct", the fact that it takes a life and its effect on the deceased's family.[45] A continuing serious failure to take proper care which causes grievous bodily harm also warrants a sentence to reflect the community's disapprobation of such conduct.

[82] The use of a heavy vehicle imposes what has been described as a special duty on drivers.[46] This is because such a vehicle has the potential to cause more serious consequences if driven dangerously than a smaller vehicle. However, as *Gruenert* illustrates, a non-custodial sentence may be imposed in some cases of "momentary inattention" by a truck driver because, as Keane JA stated, in such cases, "the claims of the consideration of deterrence are less compelling".

[83] Although deterrence does not loom as large in cases of brief inattention "as in cases involving alcohol, speed, fatigue or a lengthy period of reckless driving, a deterrent sentence is still apposite as a salutary reminder to all who undertake the serious responsibility of driving a motor vehicle."[47]

Consequences

[84] The consequence of the offender's dangerous driving are obviously relevant. The gravity of ending the life of a fellow human being must be acknowledged.[48] For this reason, decisions of this Court proceed on the basis that "the death of a human being as a result of dangerous driving is so serious that a term of imprisonment of at least 18 months should be expected save in exceptional cases. Usually such a sentence will involve actual custody."[49]

Personal Circumstances

[85] The personal circumstances and antecedents of the offender are relevant. Accordingly, an offender with a bad traffic history and who in the past has displayed recklessness and disregard of road rules will be deserving of a more severe sentence than someone with an unremarkable or good driving history.[50] Considerations of personal deterrence will have greater weight in such a case, especially where the offence displays a similar recklessness and disregard of road rules to that previously displayed.

Comparable cases

[86] In *R v Price*[51] the driver of a very heavy vehicle failed to observe a give way sign and give way road markings and drove through an intersection at about 60 kph. His

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44 *R v Maher* [2012] QCA 7 at [43].
45 *R v Allen* [2012] QCA 259 at [17].
46 *R v Price* [2005] QCA 52.
47 *R v Allen* [2012] QCA 259 at [17].
48 *R v Harris; ex parte A-G (Qld)* [1999] QCA 392 at [10] per de Jersey CJ; *R v Damrow* [2009] QCA 245 at [19].
49 *R v Hart* [2008] QCA 199 at [21].
50 cf *R v Towers* [2009] QCA 159 at [7], [31].
51 [2005] QCA 52.

truck collided with a van, killing its driver and severely injuring a passenger who was hospitalised for six months. A sentence of two years imprisonment suspended after serving four months in a case which was said to involve "momentary inattention" was not manifestly excessive. The applicant's driving history in that case was more serious than the present applicant's, and the consequences of his dangerous driving were more serious: the death of one person and grievous bodily harm to another.

[87] The essential facts of *Grunert* already have been described. It involved a dangerous manoeuvre by a heavy truck whilst overtaking another vehicle on a highway. There was insufficient time to safely overtake and a car coming in the opposite direction had to brake to avoid a collision. The truck driver veered his prime mover and high trailer back into the lane and in doing so failed to keep a proper lookout for the car and caravan that he had overtaken. The car towing the caravan was forced off the road. Its driver was killed. The respondent, who had a good driving record, was convicted after a trial of dangerous operation of a motor vehicle causing death. He was sentenced to 18 months imprisonment, wholly suspended. An appeal by the Attorney-General was dismissed. The sentence of 18 months imprisonment was said to be at "the lower end of the range" and suspension in its entirety consistent with the approach reflected in earlier decisions. *Gruenert* is not authority for the proposition that a period of actual custody would not have been open in that case. Also the increase in 2007 in the maximum penalty for dangerous driving causing death from seven years to ten years (absent the circumstances of aggravation described in s 328A(4)) suggests that an 18 month sentence may not have been appropriate if the same events had occurred after the amendments were enacted.

[88] The seriousness of the dangerous driving in that case is similar to this one. A dangerous manoeuvre was executed by a heavy vehicle on a highway that endangered other road users and an accident occurred as a result of a failure to keep a proper lookout. The consequences of the dangerous driving in that case were more severe.

[89] The applicant in *R v Proesser* was driving at the speed limit of 70 kph towards an intersection. He was not familiar with the car he was driving and looked down to adjust the radio. When he looked up again he saw that the traffic lights had turned amber and that the car in front of him had stopped at the intersection. He attempted to avoid colliding with the rear of that vehicle and swerved into the left turning lane. He hit a pedestrian who suffered grievous bodily harm and spent four weeks in hospital. The case was correctly characterised as one of "momentary inattention, or a short period of inattention resulting in serious injury". The applicant in that case had some history of traffic infringements but his traffic record was unexceptional. He showed distress at the scene and was remorseful. He was sentenced to 18 months' imprisonment, suspended after having served three months. Jerrard JA (with whom Keane JA and Muir J agreed) stated that the applicant's apparently brief period of inattention when driving, generally good previous character and conduct and his distress at what he had done made the sentence of actual imprisonment in those circumstances an unnecessarily hard one. The sentence was varied by ordering that it be suspended immediately.

[90] The fact that a heavy vehicle was involved in this case is a point of distinction from *Proesser*. The driver of a car who performed the same manoeuvre as the applicant did in his truck, mistaking the lane in which an approaching vehicle was travelling, risked causing severe injuries to other road users. But a heavy vehicle carried the potential for more severe injuries than would arise from a collision between two cars of similar size in the same situation.

[91] The nature of the brief inattention in *Proesser* and in this case was different. Mr Proesser looked down to adjust a radio for an unstated but apparently brief time as he approached an intersection driving at the speed limit. But both *Proesser* and this matter are cases of momentary or brief inattention by a driver without a history of serious traffic infringements and who was distressed and remorseful for their actions. The consequences for their victims were broadly comparable: grievous bodily harm requiring a lengthy period in hospital.

[92] A number of the other cases were cited before the sentencing judge and in written submissions to this Court. It is unnecessary to refer to all of them. Some were cases of dangerous driving causing death or cases of dangerous driving causing death and grievous bodily harm. Few cases of dangerous driving causing grievous bodily harm were cited. One such case is, *R v Towers*[52] where the driver suddenly turned across a double white line and disobeyed a "No right turn" sign. His car collided with a motorcyclist, who sustained head and other injuries. The accident had a significant psychological impact on the victim. The applicant in that case had a criminal record (including a period of actual custody) and a bad criminal traffic history over a decade. It included 22 instances of exceeding the speed limit (usually by between 15 and 29 kph), nine of unlicensed driving and two of failing to stop at a red light. Three speeding offences occurred after the commission of the offence. His long traffic history was of significant consequence. The offence displayed a "similar recklessness and disregard of road rules."[53] This Court observed that had the applicant had no previous traffic or criminal history, "he might reasonably have anticipated a non-custodial sentence in the circumstances of this offence".[54] His extensive traffic history warranted the imposition of actual custody, and for a significant period. This Court imposed a sentence of 18 months imprisonment with a parole release date after serving six months imprisonment.

[93] The dangerous driving in *Towers* and this case have their differences. No heavy vehicle was involved in *Towers* and his risk-taking in illegally turning "without pausing to take stock of the circumstances before doing so" meant that he did not see the oncoming vehicle. The applicant in this case did not make an illegal turn in disregard of a traffic sign, but failed to keep a proper lookout for the position on the road of an approaching vehicle. Grievous bodily harm was caused by their respective conduct. The main point of distinction between the two cases is the antecedents and driving history of the offenders. Although Towers did not engage in a "deliberate or sustained course of action"[55] his bad history including the commission of traffic infringements after the dangerous driving offence required a period of actual custody.

Consideration

[94] The serious mistake which the applicant made as a result of his failure to keep a proper lookout for the path of the approaching cars warranted a period of imprisonment. The fact that he was driving a heavy vehicle increased the potential for harm. But any vehicle which made the turn which the applicant did in mistakenly thinking that the approaching car was exiting on the slip lane risked causing other road users death or grievous bodily harm.

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52 [2009] QCA 159.
53 [2009] QCA 159 at [31].
54 [2009] QCA 159 at [31].
55 [2009] QCA 159 at [30].

[95] The applicant's inattention occurred over a brief period of time. The period is similar to other cases which have been labelled cases of "momentary inattention". In conformity with *Gruenert* and authorities which have followed it in cases of dangerous driving causing death, "cases of 'momentary inattention' are among rare cases of dangerous driving which may attract a non-custodial sentence because, in such cases, the claims of the consideration of deterrence are less compelling."[56]

[96] This is not to say that a period of actual custody may not be appropriate in a case of dangerous driving causing grievous bodily harm arising from brief or momentary inattention. In *Towers* it was appropriate because of the offender's bad driving history and reckless disregard of road rules. In *Proesser* actual custody was not appropriate, and found to be manifestly excessive. This case, however, is in some respects more serious than *Proesser* and a sentence that required a short period of actual custody would not be manifestly excessive.

[97] The issue remains whether a period of actual custody is just and appropriate in all of the circumstances. The sentence of 18 months imprisonment, loss of his license for 12 months and consequential loss of his employment as a truck driver is a just punishment. Considerations of deterrence may be "less compelling" in cases of "momentary inattention" than in other more serious cases, but they remain a consideration.

[98] As for personal deterrence, there would be a strong case for a period of actual custody if the applicant had a bad driving history or had not learnt his lesson, for example, if after committing the offence in question he had committed traffic infringements involving a lack of care and attention or a dangerous manoeuvre.

[99] The extent to which requiring this applicant to serve a short period of actual custody would alter the driving habits of others, and thereby advance general deterrence is uncertain. As a general proposition a period of actual custody might be said to act as a deterrent even in cases of "momentary inattention". Still, general deterrence has less of a role to play in cases of momentary inattention than "in cases involving alcohol, speed, fatigue or a lengthy period of reckless driving".[57]

[100] The consequences of the applicant's conduct are a relevant consideration. His serious error had the potential to kill. The survival and rehabilitation of the young women in the car may involve some element of good fortune. The infliction of grievous bodily harm places this case in a less serious category than a case of dangerous driving causing death or grievous bodily harm from which a victim never recovers. The gravity of ending the life of a fellow human being usually requires a period of actual custody.

[101] The applicant is a person of good character, who supports his family. His serious error on 5 June 2012 occurred over a very short period. He has an unremarkable driving history for someone who drives 200,000 kilometres each year as a professional truck driver. His immediate reaction to his error was to help his victims, even though he was in no state to do so. He pleaded guilty and spared his victims the trauma of having to recount the events of 5 June 2012 at a trial. He has served a short period of imprisonment for this offence.

[102] Unlike a driver with a bad traffic history or who deliberately disobeys traffic signs, a period of actual custody is not required by way of personal deterrence.

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56 *R v Gruenert; ex parte A-G (Qld)* [2005] QCA 154 at [16].

57 *R v Allen* [2012] QCA 259 at [17]

[103] In all the circumstances, I do not consider that a period of actual custody is required in this case. As serious as the consequences were of the applicant's brief inattention and mistake in thinking that the car was exiting on the slip lane, the circumstances of his offending and the need for deterrence do not necessitate the imposition of a period of actual custody. The most appropriate sentence in the circumstances is one which wholly suspends the term of imprisonment.

[104] Whilst a requirement to serve a period of actual custody would be open as a matter of discretion, such a sentence is not necessary to justly punish the applicant or to act as a deterrent to him or others. A sentence of imprisonment of 18 months, the loss of his licence for 12 months and the consequent loss of his ability to work as a truck driver, is a just sentence in all the circumstances.

[105] I would make the following orders:

1. Application for leave to appeal against sentence granted.

2. Appeal against sentence allowed.

3. Sentence varied by ordering that the whole of the term of imprisonment be suspended forthwith.