SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nikora* [2014] QCA 192
PARTIES:	**R** **v** **NIKORA, Rikihana Kimiora Patara** (applicant)
FILE NO/S:	CA No 26 of 2014 DC No 324 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	12 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2014
JUDGES:	Fraser and Morrison JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant was convicted pursuant to s 328A(4) of the *Criminal Code* 1899 (Qld) of dangerous operation of a vehicle causing death of two persons while adversely affected by an intoxicating substance and speeding – where the applicant was sentenced to seven years imprisonment, with parole eligibility after two and a half years – where the applicant was almost 19 years old – where the applicant held a provisional licence subject to a condition that no alcohol was permitted in the blood when driving – where the applicant had been drinking at a New Year's Eve party – where the applicant reversed into another vehicle and was too drunk to provide his details – where the applicant was driving through a residential area at more than double the 60 kilometre per hour speed limit with two passengers for an extended period of time – where the applicant lost control of the vehicle and the vehicle rolled and crashed – where the two passengers were thrown from the vehicle and died at the scene – where an hour and a half after the accident the applicant's blood alcohol concentration was 0.171 per cent – where the applicant's only criminal history was a conviction

for wilful damage – where the applicant's traffic history contained no offences relating to speed or intoxication – where the deceased were the applicant's cousins and the applicant's extended family provided positive references – where the applicant was remorseful and had good prospects of rehabilitation – whether the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER – where the learned sentencing judge was incorrectly informed of the maximum penalty in two authorities – where the applicant contends his Honour's misapprehension as to the maximum penalty in those two authorities was an error entitling this Court to exercise its sentencing discretion afresh – whether the error caused the learned sentencing judge's sentencing discretion to miscarry

Criminal Code 1899 (Qld), s 328A(4)

Director of Public Prosecutions v Edwards [2012] VSCA 293, considered
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
R v Armstrong [2007] QCA 146, considered
R v Blanch [2008] QCA 253, considered
R v CAN [2009] QCA 59, considered
R v Evans [2005] QCA 455, considered
R v Frost; ex parte A-G (2004) 149 A Crim R 151; [2004] QCA 309, considered
R v Gray [2005] QCA 280, considered
R v Johnson [2011] QCA 78, considered
R v Pham (2009) 197 A Crim R 246; [2009] QCA 242, cited
R v Ross [2009] QCA 7, considered
R v Sanderson [1998] QCA 237, considered
R v Sheedy; ex parte A-G (Qld) [2007] QCA 183, considered
R v Vessey; ex parte A-G (1996) 86 A Crim R 290; [1996] QCA 11, cited

COUNSEL: T A Ryan for the applicant
D A Holliday for the respondent

SOLICITORS: Fisher Dore for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the order proposed by his Honour.

[2] **MORRISON JA:** This is an application for leave to appeal against a sentence imposed on 17 January 2014. That sentence was in respect of a conviction recorded on 21 November 2013, on the applicant's plea of guilty. The charge was that, contrary to s 328A(4) of the *Criminal Code* 1899 (Qld), the applicant dangerously operated a vehicle causing the death of two persons, and that at the time the

applicant was: adversely affected by an intoxicating substance, namely alcohol, with a concentration of alcohol in his blood exceeding 150 mg of alcohol per 100 ml of blood; and excessively speeding. For this, the applicant was sentenced to seven years imprisonment, with parole eligibility after two and a half years.

The applicant's circumstances

[3] The offence occurred on 1 January 2013 and the applicant was born on 26 January 1994. He was therefore 18 turning 19 years old at the time of the offence, and almost 20 at the time of sentence.

[4] The applicant was born in New Zealand but moved to Australia when he was about 14 years old. He had completed high school and was in employment.

Circumstances of the offence

[5] On 31 December 2012 the applicant and his two cousins attended a New Year's Eve party at an address in Ipswich. The applicant was driving his own four door sedan. He had a provisional licence, a condition of which was that he not drink alcohol at all if he were to drive.

[6] The two people killed in the incident were the applicant's cousins (one 28 and the other 17), who were visiting from New Zealand. The New Year's Eve celebration had been planned with family members, some of whom had come from New Zealand. On that day the applicant's grandmother had suffered a stroke and was taken to hospital. Only a limited number of people were permitted to visit the grandmother in hospital, and the applicant was excluded from that number, which caused him some anguish.

[7] At some time between 1.00 am and 2.00 am a taxi was called and a number of people at the party left. The applicant and his two cousins remained. Those who left in the taxi had a conversation about confiscating the applicant's car keys, because he had been drinking.

[8] At about 1.30 am in the morning the applicant approached a Mr Sharman, to admit that he (the applicant) had reversed into his vehicle. The applicant was apologetic and offered to provide his details so that he could pay for the damage. When Mr Sharman obtained a pen and paper for the applicant to write his own details, the applicant was unable to and said: "I'm sorry, I am too drunk to write my phone number".[1] The applicant was described at that time as giggling and unsteady on his feet.

[9] At about 4.30 am a resident on the corner of Coolibah and Glebe Roads, at Silkstone, heard the applicant's vehicle coming up the hill of Glebe Road. The vehicle's engine was revving loudly and went past that resident's house at what he described as "at least twice the legal speed limit of 60 km/h".[2]

[10] At approximately 4.40 am another person was driving along South Station Road, at the intersection of that road and Glebe Road. That driver waited at a red light at the intersection and, when it had turned green in his favour, paused because he was talking to his passenger. At that time the applicant's vehicle passed through the

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1 AB 37.
2 AB 37.

intersection, against the red light. The applicant's vehicle was described as travelling in excess of 100 kilometres per hour.

[11] At approximately 4.45 am another witness saw a cloud of dust on the roundabout at the intersection of Glebe Road and Cole Street. Some five seconds later that witness heard a loud bang, upon driving up to investigate, was told by another resident that there had been a car accident.

[12] At about 4.45 am the owner of 141 Glebe Road ("**Ms O'Doherty**") was awakened by a loud bang. She went outside and saw the applicant's overturned sedan in her yard. The applicant was still seated in the driver's seat and he was conscious and able to tell Ms O'Doherty his age.

[13] Ms O'Doherty walked to the fence line of the neighbouring property where she discovered one of the deceased. His body was partially covered by a wheel strut which had come off the applicant's vehicle. She then discovered the body of the other deceased, under a tree in the yard of the neighbouring house.

[14] O'Doherty returned to the vehicle and assisted the applicant to crawl out. Police and ambulance arrived a short time later and when a police officer spoke to the applicant, the applicant stated he could not remember how many people were in the car "because he was drunk and shouldn't have been driving".[3] He told the officer that it was his fault.

[15] The applicant was taken to the Princess Alexandra Hospital and treated for his injuries.[4] At about 6.15 am a blood specimen was taken, and tests revealed that the concentration of alcohol in the applicant's blood was 0.171 per cent.

[16] A police forensic examination of the scene determined that as the applicant's vehicle approached the intersection of Glebe Road and Cole Street, it commenced braking heavily. Prior to the brakes being applied, it was estimated that the applicant's vehicle was travelling at a minimum speed of between 127 to 132 kilometres per hour. The vehicle was driven over the top of the roundabout at Glebe Road and Cole Street, and continued in an east bound direction on Glebe Road before it began to yaw, rotating in a clockwise direction.

[17] The vehicle crossed the painted centre line, slid into the westbound side of Glebe Road, and then partially crossed on to the footpath on the south west corner of the intersection of Glebe Road and Thompson Street. The vehicle then slid across that intersection, before sliding across the concrete footpath and onto the lawn of 139 Glebe Road (on the corner of the intersection). At that point the vehicle dug into the grass surface, and rolled over, travelling through a fence and colliding with a tree in the yard of 139 Glebe Road. The police forensic examination determined that both deceased passengers were probably ejected from the vehicle when it commenced rolling.

[18] The vehicle impacted with the roof guttering of the dwelling at 139A Glebe Road, before continuing through another fence and landing in the driveway of 141 Glebe Road in an upside down position. The vehicle slid for a number of metres before coming to a stop after impacting and damaging a supporting stump under the house at 141 Glebe Road. The forensic examination determined that the vehicle had

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3 AB 38.

4 General bruising on the shoulder and leg areas.

travelled an estimated 172 metres from the intersection of Glebe and Cole Road to its final resting place.

[19] The applicant's vehicle sustained extensive impact damage to almost the entirety of the vehicle. The left front wheel and suspension was torn from the vehicle and was scattered through the two yards.

[20] At the time of the offence, the weather was warm, fine and clear, and visibility was good. The road surface was bitumen, and was in good order and condition. Tests on the vehicle showed that it was in satisfactory mechanical condition.

The sentence imposed and approach of the sentencing judge

[21] The sentence imposed was seven years imprisonment, with a parole eligibility date set after having served 28 months, namely 17 May 2016. In addition the applicant was disqualified absolutely from holding or obtaining a driver's licence.

[22] The learned sentencing judge weighed the following matters in coming to the sentence:

(a) the fact that the applicant was 18 and would turn 19 some three weeks after the offence;

(b) the applicant was a P plate driver, and knew of the restriction on having alcohol in his blood when driving;

(c) the circumstances surrounding the applicant's drinking on the night, including that it was a New Year's Eve party, but also that the applicant's grandmother had suffered a stroke that day, and he had been denied the opportunity to visit her in hospital;

(d) the applicant was very remorseful and had insight into his behaviour; outward demonstrations of those matters were given by the fact that the applicant had expressed apologies to the family of his cousins, and had returned to New Zealand for his cousin's grave headstone unveiling ceremony;

(e) the material placed before his Honour, which included letters of support from the widow of one of the cousins killed in the accident, that cousin's parents, the applicant's parents, other friends and relations, and an employer;[5]

(f) the applicant had a minor criminal history for one offence of wilful damage in 2011, and a minor traffic history;

(g) the applicant's guilty plea;

(h) a review of comparable cases including *R v Sanderson*,[6] *R v Frost; ex parte A-G*,[7] *R v Ross*,[8] *R v CAN*,[9] and *R v Armstrong*;[10]

(i) the applicant's prospects of rehabilitation.[11]

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5 AB 42-54.
6 *R v Sanderson* [1998] QCA 237 ("***Sanderson***").
7 *R v Frost; ex parte A-G* [2004] QCA 309 ("***Frost***").
8 *R v Ross* [2009] QCA 7 ("***Ross***").
9 *R v CAN* [2009] QCA 59 ("***CAN***").
10 *R v Armstrong* [2007] QCA 146 ("***Armstrong***").
11 All of these factors are mentioned at in the Reasons: AB 30-31.

[23] The learned sentencing judge described the events, drawn from the agreed schedule of facts,[12] and then described the circumstances in this way:

> "You cannot explain why you drank and drove on the morning concerned. Whilst this is not one of those cases where the offender departed the scene after the accident or tried to blame others for the tragic events, the circumstances are very grave. You caused the death of two human beings."[13]

[24] Finally, in imposing the sentence, his Honour had regard to the fact that the maximum penalty for the offence was 14 years imprisonment which, "indicates the appropriate seriousness with which Parliament regards offences of this nature".[14]

The grounds of appeal

[25] Two grounds of appeal were relied upon. The first was that the sentence was manifestly excessive in all the circumstances. The second[15] was that the exercise of the learned sentencing judge's discretion miscarried by his Honour's misapprehension as to the maximum applicable penalty in the decisions of *Sanderson* and *Frost*, namely that the maximum penalty was 10 years, whereas it was, in fact, 14 years.

[26] As developed, the first ground contended that the learned sentencing judge had given insufficient weight to the applicant's youth and prospects of rehabilitation, and that a review of comparable decisions supported the proposition that a sentence of seven years was manifestly excessive.

[27] The second ground contended that his Honour's misapprehension as to the maximum penalty in *Sanderson* and *Frost* affected the penalty imposed on the applicant, and that was an error entitling this Court to exercise its sentencing discretion afresh. Then, based on *R v Johnson*[16] the appropriate sentence was no greater than six years imprisonment with a parole eligibility date fixed after 20 months served.

Was the sentence manifestly excessive?

[28] In order to address this question, not least by reference to the contended comparable cases, it is necessary to properly characterise the particular conduct the subject of the offence. The features are:

(a) a young driver, three weeks short of his nineteenth birthday;

(b) the driver held a provisional licence subject to a condition that no alcohol was permitted in the blood when driving; that limitation was known to the driver;

(c) the driver consumed alcohol to the point of appearing to be "tipsy" and where others considered confiscating his keys;

(d) by 1.30 am the driver considered himself to be too drunk to write his own phone number, and was giggling and unsteady on his feet; this

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12 AB 36-40.
13 AB 31.
14 AB 31.
15 Added by leave at the hearing.
16 *R v Johnson* [2011] QCA 78 ("***Johnson***").

occurred when it was apparent that he had reversed into another person's vehicle;

(e) about 4.30 am the driver, with two passengers, drove through a residential area at more than double the speed limit of 60 kilometres per hour;

(f) 10 minutes later the driver ran a red light at an intersection, at a speed in excess of 100 kilometres per hour;

(g) as the driver approached a particular intersection, he commenced braking heavily, to slow down from a speed of, at a minimum, between 127 and 132 kilometres per hour; he drove over the top of the roundabout, on to the wrong side of the road, and then on to the footpath in the vicinity of the next intersection; the vehicle slid across the intersection, across the footpath, and into the yard of a house on the corner; at that point the vehicle started to roll, crashing through a fence and colliding with a tree, at about which time both passengers were thrown from the vehicle and killed; the vehicle impacted on the roof guttering of the next house, crashed through another fence and ended up upside down in the next house along;

(h) the driver travelled 172 metres from the intersection where the heavy braking started, to where it came to rest;

(i) an hour and a half after the events the driver's blood alcohol concentration was 0.171 per cent;

(j) the driver entered an early plea of guilty and was very remorseful; he did not (at least at the sentence) lack insight into the offending conduct;

(k) the driver's only criminal history was for an offence of wilful damage, for which no conviction was recorded;

(l) the driver's traffic history contained no offences relating to speed or driving under the influence of alcohol, and was limited to two offences on the same day when the driver was under a learner's permit.[17]

[29] On the hearing of the appeal the applicant relied on *Sanderson*, *Frost*, *Ross*, *CAN* and *Armstrong*, all of which were referred to at first instance. In addition the applicant referred to *R v Sheedy; ex parte A-G (Qld)*[18], *R v Blanch*[19], *R v Gray*[20] and *R v Evans*.[21]

[30] *Sanderson* involved a 28 year old driver with a blood alcohol concentration of 0.245 per cent, who killed her two passengers when she lost control as a result of driving at "considerable speed" and collided with a power pole. Her sentence of six and a half years imprisonment, with a recommendation for parole after two years and nine months, was not disturbed on appeal. The driver had been drinking during that day, with the passengers. She had never held a Queensland driver's licence and

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17 Failing to display L plates and have a driver beside the learner.
18 *R v Sheedy; ex parte A-G (Qld)* [2007] QCA 183 ("***Sheedy***").
19 *R v Blanch* [2008] QCA 253 ("***Blanch***").
20 *R v Gray* [2005] QCA 280 ("***Gray***").
21 *R v Evans* [2005] QCA 455 ("***Evans***").

had a traffic history which included convictions for unlicensed driving and driving with a blood alcohol concentration of 0.224 per cent. She entered an early guilty plea and was remorseful. A psychologist's report suggested she had a fragile personality. The decision does not reveal that the driving was for any prolonged period or what speed was involved. She was on probation at the time, but in respect of offences of dishonesty, not offences relating to driving. In refusing to vary the sentence, de Jersey CJ described it as a:

> "bad case of dangerous driving causing death involving as it did the killing of two young people in a collision where the driver was unlicensed, on probation, driving at speed with a very high blood alcohol level and prior convictions for unlicensed driving and drink driving."[22]

[31] Whilst *Sanderson* involved an older driver with a worse traffic history and on probation, the case was not one involving prolonged driving at high speed through a residential area. Moreover, the court distinguished a case put forward as comparable,[23] on the basis that the driving in *Vessey* was of a more serious character. The driving in *Vessey* involved driving through a give way sign into an intersection and colliding with another car. That bears some similarity to the applicant's driving, which included running a red light and dangerously crossing two intersections. I do not consider that *Sanderson* demonstrates that the applicant's sentence was manifestly excessive; in fact, it supports the sentence imposed.

[32] *Frost* was an appeal by the Attorney-General against a sentence of nine years imprisonment with a recommendation for release after three and a half years. The driver was aged 24, and killed three pedestrians. He had consumed alcohol during the evening to the point where he was visibly affected, and when he was driving, he was weaving within the lanes going in his direction. A passenger in his vehicle pleaded to be let out, but the driver refused. The vehicle moved onto the road shoulder and hit three pedestrians. Despite being definitively informed by his passenger that he had hit the pedestrians, the driver did not stop, but drove on. He hit a guide barrier at a roundabout, but again continued to drive, at times on the wrong side of the road, and on one occasion into the path of another vehicle.

[33] His blood alcohol concentration three hours after the event was 0.198 per cent, and would have been at least 0.237 per cent at the time. He had a poor traffic record of offences including speeding, committed over about five years. After committing this particular offence, and while on bail, he committed further offences of speeding and driving under the influence of alcohol. His driving was over a prolonged period in which he drove dangerously, covering a distance of about 14 kilometres. However, he was not speeding during that time. The case was described as "plainly a very bad case of dangerous driving"[24] by a driver who "had a poor driving record and exhibited no remorse when he committed the offence, and instead callously continued on".[25] Although he exhibited no remorse at the time, evidence was presented to show that he experienced it later.

[34] The court reviewed a number of comparable authorities, including *Sanderson*. The court evidently took the view that *Frost's* was a worse case than *Sanderson*.[26]

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22 *Sanderson* at pp 4-5.
23 *R v Vessey; ex parte A-G* [1996] QCA 11.
24 *Frost* at [13].
25 *Frost* at [14].
26 *Frost* at [26].

[35] I do not consider that *Frost* assists on the issue whether the applicant's sentence was manifestly excessive. Indeed, the applicant accepts that the circumstances of *Frost* were far worse.[27]

[36] *Ross* involved a 25 year old man whose driving killed his two infant children. He pleaded guilty and was sentenced to eight years imprisonment with no recommendation for parole. He had a blood alcohol level of 0.163 per cent at the time of his driving, which involved doing burnouts, tailgating, fishtailing and driving at speed until he lost control. The vehicle then mounted a median strip, collided with trees, became airborne and rolled a number of times before coming to rest on its side. He was doing about 138 kilometres per hour in a 70 kilometre per hour zone. The driving took place over about one kilometre. After the accident he absconded and later lied about his participation. He had a traffic history which included four instances of unlicensed driving and two of drink driving. He also had a relatively short criminal history, which did not involve any imprisonment. The trial judge had described the case as being one of "grossly irresponsible driving", and a "bad case of dangerous driving by any measure".[28]

[37] On appeal the court emphasised that it was very important to acknowledge the gravity of the offence, described as "dangerous driving over a substantial distance in a suburban area at high speed, with a high blood alcohol concentration in the driver";[29] that it involved driving with infant passengers; the consequence, namely the death of those two infant children; the attempts to avoid detection; and the past traffic history and current disqualification from driving.[30] All of that called for a "strongly deterrent sentence".[31] Ultimately the court did not consider that the sentence was manifestly excessive, noting that the case was one not as severe as *Frost*.

[38] In the applicant's case his criminal and traffic history is much better than that in *Ross*, he is younger than Ross, and the applicant from the start has exhibited profound remorse. However, his driving was over a greater distance and time and was potentially of much greater danger to the public than was the driving in *Ross*. In my view, *Ross* supports the appropriateness of the sentence in the applicant's case.

[39] The applicant also relied on *CAN*. That involved a 35 year old man who was convicted of a number of offences, the most serious of which was dangerous operation of a vehicle causing death with a circumstance of aggravation, namely being under the influence of alcohol and cannabis. He was driving in good conditions with a passenger when he failed to negotiate a bend in the roadway. As a result the vehicle mounted the kerb, repeatedly gouging the concrete kerbing and sliding for about 80 metres, before hitting a power pole. The passenger was killed. The driver was apprehended 300 metres from the scene, trying to get a lift to the hospital. He denied he was the driver. He had a blood alcohol reading of 0.154 per cent and cannabis in his bloodstream. The offence was committed while he was on bail for other offences.

[40] He pleaded guilty and was sentenced to seven years imprisonment with no parole eligibility date. However, at the same time he was convicted of 10 other offences, including dangerous operation of a motor vehicle while adversely affected by an

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27 Applicant's Outline of Submissions, filed 19 May 2014, para 12.3.
28 *Ross* at p 4.
29 *Ross* at p 7.
30 *Ross* at p 7.
31 *Ross* at p 7.

intoxicating substance, assaults, wilful damage, motor vehicle offences (including driving over the general limit and being unlicensed), possession of a dangerous drug, possession of a knife and breaches of the *Bail Act*. The circumstances of the other charges do not presently matter, but they fit with a pattern revealed by the past criminal record in *CAN*. That showed persistent offending, including drug related offences, assaults, driving offences, stealing, destruction of property, failing to appear and obscene language. These convictions span the period 1987 to 2007 and occurred in New South Wales and Queensland. Some of his offending, including the charge of dangerous driving causing death, had to be seen in the light of the expert evidence as to his mental condition. In 1995 he had suffered a severe head injury which left him with frontal lobe syndrome and poor impulse control. By the time he suffered that injury he already had a significant problem with alcohol abuse and was a user of cannabis. His injuries meant that he was impaired in terms of dealing with impulses, and was prone to rapid shifts in mood and behaviour in a dangerous manner, both with regard to himself and others.

[41] As the applicant acknowledges, the personal circumstances in *CAN* are far removed from those in this case. That, together with circumstances of the driving and the fact that it only caused one death, to distinguish *CAN*, and make it unhelpful in terms of this application. Further to that, though, was the fact that the main complaint in *CAN* was not in relation to the head sentence, but in relation to the parole eligibility date.[32] Because of the sequence of offences for which he was convicted, and the difficult balancing exercise on sentencing, between the charge of dangerous driving causing death and all of the other charges, *CAN* is distinguishable and therefore not useful in this case.

[42] The applicant also relied upon *Armstrong*. That involved a plea of guilty to the offence of dangerous operation of a motor vehicle causing death whilst adversely affected by an intoxicating substance. The driver was sentenced to five years imprisonment, to be suspended after two years and two months. He was 28 when the offence was committed and 31 at the date of sentence. He had a previous history which included convictions for grievous bodily harm resulting in a sentence of six months imprisonment (to be served by way of an intensive correction order), breach of the intensive correction order, obtaining payments not payable, two occasions of unlicensed driving, driving with a blood alcohol of 0.117 per cent and unlicensed driving (resulting in a disqualification), and another occasion of disqualified driving, resulting in an absolute disqualification. As a consequence he was, again, driving whilst disqualified when the incident happened.

[43] The circumstances were that the driver and his friend were at a party, at about midnight his friend wanted to get some cigarettes, and a debate ensued about who should drive, each being intoxicated. He did so, driving a couple of kilometres to a place where cigarettes were purchased. At about 3.15 am he was driving back, doing 82 kilometres per hour in a suburban 60 kilometre per hour zone, when he lost control on a bend, starting spinning and then rolled. The car was extensively damaged and the friend was critically injured, dying the next day. The driver stayed at the scene trying to lend assistance, thus demonstrating remorse. The plea was a timely one. Armstrong's blood alcohol content was calculated to be 0.209 per cent at the time of the offence.

[44] There was no contention on the appeal as to the head sentence. The only issue concerned whether the suspension of the sentence should be after 20 months rather

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32 *CAN* at [25].

than two years and two months. Ultimately this Court held that the period of suspension should be reduced to 20 months.

[45] Whilst *Armstrong* involved an older driver with a record worse than the applicant's, the driving was only over a short distance, the speed involved was nowhere near that of the applicant, and only one death was caused. That, combined with the fact that the appeal was only concerned with the period of suspension, makes *Armstrong* an unhelpful decision in terms of assessing the penalty imposed on the applicant.

[46] The applicant also referred to *Evans*, which involved a 33 year old driver who pleaded guilty and was sentenced to six years imprisonment with a recommendation for eligibility for release after two and a half years. She drove the vehicle (unregistered, uninsured and with a flat rear tyre) along suburban streets. She drove erratically down one street, crossed the gutter and mounted the footpath a number of times, narrowly missed a parked car and approached a group of pedestrians. One pedestrian was struck and killed. The driver travelled a further 124 metres before coming to a stop. The driving was described as "grossly irresponsible driving to say the least."[33]

[47] The driver had a blood alcohol concentration of 0.247 per cent. She had a traffic history which included a conviction for driving under the influence of liquor (0.067 per cent). She was the single mother of six children, aged between four and 13 years. Imprisonment did not mean that they would be left without care, "although it will be hard for mother and children inevitably".[34]

[48] The driver had demonstrated remorse and cooperated with the authorities. After a review of various decisions the court concluded that the sentence was not manifestly excessive.

[49] The driving in *Evans* was not of the same character as that of the applicant. Notwithstanding that it was along suburban streets, it did not, apparently, involve the prolonged driving at speed which was carried out by the applicant. Further, only one person was killed, whereas the applicant caused the death of both of his passengers. A further factor, absent from that of the applicant, is that in *Evans* the driver was the mother of six children who would suffer from her imprisonment. These matters distinguish *Evans* from the applicant's case and do not persuade me that *Evans* supports a conclusion that the applicant's sentence was manifestly excessive.

[50] The applicant relied on a number of cases which were decided when the maximum penalty for dangerous operation of a motor vehicle causing death was only 10 years. They are *Sheedy*, *Blanch*, and *Gray*.

[51] *Sheedy*, an Attorney-General's appeal, involved a 25 year old man who was sentenced to five and a half years imprisonment, with a parole eligibility recommendation after 18 months. He had an "unimpressive" criminal history, including convictions between 1995 and 2002 for a variety of property offences, drug offences, breaking and entering and stealing. None of those had resulted in a term of imprisonment.

[52] His traffic history was "even less impressive" and included convictions between 1997 and 2002 for unlicensed driving, being unaccompanied as a learner driver, driving whilst disqualified, and driving under the influence of liquor.[35]

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33 *Evans* at p 3.

34 *Evans* at p 3.

35 Two occasions where the blood alcohol concentration was very low, 0.028 per cent and 0.027 per cent, but at a time when he was a learner driver and therefore any alcohol in the blood was impermissible.

[53] The offence occurred when he was driving in heavy fog and on a wet surface through a busy residential area where the speed limit was 60 kilometres per hour. He failed to negotiate a roundabout, collided with the kerb, which caused his car to launch into the air across the roundabout and hit an oncoming vehicle. The driver of the oncoming vehicle died at the scene and her young daughter died later of head injuries.

[54] There was genuine remorse and an early guilty plea. Favourable work and character references were tendered and it was revealed that he was being treated for post-traumatic stress disorder and anxiety depression.

[55] The appeal succeeded but only in respect of adjusting the parole eligibility period, taking it to 22 months rather than 18 months. Reference was made to a number of contended comparable cases, none of which are relied upon by the applicant. *Sheedy* does not involve the prolonged and high speed driving demonstrated in the applicant's case, albeit that it was an older driver with a worse history. It was an Attorney-General's appeal, attempting to demonstrate that the five and half years (just over half of the then maximum) sentence was manifestly inadequate. The fact that that aspect of the appeal failed does not lend support to a conclusion that the applicant's sentence was manifestly excessive.

[56] In *Blanch* a 20 year old man drove his vehicle, with passengers, intending to refuel the vehicle. He became involved in a high speed car chase which resulted in him losing control and crashing into a concrete barrier. He and the driver of the other vehicle weaved in and out of the traffic at high speed for several minutes. Estimates of the speed were that the vehicle was travelling between 150 and 180 kilometres per hour. The front seat passenger died as a result of injuries, and the rear seat passenger suffered a ruptured spleen, broken jaw and broken ribs. The driver's blood alcohol concentration at the time was of the order of 0.092 per cent.

[57] The driver had no criminal history and a minor history of traffic offences. A psychologist report demonstrated the grief and remorse he suffered since the accident and the death of his best friend. Indeed, the parents of the deceased provided a reference, referring to the incident as a "tragic accident".[36] He was sentenced on his own plea of guilty, and sentenced to six years imprisonment with a parole eligibility date after serving two and a half years.

[58] Keane JA[37] said:

> "The applicant's Counsel was not able to point to any case where it has been said that the sentencing discretion for this serious offence does not extend to six years, even in the case of a youthful offender with a good record. The simple but tragic fact is that the applicant's offence has caused the loss of a human life by deliberate acts of wanton recklessness.
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> In my respectful opinion, his Honour was right to refuse to regard the death of Mr Tierney as merely a tragic accident. To accept such a description as appropriate is to go a long way towards accepting that the community cannot do anything about the carnage on our roads which is the consequence of deliberately dangerous behaviour by young men."[38]

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36 *Blanch* at [12].

37 With whom Mackenzie AJA and Douglas J agreed.

38 *Blanch* at [20]-[21].

[59] In the result this Court did not disturb the head sentence, but adjusted the parole eligibility date so that it represented one-third of the term of imprisonment. That was done to recognise, amongst other things, "the applicant's youth, his deep and genuine remorse, and the unusually long delay attending his conviction and sentence".[39]

[60] Bearing in mind that the relevant maximum at the time of the offence in *Blanch* was 10 years, the decision does not provide any support for a conclusion that the applicant's sentence was manifestly excessive. In fact, the contrary is the case. That is especially so given the following statement by the Keane JA:

> "While a sentencing court must bear in mind the youthfulness of an offender as an important consideration in mitigation of sentence, the strong need for deterrence in cases of this kind is not lessened by the circumstance that the offender is young. The very nature of this offence is such that it is usually committed by young men who, by reason of the excessive self-confidence of immature youth, are recklessly indifferent to their own safety and the safety of others on the road. It is to deter precisely this category of potential offender that condign punishment is imposed on offenders."[40]

[61] *Gray* involved a young offender, aged almost 18 when he committed the offence and 19 when he was sentenced. His driving caused the death of one girl and serious injuries to another. He was sentenced to four years imprisonment, to be suspended after 18 months. The circumstances were that he was driving a dual-cab utility, with passengers in the front and rear seats, and three girls in the tray of the utility. As he drove he started swerving on the road and "fishtailing". The front seat passenger and the three girls in the back all tried to make him adjust his driving. He lost control and the vehicle slid sideways, hitting some trees, and rolled. One girl in the back was killed instantly and another suffered very serious injuries to her abdomen and jaw. An hour after the accident the driver's blood alcohol concentration was 0.125 per cent. It would have been higher at the time of the accident.

[62] A psychiatric report was tendered demonstrating that the driver was suffering "protracted and abnormal grief" and describing his remorse as "manifestly profound".[41] The question for the court was whether sufficient allowance had been made for the driver's youth, previous good character and remorse. The court took the view that it was a case of "deliberate bad driving"[42] and that the sentence was not manifestly excessive.

[63] In my view the driving in *Gray* was demonstrably less serious than that of the applicant. Whilst deliberately bad, it lasted only a short time and did not involve the very high speeds and prolonged danger which the applicant's driving presented. Further, the applicant's blood alcohol concentration was significantly higher, and two people died as a result. As it seems to me, *Gray* is a less serious case than that of the applicant. It is therefore unhelpful in terms of a comparative case on the question of sentence.

[64] However, some of the things said by the court in *Gray* are apposite to the applicant:[43]

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39 *Blanch* at [24].

40 *Blanch* at [22], citing *R v Collier* [2003] QCA 314 and *R v Gray* [2005] QCA 280 at [15].

41 *Gray* at [10].

42 *Gray* at [15].

43 *Gray* at [12]-[13], per Williams JA, McPherson JA concurring.

> "[12] The Court is dealing with a young man with no previous convictions, and they are important considerations when it comes to determining the appropriateness of the sentence imposed on him. But equally it cannot be overlooked that causing the death of a fellow citizen is one of the most, if not the most, serious offence known in our society. Killing by grossly negligent conduct is, of course, significantly less serious than intentional killing, but the criminal law for centuries has recognised that the consequences of criminal conduct play a critical role in determining the appropriate sentence. For example, dangerous driving causing death must attract a more severe penalty than similar driving which fortunately does not have such a consequence. Further, it is not irrelevant here on the issue of sentence, that the applicant did not only cause the death of one person, but he caused very serious life-threatening injuries to another person who will suffer the consequences for the rest of her life.
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> [13] This was not simply a case of negligent driving. From the outset it is clear that the applicant knew that there were people in the tray of the utility who were in a very vulnerable position; knowing that, he was under a duty to drive even more carefully. Notwithstanding that, he deliberately drove in a dangerous manner by causing the vehicle to fishtail. He was then berated not only by the person beside him in the front of the vehicle, but he was reminded of the perilous situation in which the girls were placed by their banging on the cabin and calling out for him to drive safely. Notwithstanding all of that he continued to drive in a deliberately reckless manner which ultimately resulted in the death and serious injury."

[65] The applicant contends that the considerations of the applicant's youth, remorse and prospects of rehabilitation should outweigh considerations of the seriousness of the offence and the need for general deterrence. Unqualified acceptance of that contention as a general proposition cannot be given. Each case depends on its own facts. Where, as here, the offence is very serious and the need for general deterrence is high, those factors should be given greater weight than might otherwise be the case. Such an approach accords with what was said in *Blanch*,[44] and *Gray*.[45]

[66] In this respect a passage from the reasons of Warren CJ in *Director of Public Prosecutions v Edwards*[46] is apt. There a young man, 23 years old at the time of the offence and 24 years old at sentence, was sentenced on a charge of recklessly causing serious injury. He punched another man who fell to the ground, striking his head. The victim underwent urgent (and ongoing) surgery for a fractured skull and brain haemorrhaging, and remained in an induced coma for two weeks. His injuries were serious and ongoing, including a fractured neck and skull, and severe brain injury causing a degree of paralysis on one side of the body, deafness in one ear, loss of taste and impairment of smell. The offender had served 15 days in custody,

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44 *Blanch* at [22], see paragraph [60] above.

45 *Gray* at [12], see paragraph [64] above.

46 *Director of Public Prosecutions v Edwards* [2012] VSCA 293 at [124].

and was sentenced to a three year community correction order. In the course of examining the contended inadequacy of the sentence Warren CJ[47] had this to say:

> "Finally, the respondent submits that the sentencing judge rightly gave rehabilitation greater weight than deterrence and punishment due his youth. In my view, the respondent's relative youth cannot be the dominant factor in this case. As Batt JA explained in *DPP v Lawrence*,[48] with serious violent offences, 'the offender's youthfulness and rehabilitation, achieved and prospective, whilst not irrelevant in the instinctive synthesis which the sentencing judge must make, were of much less significance than they would have been with a less serious offence'.[49] Youth 'must be subjugated to other considerations' and 'take a "back seat" to specific and general deterrence where crimes of wanton and unprovoked viciousness … are involved'.[50] While Batt JA was referring to the offence of intentionally causing serious injury, the same principle applies, in my view, to serious instances of the offence of RCSI [recklessly causing serious injury]."[51]

[67] The applicant's overall contention is that insufficient weight must have been given to the applicant's youth and prospects of rehabilitation in arriving at the sentence. That contention is difficult to sustain given that those factors were expressly recognised by the learned sentencing judge[52] and he had conducted a review of the comparable cases proposed. The review, conducted above, of the comparable cases proposed by the applicant does not support the conclusion that the learned sentencing judge erred in exercising his discretion. In my view the sentence imposed cannot be demonstrated to be manifestly excessive.

Misapprehension as to the maximum penalty in *Sanderson* and *Frost*

[68] In the course of argument the prosecutor addressed the learned sentencing judge in respect of comparable cases. He referred to *Sanderson* and his Honour inquired whether the maximum penalty was then 14 years.[53] The response came from counsel for the applicant[54] that the maximum at the time of *Sanderson* was 10 years. The prosecutor agreed. Then the prosecutor referred to *Frost* and went through its facts. The learned sentencing judge made a comment attributing the maximum penalty at the time of *Frost* as being 10 years, and the prosecutor agreed. No correction was made by counsel for the applicant.[55]

[69] The contention is that the learned sentencing judge must have proceeded on the mistaken premise that the maximum penalty in respect of *Sanderson* and *Frost* was 10 years. Thus, it is said, there was an error and this Court could therefore exercise the sentencing discretion afresh.

[70] There is no doubt that the learned sentencing judge was wrongly informed that both *Sanderson* and *Frost* were decided at a time when the maximum applicable penalty

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47 Warren CJ was in the minority, Weinberg JA and Williams AJA determining the appeal on a different basis.
48 (2004) 10 VR 125.
49 Ibid [22] (Batt JA, Winneke P and Nettle JA agreeing).
50 Ibid.
51 [2012] VSCA 293 at [124].
52 AB 31.
53 AB 18.
54 Not the same counsel on the application before this Court.
55 AB 19.

was 10 years. That error was invited initially, in respect of *Sanderson*, by the applicant's then counsel,[56] but supported by the prosecutor. The misstatement by counsel on each side is puzzling, not simply because it was wrong, but because the decision in *Frost* expressly states to the contrary, both in respect of *Frost* and *Sanderson*.[57] Evidently that passage was not adverted to by either counsel.

[71] The transcript reveals that notwithstanding that the learned sentencing judge was given copies of the comparable authorities,[58] and no doubt read parts of them as they were being addressed, he moved to sentencing the applicant immediately upon completion of submissions. Given this, it is unclear whether his Honour had the time to peruse the authorities more thoroughly than the salient features referred to by counsel.

[72] However, even if the sentencing proceeded upon this error, the real question is whether that error has affected the sentencing discretion. In my view it cannot be so in respect of *Frost*, because that was put forward as a much more serious case of offending than that applicable to the applicant, the prosecutor referring to the fact that it was an Attorney-General's appeal, it involved three deaths rather than two, the driver had a poor traffic record and he failed to remain at the scene.[59] Some of those matters were also emphasised by counsel for the applicant.[60] In light of that, it is to my mind, doubtful that the learned sentencing judge placed any emphasis on *Frost*, apart from adverting to the fact that he had been referred to it.

[73] The same may not necessarily be the case with *Sanderson*. The learned sentencing judge specifically questioned what the maximum penalty was and said: "So Sanderson was six and a half years at the time when the maximum was 10".[61] Though counsel for the applicant had grounds for distinguishing *Sanderson* based on the offender being older, on probation, unlicensed, with a previous conviction for driving under the influence, and a more relevant criminal and traffic history, those comments were made at the same time as counsel reinforced the error, say: "Having said that, that was obviously also before the amendments …".[62]

[74] Notwithstanding those considerations, it is not clear to me how such an error can be said to necessarily result in an error in the exercise of the sentencing discretion. It has long been accepted that the process of sentencing does not follow a rigid process; rather, the exercise is one of intuitive synthesis, drawing a number of factors together, only one of which is what has been said in previous decisions.[63] Insofar as his Honour referred to those authorities it was in this way:

> "I have also considered the various Court of Appeal authorities to which reference was made by Mr Connolly the learned Crown Prosecutor and Mr Dore on your behalf; they are *R v Sanderson*, *R v Frost ex parte Attorney-General*, *R v Ross*, *R v CAN* and *R v Armstrong*. I've considered the facts and the judgments in each of those cases and the distinguishing features with respect to each of those cases."[64]

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56 Who repeated the submission at AB 24.

57 *Frost* at [25].

58 AB 17.

59 AB 18-19.

60 AB 25.

61 AB 18.

62 AB 24.

63 *Markarian v The Queen* (2005) 228 CLR 357, per Gleeson CJ, Gummow, Hayne and Callinan JJ at [27], [37]; per Kirby J at [133]; *R v Pham* [2009] QCA 242, at [7].

64 AB 31. Internal citations have been omitted.

[75] Without more being said to indicate that the error in respect of *Sanderson* manifested itself in his Honour's deliberations, I would not be prepared to draw the conclusion that the error has resulted in a miscarriage of the sentencing discretion.

Conclusion

[76] Bearing in mind what was said by Keane JA in *Blanch*[65] and by Williams JA in *Gray*[66] this is an occasion where the strong need for deterrence outweighs the aspects of youth and prospects of rehabilitation. This was a very serious example of dangerous driving causing two deaths. The applicant drove dangerously at speeds more than twice the speed limit, through a residential area, whilst significantly intoxicated as revealed by the blood alcohol concentration of 0.171 per cent. His driving included the failure to negotiate a roundabout, travelling on the wrong side of the road and across another intersection, and then crashing through the front yards of at least two houses. The driving was prolonged, involving excessive speed for over 15 minutes prior to the collision, and in circumstances where the applicant was only too well aware of his highly intoxicated state, having admitted himself some hours earlier that he was too intoxicated to even write his own contact details. That places this particular case towards the upper end of such offences.

[77] I would refuse the application.

[78] **PHILIPPIDES J**: I agree that the application should be refused for the reasons given by Morrison JA.

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65 Paragraph [60] above.

66 Paragraph [63] above.