SUPREME COURT OF QUEENSLAND

CITATION:	*R v Francis* [2014] QCA 258
PARTIES:	**R** **v** **FRANCIS, Russell Brett William** (appellant/applicant)
FILE NO/S:	CA No 208 of 2013 DC No 322 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	14 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2014
JUDGES:	Margaret McMurdo P and Muir JA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The application to adduce further evidence is refused.** **3. The application for leave to appeal against sentence is granted.** **4. The appeal against sentence is allowed.** **5. The sentence imposed at first instance is vacated and instead the appellant is sentenced to three and a half years imprisonment with parole eligibility on 8 November 2014.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was in a de facto relationship for 28 years – where the appellant and his partner separated – where the appellant's former partner began dating another man – where the appellant confronted the new boyfriend and threatened to "blow up" his mother's house – where the appellant and the new boyfriend had a physical altercation – where the car belonging to the new boyfriend's mother was set alight – where the appellant attended hospital soon after, but did not wait to see a doctor – where police arrested the appellant later that night – where the appellant suffered burns to his hands

and nose – where methanol based fuel was found in the appellant's car – where the appellant was convicted of arson of a motor vehicle – whether the appeal against conviction should be allowed

CRIMINAL LAW – EVIDENCE – GENERALLY – OTHER MATTERS – where the appellant applied to adduce further evidence – where the appellant sought to admit evidence by way of an affidavit of his former partner – where the evidence in the affidavit was not directly inconsistent with the evidence given by the appellant's former partner at trial – whether leave to adduce further evidence should be allowed

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted of arson of a motor vehicle – where the appellant was sentenced to four years imprisonment with parole eligibility after 18 months – where the appellant's counsel contended that the sentence was manifestly excessive for an arson of a vehicle rather than arson of a house – whether the sentence imposed was manifestly excessive

Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26, cited
Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, cited
R v Cramond [1999] QCA 11, cited
R v Gwilliams [2008] QCA 40, cited
R v Johnson [2005] QCA 265, cited
R v Johnson (2007) 173 A Crim R 94; [2007] QCA 249, cited
R v Matheson [2006] QCA 150, cited
R v NL [2011] QCA 113, cited
R v Porter [2014] QCA 14, cited
R v Silasack [2009] QCA 88, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: S M Ryan QC for the appellant (sentence application)
The appellant appeared on his own behalf (appeal against conviction)
D C Boyle for the respondent

SOLICITORS: Legal Aid Queensland for the appellant (sentence application)
The appellant appeared on his own behalf (appeal against conviction)
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant, Russell Francis, was convicted after a four day trial on 9 August 2013 of arson of a motor vehicle on 10 April 2010. He was sentenced to four years imprisonment with parole eligibility after 18 months on 8 February 2015. He has appealed against his conviction and applied for leave to

appeal against sentence. His sole ground of appeal against conviction was that the verdict is unreasonable or cannot be supported having regard to the evidence. In support of that ground he applied to adduce evidence not led at trial. He was self-represented in his appeal against conviction. He was legally represented in his application for leave to appeal against sentence on the ground that it is manifestly excessive.

The appeal against conviction

[2] A consideration of the sole ground of appeal against conviction requires this Court to determine whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of arson: *SKA v The Queen*.[1] It is therefore necessary to review the evidence at trial.

The evidence

[3] Charmaine Fagg gave the following evidence. She and the appellant had been in a relationship for 28 years and had four children but at the time of the alleged offence they were separated. She lived with two of their children, aged 13 and 16, in a unit in a gated community. Samuel Stephens was her boyfriend. The car destroyed in the alleged arson belonged to his mother, Ms Sinikka Stephens, who did not know the appellant. Mr Stephens ordinarily lived with his mother in her house which was a five to 10 minute drive from Ms Fagg's home. On the evening of 9 April 2010 Mr Stephens was staying at Ms Fagg's home. As they lay in bed they heard noises in the back yard and Mr Stephens went outside to investigate. He was gone for a while.

[4] Mr Stephens gave evidence that at this point he heard a car. He jogged to the front gate of the unit complex where Ms Fagg lived, went up to a blue Proton and said, "Oi, Russell, is that you?" The appellant said, "Fuck off mate, leave [my] family alone" and was struggling to trigger the sensor to open the gate to drive out of the complex. The appellant said, "Look mate, I was with her for 28 years. You're 29. Leave my family alone," adding "Mate, fuck off, I'm going to get you. I'm going to blow up you and your mum's house." He took a swing at Mr Stephens, reversed his car, triggered the sensor and drove off.

[5] Ms Fagg also gave evidence that later that evening she received a phone call from a private number. The speaker who sounded like the appellant said, "You'd better tell your boyfriend to go to his mother's. She might need him." She sent a warning text to Ms Stephens at 1.18 am. She went to a neighbour's house and Mr Stephens left. She was unsure how long he was gone; it could have been 20 minutes or longer.

[6] In cross-examination she agreed she had travelled in the appellant's car on a few occasions and had noticed that his driver's side window was faulty. She confirmed he had bought a model car for his son and she most recently saw this in the back of the appellant's car.

[7] Mr Stephens gave evidence that Ms Fagg received a text message from the appellant and as a result he decided to check on his mother. Ms Fagg went to a neighbour and he armed himself with a pool cue. He saw the appellant's car at the exit gate and ran up to it. The appellant drove at Mr Stephens but hit a garden embankment, smashing the

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1 (2011) 243 CLR 400; [2011] HCA 13, [12].

front of his car. Mr Stephens broke the car's back window with the pool cue, told the appellant he was "fucked" and delivered a flurry of punches to the appellant's face, only two of which connected. He drove to his mother's. When he arrived a fire engine and police vehicles were present and the fire was extinguished.

[8] In cross-examination, he maintained that Ms Fagg received a text message from the appellant. He also maintained that in the first altercation that night the appellant threatened to blow up the house of Mr Stephens' mother. He agreed he did not initially tell the police about that threat. He thought the appellant was intoxicated, "went off his head" but had then settled down. He returned to Ms Fagg's unit after the first altercation and went back to bed. They were woken up by a text message to the effect that Mr Stephens had better check on his mother. This worried them and they sent a text message to his mother to lock the door. As to the second altercation, he denied assaulting the appellant with the pool cue before the appellant drove his car at him.

[9] Ms Stephens' neighbour, Ms Amy Dennis, saw Ms Stephens' car alight in the car port sometime between 1.00 am and 2.00 am on the morning of 10 April 2010. There were flames around the boot area. Her flat mate called the fire brigade at 1.20 am and a fire truck arrived at 1.35 am. While Ms Dennis was standing in the street waiting for the fire brigade she saw a sedan car, dark in colour, either navy or black. As soon as it turned the corner and came into view, it did a u-turn and sped away.

[10] The expert evidence established that the fire probably started very soon before it was detected. It was possible but unlikely that it started as early as 15 minutes before it was detected, that is, between 12.45 am and shortly before 1.20 am. The fire damage was principally to the boot area near the left hand tail light. There was no significant overhead damage to the car port. An accelerant had been poured either into the crack at the boot opening or over that part of the car and then ignited.

[11] No detectable, ignitable liquid residues were present in swabs taken from the appellant's clothing, hands and feet. The material in the fuel bottles found in his car was methanol based. It was highly evaporative, volatile and absorbent on skin so it was unlikely that swabs from skin would disclose its presence.

[12] Later that night the appellant rang Ms Fagg and told her that, thanks to her boyfriend, the appellant was in hospital. The appellant attended the Robina hospital where he was first seen by a triage nurse at 2.37 am on 10 April but the evidence does not show how long he was at hospital beforehand. He did not wait to see a doctor. Hospital records showed that he did not answer to his name when called at 3.40 am. The evidence did not show when he left.

[13] The investigating police officers did not ascertain whether there was any CCTV recording that evening, either at the hospital capturing when the appellant arrived and left or of the altercations between Mr Stephens and the appellant at Ms Fagg's unit complex.

[14] The parties admitted that the following text messages were retrieved from the appellant's phone.

Number	Date and Time	Status	Folder	Type	Text
+61401396221	10/04/10 00:51:50 (GMT)	Read	Inbox	Incoming*	U fool
+61401396221	10/04/10 00:53:45 (GMT)	Read	Inbox	Incoming*	Cops on way to your ma and kims
+61401396221	10/04/10 00:1:08:43 (GMT)	Read	Inbox	Incoming*	Police lookn for u now
+61401396221	N/A	Sent	Sent	Outgoing$^{\nabla}$	Whoopie. Find me slut
0420361017	N/A	Sent	Sent	Outgoing	I need help. Can i come there
+61401396221	10/04/10 02:12:44 (GMT)	Read	Inbox	Incoming*	Cops r everywhere
+61401396221	N/A	Sent	Sent	Outgoing$^{\nabla}$	Yehc
+61401396221	10/04/10 02:13:47 (GMT)	Read	Inbox	Incoming	Grow the fuk up
+61401396221	N/A	Sent	Sent	Outgoing$^{\nabla}$	Im in hospital at robina. Your boy is going 4 assault with a deadly weapon
+61401396221	10/04/10 03:08:36 (GMT)	Read	Inbox	Incoming*	The police r recording how many times u ring to trace u

* Sent by Ms Fagg $^{\nabla}$ Received by Ms Fagg

[15] Forensic medical officer, Dr Anne Swain, examined the appellant on the afternoon of 10 April 2010 between 4.45 pm and 5.38 pm. She looked at photographs taken that day of the appellant's fingers and described the burns as fairly recent, within the last 24 hours. The photographs which were tendered[2] reflected the state of the burns when she examined them. They were still wet and the skin tag had not dried and shrivelled. This absence of any real sign of healing meant that the burns were less than 24 hours old. In cross-examination she agreed she did not have specific expertise in burns or in determining their age. She was, however, qualified to interpret the age of injuries having completed a Masters degree in Forensic Medicine. Principles of healing are essentially the same across all injuries. She agreed that people heal at different rates. The burn injuries could have been caused by the appellant picking up something hot between his index and middle fingers, for example, a pair of sunglasses with metal side rims that had been dropped in fire.

[16] Police arrested the appellant in his car later that night. He appeared intoxicated and had a blood alcohol level of 0.126. He told police he had smoked a couple of marijuana cones earlier in the evening. Police did not interview him until he was sober. He had burns to his hands and a half centimetre laceration on his nose between his eyebrows. The laceration was consistent with being received during his physical altercation with Mr Stephens.

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2 Ex 12.

[17] In his interview with police, he denied setting fire to Ms Stephens' car. He claimed he burned his hands in a bonfire several days earlier when he retrieved sunglasses which had fallen into the fire. He threw the sunglasses back into the fire as "they were buggered". He was a smoker and the bottles of "nitro" in the back of his car were for a model car he had bought for his son. He went to Ms Fagg's unit on only one occasion during the preceding night.

[18] The appellant did not give or call evidence. The defence case was that the timing of the records of phone calls and messages and the fire service's records did not support the prosecution case. The fire which destroyed the car must have started when the appellant was having an altercation with Mr Stephens at Ms Fagg's unit complex. There was not enough time for him to travel to Ms Stephens' home and to burn her car. The warning text was sent to Ms Stephens by Ms Fagg at 1.18 am. The burns on the appellant's hands did not assist the prosecution case as the appellant gave a credible explanation for them. Dr Swain was not infallible; she could be wrong. The jury would be left in reasonable doubt and should find him not guilty.

Conclusion on the appeal against conviction

[19] The appellant contended that the jury should not have accepted Mr Stephens' evidence; they should have accepted the version put to him in cross-examination. As the appellant told police in his record of interview, he went to Ms Fagg's unit on only one occasion on the night of the fire. Mr Stephens' account of the second altercation was implausible as the appellant's car window was faulty.

[20] The difficulty with that contention is that Mr Stephens denied the defence case put to him in cross-examination. He gave evidence that the appellant was at Ms Fagg's unit complex on two occasions and he maintained that account in cross-examination. There was no competing sworn evidence from the appellant. Mr Stephens' evidence was supported by Ms Fagg, who gave evidence that Mr Stephens left her unit twice that evening, first when they heard a noise and second after the appellant telephoned. Her evidence about the appellant's faulty car window did not mean the jury had to reject Mr Stephens' account of his two altercations with the appellant. The absence of any CCTV footage of the altercations is of no moment and does not assist the appellant. The jury were entitled to reject the appellant's account to police and to accept the evidence of Mr Stephens.

[21] The appellant questioned Dr Swain's expertise. While the doctor conceded she did not have specific expertise in burns, she explained that her training in general forensic medicine allowed her to give an expert opinion as to the age of the burns when she examined him. The jury were entitled to accept her evidence.

[22] The appellant emphasised Ms Dennis' evidence that she saw a navy or black car speeding off after the fire, while his car was a lighter blue. But even if the car Ms Dennis described was not the appellant's, it did not follow that the driver was the arsonist. This piece of evidence was not critical to the circumstantial case against the appellant and did not require the jury to be left in doubt about the prosecution case.

[23] It is true, as the appellant emphasised, that the phone records do not disclose any call or text from the appellant's mobile to Ms Fagg's phone preceding her text message to Ms Stephens at 1.18 am. Ms Fagg, however, was familiar with the appellant's voice after 28 years of marriage and said the caller sounded like the appellant. He may

have called from a phone other than his mobile, perhaps a public phone. The absence of a record of this phone call did not mean Ms Fagg and Mr Stephens were lying. Nor was it fatal to the prosecution case that Mr Stephens thought this was a text message rather than a phone call.

[24] There was no evidence, as the appellant emphasised, as to exactly when the appellant arrived at and left Robina hospital. He was first seen there at 2.37 am but had left by the time he was called for treatment at 3.40 am. This evidence is not inconsistent with him burning the car. Indeed, in so far as it suggests he was seeking help for recent burns to his hands after the arson attack, it supports the prosecution case.

[25] The appellant contended that the police should have obtained CCTV footage of when he arrived and left the hospital and of any altercations at Ms Fagg's unit complex. But even if such CCTV footage existed, the question for this Court is whether, on the evidence before the jury, it was open to them to be satisfied of the appellant's guilt beyond reasonable doubt. This contention does not assist the appellant.

[26] The appellant emphasised the circumstantial nature of the case against him. No traces of fuel were found on his body or clothing. The prosecution did not prove his guilt beyond reasonable doubt.

[27] The judge properly directed the jury as to how to consider circumstantial evidence.[3] The prosecution case against the appellant was circumstantial but very strong. It established that he was angry and had a motive for the arson: he was jealous of Mr Stephens' relationship with the appellant's estranged wife of 28 years, and sought to hurt Mr Stephens by damaging his mother's car. He made threats of that kind to Mr Stephens shortly before the fire. The appellant was in his car that evening in an area about five to 10 minutes drive from Ms Stephens' house so that he had the opportunity to commit the offence. Ms Fagg gave evidence that someone who sounded like the appellant phoned her to tell Mr Stephens to go to his mother's; she might need his help. Bottles of fuel of a kind which could have been used in the fire were in his car when he was apprehended by police. The fact that he had the bottles of the fuel in his car to use in his son's model car did not preclude him from using some of it to burn the car in a jealous rage. He had fresh burns on his hands when Dr Swain examined him on the afternoon following the fire and he sought hospital treatment of the burns within hours of the fire. The record of text messages from the appellant's phone commenced shortly before 1.00 am but this is not inconsistent with the prosecution case; rather, it tends to support it as the fire could have started as early as 12.45 am. Ms Fagg did not send the warning text message to Ms Stephens until 1.18 am. This suggests that the appellant committed the arson before phoning Ms Fagg and returning to her unit complex where the second altercation with Mr Stephens occurred.

[28] Despite his denials to police and the many matters raised by him in his outline of argument, there was ample evidence upon which the jury were entitled to be satisfied beyond reasonable doubt of his guilt. It is not surprising that the jury took less than one hour and 20 minutes, including lunch, to reach their guilty verdicts.

[29] After reviewing the whole of the evidence, I consider the jury were well entitled to be satisfied beyond reasonable doubt that the appellant was guilty of arson. As the sole ground of appeal is not made out, the appeal against conviction should be dismissed.

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[3] AB 173.

The application to adduce further evidence

[30] The appellant sought leave to adduce evidence in the appeal by way of an affidavit from Ms Fagg dated 22 October 2013 to the effect that on the night of 10 April 2010 Mr Stephens left Ms Fagg's unit at about 1.00 am for 30 to 45 minutes. That evidence is not directly inconsistent with her evidence at trial that Mr Stephens left her home after she received the phone call from someone who sounded like the appellant stating that Mr Stephens should go to his mother's; she might need him. The fire probably started before 1.20 am when the fire brigade was called and up to 15 minutes before it was first observed. Ms Fagg said it was "about" 1.00 am when Mr Stephens left. The term "about" is imprecise. She texted Ms Stephens at 1.18 am. It seems unlikely that Mr Stephens left earlier than 1.18 am and drove the five to 10 minutes to his mother's. The fire brigade and police were there and the fire was out when he arrived. The fire brigade arrived at 1.35 am. He must have arrived after 1.35 am. It seems that he must have left Ms Fagg's unit much closer to 1.30 am than 1.00 am. The appellant has not demonstrated that if this further evidence from Ms Fagg were led and considered together with the other evidence at trial, there was a significant or a real possibility that the jury would have acquitted him: see *Gallagher v The Queen*[4] and *Mickelberg v The Queen*.[5] His application to adduce further evidence should be refused.

The application for leave to appeal against sentence

The sentencing proceeding

[31] The appellant was 41 at the time of the offence and 45 at sentence. He had a limited criminal history which commenced only in 2010 when his marriage failed and he committed an offence of wilful damage. He was the respondent in a domestic violence order in favour of Ms Fagg. In February 2010 he was fined for breach of a bail condition. In September 2011, he was placed on a nine month good behaviour bond for breaching the domestic violence order on the night of the arson and fined and placed on an 18 month bond for the earlier wilful damage. The present offence was a breach of the domestic violence order but not of the good behaviour bond. On 4 January 2013 he was fined $1,500 without conviction for a number of drug offences committed on 5 July 2012, subsequent to and whilst on bail for the present offence. He was in pre-sentence custody for 181 days, about six months.

[32] The prosecutor emphasised the seriousness of the offence; the fire could have spread and jeopardised the safety of Ms Stephens and others. The appellant had demonstrated no remorse. The complainant's insurer paid her $11,200, the market value of the vehicle. Comparable cases did not suggest there was any marked difference between sentences for arson of a valuable car or for arson of a house. The prosecutor referred to *R v Cramond*[6] where a sentence of four years imprisonment was imposed.

[33] Defence counsel emphasised that the appellant had been in steady employment after leaving school at year 10 and completing a 12 month engineering and construction course. He had a workplace accident in 2003 which caused ongoing neck and back pain and periods off work. He was in a relationship with Ms Fagg for 28 years and

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4 (1986) 160 CLR 392, 392, 399, 407.
5 (1988) 167 CLR 259, 273, 275, 292.
6 [1999] QCA 11.

they had four children. As a result of this charge he has had only occasional contact with his two youngest children who reside with her. Their marriage ended when Ms Fagg commenced a relationship with Mr Stephens in February 2010. It is against that background that the appellant committed these and his other criminal offences in 2010. He was otherwise of good character. There had been delay in bringing the matter to trial. The original trial was adjourned because of inadequacies in the police investigation. A second trial was adjourned as police had wrongly claimed phone records were unavailable. Defence counsel asked the judge to take into account the mitigating features including the six month period (181 days) of pre-sentence custody which could not be declared as time served under the sentence by setting a parole eligibility release date earlier than the half way point in the sentence.

[34] In sentencing, the judge made the following observations. The appellant had set fire to Ms Stephens' car in the middle of the night whilst it was parked immediately outside her home. He targeted her because her son was in a relationship with his ex-wife. It was a calculated, malicious, vengeful, callous and very dangerous act when Ms Stephens was asleep in her home. The car was under a pergola connected to the house. The surrounding area was at risk of fuelling the fire back to the house. He told Mr Stephens that he was going to blow up his mother's house and he targeted the petrol tank of her car. He could well have succeeded in creating an explosion. He destroyed the car valued at about $11,000 and placed Ms Stephens' house and her safety at risk. The call to check on Mr Stephens' mother was probably made after the appellant lit the fire. The appellant showed no cooperation with the authorities or remorse. His judgment was probably impaired by alcohol and cannabis but that was no excuse. He took the breakdown of his lengthy marriage badly. All his criminal history had occurred in the context of that breakdown. There had been no relevant offending since his arrest.

[35] Her Honour considered the offence was serious and warranted a stern sentence to punish the appellant and to deter others. The sentencing range was well-defined. The appropriate sentence was four years imprisonment. Ordinarily the parole mark would be set at one half of that sentence, but taking into account the delay and that the six months spent in custody on remand for this and other matters could not be declared as time served, the parole date would be set after 18 months instead of the usual two years.

The parties' contentions in the appeal

[36] The appellant's counsel contended that the sentence was manifestly excessive for an arson of a vehicle rather than a house, taking into account his previous and subsequent good record, his time in custody, the delay and the circumstances of the offending. A sentence of no more than three or three and a half years imprisonment with parole eligibility after no more than 14 months should be substituted. This was supported by the sentences imposed in *R v Johnson*;[7] *R v Matheson*;[8] *R v Johnson*;[9] *R v Gwilliams*;[10] *R v Silasack*;[11] *R v NL*;[12] and *R v Porter*.[13]

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7 [2005] QCA 265.
8 [2006] QCA 150.
9 [2007] QCA 249.
10 [2008] QCA 40.
11 [2009] QCA 88.
12 [2011] QCA 113.
13 [2014] QCA 14.

[37] The respondent, like the prosecutor below, emphasised the serious aspects of the offending. Ms Stephens could have been injured or killed. General deterrence was important in sentencing for a revenge arson committed in a jealous rage arising from a relationship breakdown. The offence was a flagrant breach of a domestic violence order. The appellant was a mature man. A sentence in excess of three years imprisonment was warranted. The sentence was not manifestly excessive.

Conclusion on the sentence application

[38] The cases to which the appellant's counsel has referred the Court are not closely comparable to the present. They do support the conclusion that, generally speaking, a more serious penalty is imposed for arson of a house where significant damage is done and there is a real risk of personal injury or death, than for arson of an empty motor vehicle. The appropriate sentence, however, will turn on the facts and circumstances of each individual case.

[39] The judge was right to conclude that this was a serious case of arson of a motor vehicle. The car was positioned close to Ms Stephens' house under a pergola so that it was possible that the house in which Ms Stephens was asleep could have caught fire. The destroyed car was valued at $11,200. The appellant committed the offence when intoxicated and angry at the breakdown of his long term relationship in a desire to hurt Ms Fagg's new boyfriend, Mr Stephens, through his mother. Public denunciation of such conduct was an important sentencing principle as was the need to deter not only this appellant but all who would behave in such a violent and anti-social way following the breakdown of personal relationships. It was understandable that the appellant was in a troubled and emotional state at this difficult time in his life when his partner of 28 years and the mother of their four children had ended their relationship. But he was a mature man who should have had the self-control and maturity to seek help for his problems instead of resorting to alcohol and violence. His conduct was inexcusable and will inevitably impact negatively on his future relationship with his children. He did not have the mitigating benefit of remorse or cooperation with the authorities.

[40] The appellant had spent six months in custody which could not be declared as time served under the sentence. This means that the sentence imposed was effectively four and a half years imprisonment with parole eligibility after 18 months. Unusually, the judge set an early parole eligibility even though there was no guilty plea. This was to reflect two matters: the time spent in pre-sentence custody which could not be declared and the delay in bringing the matter to trial. The judge should also have taken the pre-sentence custody into account in calculating the head sentence. In light of the appellant's good history prior to the breakdown of his marriage in early 2010 and despite the serious aspects of this offending, the cases to which counsel have referred do not support an effective head sentence of four and a half year imprisonment in this case. The sentence is manifestly excessive.

[41] I would grant the application for leave to appeal, allow the appeal and re-sentence the appellant. The six months pre-sentence custody which could not be declared should have been reflected in the imposition of a head sentence of three and a half years imprisonment. In recognition of the time spent in pre-sentence custody which could not be declared, the delay in the finalisation of the case which was not the fault of the appellant, and his prior and subsequent good history, I would set his parole eligibility date after 15 months. In terms of comparability to future sentences, this is in effect a sentence of four years imprisonment with parole eligibility after 21 months.

ORDERS:

1. The appeal against conviction is dismissed.

2. The application to adduce further evidence is refused.

3. The application for leave to appeal against sentence is granted.

4. The appeal against sentence is allowed.

5. The sentence imposed at first instance is vacated and instead the appellant is sentenced to three and a half years imprisonment with parole eligibility on 8 November 2014.

[42] **MUIR JA:** I agree with the reasons of McMurdo P and with her proposed orders.

[43] **DALTON J:** I agree with the orders proposed by the President and with her reasons.