SUPREME COURT OF QUEENSLAND

CITATION:	*R v Turner* [2016] QCA 282
PARTIES:	**R** **v** **TURNER, Raymond James** (applicant)
FILE NO/S:	CA No 132 of 2016 DC No 75 of 2016 DC No 474 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich – Date of Sentence: 29 April 2016
DELIVERED ON:	4 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	4 October 2016
JUDGES:	Gotterson JA and Douglas and Boddice JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to a five-count indictment and a bench charge sheet alleging 14 summary offences – where the indictment included one count of dangerous operation of a motor vehicle causing grievous bodily harm while adversely affected by an intoxicating substance – where the applicant drove dangerously while under the influence of methylamphetamine, on bail, disqualified from driving, and with an overloaded vehicle – where the applicant was pursued by two police vehicles and avoided a tyre deflation device before colliding with a parked vehicle, resulting in three of his five passengers sustaining injuries which were sufficiently serious to amount to grievous bodily harm – where the applicant was sentenced to six years imprisonment for the dangerous operation offence which was declared a serious violent offence – where the applicant alleges the serious violent offence declaration renders the sentence manifestly excessive – whether the offence might properly be regarded as being beyond the norm – whether the sentence was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 161B(3)(a)(i)

R v Balic [2005] QCA 212, considered
R v Benjamin (2012) 224 A Crim R 40; [2012] QCA 188, cited
R v Bojovic [2000] 2 Qd R 183; [1999] QCA 206, cited
R v Frost; ex parte Attorney-General (2004) 149 A Crim R 151; [2004] QCA 309, considered
R v Hopper [2011] QCA 296, considered
R v Ibrahim [2003] QCA 386, considered
R v Lennon [1999] QCA 192, considered
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v Moody [2016] QCA 92, considered
R v Pham (2016) 90 ALJR 13; [2015] HCA 39, applied
R v Slater [1997] QCA 42, considered
R v Vessey (1996) 86 A Crim R 290; [1996] QCA 11, considered
R v Wilde; ex parte Attorney-General (Qld) (2002) 135 A Crim R 538; [2002] QCA 501, considered

COUNSEL: The applicant appeared on his own behalf
D R Kinsella for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** On 29 April 2016, in the District Court at Ipswich, the applicant, Raymond James Turner, pleaded guilty to each count on a five-count indictment and to the charges on a bench charge sheet which alleged some 14 summary offences. The counts alleged, respectively, receiving stolen property, supplying a dangerous drug, namely, methylamphetamine, dangerous operation of a motor vehicle causing grievous bodily harm while adversely affected by an intoxicating substance and excessively speeding, and two counts of possessing a dangerous drug, respectively, cannabis and methylamphetamine. The offences charged summarily were stealing, possessing counterfeit money, breach of a bail condition, failing to stop as a driver of a motor vehicle upon direction by a police officer, driving while disqualified by court order, driving while exceeding the amount of passengers the vehicle was capable of carrying, possessing a thing used in connection with the administration of a dangerous drug, taking a shop good without discharging his lawful indebtedness, two counts of fraud, entering a premises and committing an indictable offence by break, possessing a knife in a public place, failing to take reasonable care in using a needle, and possessing a dangerous drug, namely methylamphetamine.

[2] On the same day, for the dangerous operation offence, the applicant was sentenced to six years imprisonment and he was disqualified from holding a driver's licence absolutely. This offence was also declared to be a serious violent offence which requires the applicant to serve at least 80 per cent of his sentence before being eligible for parole. The applicant was further sentenced to six months imprisonment for the supply of a dangerous drug offence and three months imprisonment for each of the other three counts on the indictment. The applicant was sentenced to three months

imprisonment for all of the summary offences[1] except for the unauthorised dealing with shop goods, where a conviction was recorded but no further punishment was imposed. All sentences are to be served concurrently. Some 472 days of pre-sentence custody were declared to be imprisonment already served.

[3] On 16 May 2016, the applicant filed an application for leave to appeal against the sentence imposed for the dangerous operation offence.[2]

Circumstances of the applicant's offending

[4] The circumstances of the offending were set out in two agreed schedules of facts[3] which were tendered by the prosecution.[4] It is sufficient for present purposes to outline the circumstances of the dangerous operation offence.

[5] At around midday on 6 January 2015, the applicant, while on bail and disqualified from holding or obtaining a driver's licence, picked up a friend in a vehicle. They proceeded to spend the day together. During this sojourn, the applicant injected a shot of methylamphetamine (ice) while at a hotel in Goodna and again at another friend's house in the early hours of 7 January 2015. The applicant then proceeded to pick up another two friends and drove to a shopping centre where a further two friends were picked up. The vehicle, now carrying six people, was overloaded.

[6] After stopping briefly, the applicant began driving along Redbank Plains Road. Police officers observed him drive at up to 100 km per hour in a 60 km per hour zone. The police officers commenced pursuit, activating the vehicle sirens. All but one passenger told the applicant to stop. One passenger later described the applicant as "driving like a lunatic".[5] During the pursuit, the applicant said that he was "fucked" because he was "wanted" by police and was "going to gaol for a long time". He requested a further shot of ice from his passengers. The applicant continued to accelerate up to 120 to 130 km per hour. He was noticed by officers in another police vehicle which then also commenced pursuit.

[7] The applicant was observed cutting off another vehicle, almost causing an accident, and making turns that caused visible sparks to emerge from underneath his vehicle. Neither police vehicle was able to continue the pursuit. A witness later observed the applicant travelling in excess of 100 km per hour, on the wrong side of the road, and struggling to keep control of the vehicle.

[8] Two police officers, Sergeant Burns-Hutchinson and Constable Evans, had been conducting patrols in the Springfield and Goodna areas and heard of the pursuit over the police radio. The officers obtained authority to deploy a tyre deflation device ("stingers"). As the applicant approached the location of the stingers, he swerved left and mounted the grass path on the side of the road in an attempt to avoid them. The applicant continued to accelerate along the side of the road as the tyres of the vehicle began to deflate, colliding with three sign posts in an attempt to return to the road. He then drove through a garden bed and over an on-ramp, causing another driver travelling with her young daughter to brake immediately to avoid a collision. At this time the applicant was still travelling at about 90 km per

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1 In respect of the disqualified driving and failing to stop charges, the applicant was further disqualified from holding or obtaining a driver's licence for two years for each charge.

2 AB205-207.

3 Exhibits 6 and 7: AB77-87; AB88-91.

4 AB21 Tr1-11 l21.

5 Sentence AB49 l41.

hour. His vehicle was then seen to have been thrown across Redbank Plains Road, before travelling diagonally to the other side and colliding with a parked trailer at about 70 km per hour. The applicant drove dangerously for over nine kilometres in total.

[9] As a result of the collision, three of the five passengers sustained injuries which were sufficiently serious to amount to grievous bodily harm. One suffered a blood clot on the brain and diffuse brain cell injury, a bruised chest, taktsubo cardiomyopathy, and a fractured ankle. Even with treatment, she will almost certainly be permanently disabled and be dependent upon personal carers in the future. Another suffered a large laceration to the rear upper leg, fractures to the right scapular, right clavicle and right foot, as well as a right pectoral haematoma. Even with treatment, it is possible she will be left with reduced function and strength in her right foot and clavicle. The third suffered spinal, rib and toe fractures. If her injuries had been left untreated, it would have caused a permanent injury to health.

[10] A search of the vehicle revealed a bag containing 0.1 grams of cannabis and a second bag containing 0.01 grams of methylamphetamine.

[11] A blood sample was taken from the applicant about two hours and 40 minutes after the accident. It revealed 0.3 mg/kg of amphetamine and 1 mg/kg of methylamphetamine in his system. These amounts were determined by the forensic medical officer to be significant,[6] and would have resulted in an impaired ability to concentrate and difficulty with muscle control.

[12] A Princess Alexandra Hospital Discharge Summary for the applicant was tendered at the sentence hearing.[7] It stated that the applicant had been hospitalised for six days for injuries sustained in the collision. They were: right lateral fractures of six ribs, multiple scalp lacerations with a right frontal subgaleal haematoma, and a small right sided pneumothorax with extensive pulmonary contusion.

The applicant's personal circumstances and history of offending

[13] The applicant was 28 years of age at the time of the dangerous operation offence and 29 at sentence. He has a serious and lengthy criminal history which includes three previous convictions for dangerous operation of a motor vehicle.

[14] The first two of the three convictions related to offences committed over a two day period. For one of them he was adversely affected by an intoxicating substance. Both offences involved police pursuits and stolen cars. The applicant was sentenced on 13 August 2009 to two years imprisonment in respect of each of these dangerous operation offences, with an order for release on parole after six months. He was also disqualified from driving for three years.

[15] The applicant was convicted of the further dangerous operation offence on 25 July 2012. A sentence of 18 months imprisonment was imposed. On this occasion, while under the influence of alcohol and "speed", the applicant was again pursued by police. He drove at speeds over the limit and on the wrong side of the road.

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6 A Schedule of Facts stated that in his 13 years in reviewing similar cases, and seeing 213 cases of the kind, in only five instances had this officer encountered methylamphetamine levels that reached the level that the applicant had in his system (for living drivers): AB 86.

7 Exhibit 15; AB114-115.

This offending occurred within six months after the parole period for the 2009 offending ended.

[16] After being released on parole for the 2012 offending, the applicant failed to follow through with the drug rehabilitation and counselling services offered to him. That resulted in his parole being suspended. In his written outline filed in this Court, the applicant states that the failure to attend was accidental and his parole period ended before he could make a further appointment.

[17] The applicant had been continuously disqualified from driving by court order since May 2007 as a result of an initial driving under the influence of liquor offence and five further driving while disqualified offences. In the four years prior to May 2007, he had been disqualified from driving once for driving under the influence of liquor and on another occasion for unlicensed driving. Also, during that period, his driver's licence was suspended once for six months and on three separate occasions for three months.

Sentencing remarks

[18] In sentencing the applicant, the learned sentencing judge referred to the applicant's offending (and the injuries that resulted) and to his history of offending, traffic history, and personal aspects. By way of mitigating factors, reference was made to the timely plea of guilty and his positive behaviour while in prison, remorse and letter of apology, and family support.

[19] Her Honour also considered the need for community protection in the following way:

> "…it is very difficult for people who've been – or who are addicted to ice to kick that habit, but we've come to the point with you where the community needs to be protected from you. Despite repeatedly being disqualified from holding a driver's licence, despite being sentenced to significant terms of imprisonment, you, on this occasion yet again, got into a motor vehicle and drove under the influence of ice, causing significant damage to other people."[8]

[20] Her Honour approached the fixing of the head sentence and a consideration of whether there should be a serious violent offence declaration in an integrated way. How she undertook that is revealed by the following extract from the sentencing remarks:

> "…In all the circumstances, the appropriate penalty is one that should be accompanied by a declaration that you are convicted of a serious violent offence and I arrive at that decision bearing in mind the actual course of conduct that you engaged upon in the early hours of the 7th of January last year, and the devastating consequences that resulted from that.
>
> As I discussed with your counsel, in my view, a head sentence for the dangerous operation of the motor vehicle in these particular circumstances could have resulted in a head sentence of up to seven years imprisonment, and it would not have been unreasonable to add a cumulative sentence for the supplying of the dangerous drug.

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8 Sentence AB51 ll23-28.

> However, I will ameliorate that because of the declaration that I'm going to make regarding the serious violent offence…."[9]

[21] Consistently with the approach outlined, her Honour set a head sentence of six years imprisonment and made the serious violent offence declaration. The sentence set has, for present purposes, two significant features. Firstly, it is at or approaching the lower end appropriate for the dangerous operation offending. Secondly, it was not increased to reflect the totality of the offending for which the applicant was sentenced. The sentences for the other offending, it will be recalled, are to be served concurrently.

The ground of appeal

[22] The application for leave to appeal against sentence filed by the applicant on 16 May 2016 relies on a single ground of appeal, namely, that the sentence for the dangerous operation offence is, in all the circumstances, manifestly excessive. None of the sentences imposed in respect of the other offences to which the applicant was sentenced at the time is said to be manifestly excessive. It is clear, however, from both the nine-page hand-written outline filed by the applicant on 6 September 2016, and his oral submissions at the hearing of the application on 4 October 2016, that the contention that underpins the ground of appeal is that it is the serious violent offence declaration that has rendered the sentence manifestly excessive.[10]

Applicant's submissions

[23] The applicant, who appeared for himself at the hearing of the application, submitted that his sentence for the dangerous operation offence should be varied to a head sentence of six or seven years with eligibility for parole after "around a third to half" of the head sentence.[11] He challenged the declaration as unwarranted by submitting that he is not a violent person, and that his driving and the injuries to those in his vehicle, were "accidental". They were the result of intoxication only, and not of a deliberate act. He further submitted that the declaration was inappropriate because, as he contended, the injuries he sustained in the collision amounted to extra-curial punishment.

[24] The applicant also cited the decisions in *R v Frost; ex parte A-G*,[12] *R v Wilde; ex parte A-G (Qld)*,[13] and *R v Vessey*,[14] and submitted that the culpability of his driving, and the severity of the injuries that resulted, were not as serious as they were in those cases. Notwithstanding that, he argued that on account of the declaration, he will have to serve a longer period of imprisonment before he is eligible for parole than the offenders in those cases had to serve.

Respondent's submissions

[25] The respondent submitted that the imposition of a six year head sentence was within the appropriate range. Further, it was open to the learned sentencing judge to impose a serious violent offence declaration. The imposition of it did not make the sentence manifestly excessive having regard particularly to the two significant features of the head sentence to which I have referred. The sentencing discretion

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9 Sentence AB51 l40 – AB52 l4.
10 Appeal Transcript 1-3 l22-23.
11 Applicant's outline p8.
12 [2004] QCA 309; (2004) 149 A Crim R 151.
13 [2002] QCA 501.
14 [1996] QCA 11; (1996) 86 A Crim R 290.

did not miscarry. In support of these submissions, the respondent referred to the decisions of this Court in *R v Lennon*,[15] *R v Balic*,[16] *R v Ibrahim*,[17] *R v Slater*,[18] *R v Hopper*,[19] and *R v Moody*[20] as illustrative of the range of sentences imposed for comparable offending.

Discussion

[26] **Cases cited:** The sentencing decisions cited by the respondent signal that a head sentence of six years was appropriate for the applicant's dangerous operation offending alone. It suffices to make the following brief observations with respect to them.

[27] *Balic*, *Lennon* and *Slater* each involved an offender who committed a dangerous operation of a motor vehicle offence causing grievous bodily harm, while adversely affected by an intoxicating substance. The head sentences imposed in those cases were five and a half, six, and seven years imprisonment respectively.

[28] The offender in *Ibrahim* was sentenced to six years imprisonment for dangerous operation of a motor vehicle while adversely affected by an intoxicating substance and excessively speeding. His driving causing personal injury insufficient to amount to grievous bodily harm.

[29] The offender in *Hopper* pleaded guilty to dangerous operation of a motor vehicle causing death while adversely affected by an intoxicating substance and excessively speeding. He was sentenced to eight years imprisonment with parole eligibility after three years.

[30] In *Moody*, the offender pleaded guilty to dangerous operation of a motor vehicle causing death while adversely affected by an intoxicating substance. The offender caused the death of one person and caused grievous bodily harm to two others as a result of his conduct. The sentencing judge determined not to make a serious violent offence declaration. He imposed a head sentence of nine years imprisonment with parole eligibility after four and a half years. This Court affirmed the sentence, observing that in view of the gravity of the offending it was condign punishment not to fix parole eligibility at an earlier date.

[31] I now turn to the cases to which the applicant has referred. None of them, I would observe, suggest that the head sentence imposed is inappropriate for the dangerous operation offence.

[32] In *Frost*, this Court by majority allowed an Attorney-General's appeal to the extent of removing a recommendation by the sentencing judge that the offender be considered for post prison community based release after only three and a half years. The offender, who was 24 years old, was sentenced on his own guilty plea to nine years imprisonment for dangerous operation of a motor vehicle causing death, while adversely affected by liquor. Three pedestrians died as a result of his driving with a blood alcohol concentration of at least 0.237 per cent. The offender had a passenger in his vehicle who told him many times to stop and let him out. The offender

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15 [1999] QCA 192.
16 [2005] QCA 212.
17 [2003] QCA 386.
18 [1997] QCA 42.
19 [2011] QCA 296.
20 [2016] QCA 92.

refused. Overall, he drove dangerously for about 14 kilometres. After colliding with the pedestrians, the offender drove off. The Court observed that the head sentence of nine years was at the lower end of the appropriate range.[21]

[33] In *Wilde*, the offender pleaded guilty to dangerous operation of a motor vehicle causing death, as well as unlawful use of a motor vehicle, burglary, stealing and two counts of receiving. The offender was on bail, had had her licence cancelled two days earlier, and was driving a stolen vehicle when she caused the death of one person and severely injured another. She had been driving dangerously for about 1.35 kilometres before she swerved into a bike lane, striking two cyclists. She stopped briefly after the collision, and then drove off at excessive speeds. As a result, she could not be tested for the presence of drugs or alcohol in her system. She was apprehended by police three days later. She had a criminal history that consisted of drug and dishonesty offences, as well as a lengthy traffic history that included four licence cancellations for accumulations of demerit points.

[34] This offender was sentenced to two years and four months imprisonment for the dangerous operation causing death, to be served cumulatively upon concurrent sentences of 12 months and 18 months for a negligent act causing harm offence and for an unlawful use of a motor vehicle offence respectively. Upon an Attorney-General's appeal, her sentence for the dangerous operation causing death offence was increased to five years imprisonment cumulative upon the other sentences which were unaltered. A post prison community based release eligibility date after three years was set. In increasing the sentence imposed, this Court held that the sentencing judge ought to have worked from a sentence approaching the maximum for the offending, namely, seven years, as "the case approache[d] the category of the worst examples of the offence".[22] It adopted a starting point of six years which it modified to five years to allow for eight months pre-sentence custody and the totality principle in the context of cumulative terms.[23]

[35] In *Vessey*, also an Attorney-General's appeal, the offender's sentence was increased from six and a half years imprisonment with a recommendation for consideration for parole after 26 months, to nine years imprisonment with a recommendation for consideration for parole after four years. The offender, who was disqualified from driving, had been observed making a U-turn and then driving on the wrong side of the road for about 150 metres. This caused a second vehicle to take evasive action. The offender then turned a corner, drove straight through a 'give way' sign, and collided with a third vehicle. The driver of that vehicle died as a result of his injuries. A urine sample taken one and a half hours after the incident revealed that the offender had a blood alcohol concentration of at least 0.2 per cent. He had a prior history of driving under the influence of liquor and two convictions for dangerous driving.

[36] **The head sentence:** The dangerous operation offending itself warranted a head sentence of six to seven years imprisonment. This is unquestionably so having regard to the reckless danger in the applicant's driving; the injuries, including permanent injuries that resulted; the fact that he is a repeat offender; and the fact that the offending occurred while he was on bail. It is unsurprising that at the

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21 At [19].
22 At [27].
23 At [29].

sentence hearing his counsel accepted that a head sentence of six or seven years was appropriate.[24]

[37] It was open to her Honour to ameliorate the effect of the serious violent offence declaration by imposing a head sentence at the lower end of the appropriate range, as well imposing a concurrent rather than cumulative sentence for the supply offence. Her Honour also did not elect to make an adjustment to the head sentence imposed on the dangerous operation offence, in light of the order that all of the sentences imposed be served concurrently, in order to reflect further the totality of the offending.[25]

[38] This approach is supported by the judgment of this Court in *R v Bojovic*,[26] where their Honours stated:

> "… if according to ordinary principles a violent offence seems to call for a sentence of between six and eight years, and it is one where the discretion to make a violent offender declaration arises, such that it might but not must be made, the sentencing judge has the discretion in the event that a declaration is to be made, to impose a sentence towards the lower end of the applicable range. Conversely if the Judge is to give the offender the benefit of declining to make such a declaration, it might be appropriate to consider imposing a sentence towards the higher end of the range. If this were not done, it is difficult to see how the sentencing judge could properly discharge his or her duty under s 9 of the [*Penalties and Sentences Act* 1992 (Qld)]. A just sentence is the result of a balancing exercise that produces an acceptable combination of the purposes mentioned in s 9(1)(a) to 9(1)(e) of the [*Penalties and Sentences Act* 1992 (Qld)]." [27]

[39] Further, in *R v McDougall and Collas*,[28] the Court said:

> "…where a discretionary declaration is made, the critical question will be whether the sentence with that declaration is manifestly excessive in the circumstances; accordingly the just sentence which is the result of a balancing exercise may well require that the sentence imposed for that declared serious violent offence be toward the lower end of the otherwise available range of sentences…"[29]

[40] **Serious violent offence declaration:** The discretion conferred by s 161B(3)(a)(i) of the *Penalties and Sentences Act* 1992 (Qld) to declare the dangerous operation of a motor vehicle causing grievous bodily harm offence a serious violent offence was exercisable by the learned sentencing judge.[30] It is the offence in respect of which

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24 AB40 ll45-46.

25 *Griffiths v The Queen* (1989) 167 CLR 372 at 377 per Brennan and Dawson JJ; 393 per McHugh J. See also *R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175 per Williams JA at [31]-[32]; Jerrard JA at [66].

26 [2000] 2 Qd R 183; [1999] QCA 206 per de Jersey CJ, Thomas JA and Demack J. See also *R v Brown; Ex parte Attorney-General (Qld)* [2016] QCA 156 at [99] per Jackson J (with whom Fraser JA and Bond J agreed).

27 At [34].

28 [2007] 2 Qd R 87; [2006] QCA 365 per Jerrard, Keane and Holmes JJA.

29 At [19].

30 This offence is a crime pursuant to s 328A(4) of the *Criminal Code* and is listed as a serious violent offence in Schedule 1 to the *Penalties and Sentences Act* 1992 (Qld).

a declaration is made, not the offender. It follows that the applicant's self-commendation that he is not a violent person is rather misdirected.

[41] Turning to other submissions made by the applicant, I mention first his reliance upon the fact that he was intoxicated and his contention that, as a result, his dangerous driving was "accidental". I reject that argument. As was acknowledged by the applicant at the hearing of the application,[31] his prolonged erratic driving was undertaken once he knew that the police were in pursuit of him. It was therefore a response on his part that he made deliberately. Insofar as the argument seeks to characterise the injuries to the passengers as accidentally caused, I would accept that the applicant did not intend to injure his passengers.[32] However, inherent in the manner of his dangerous driving was the very significant risk that injuries of those kinds would result.

[42] The applicant also submitted that the injuries he sustained, together with a range of "trauma-form" psychological symptoms he suffered[33] thereafter, amounted to extra-curial punishment. This submission is at odds with the disavowal by his counsel at sentence of a submission of that kind with respect to the injuries.[34] The approach taken by counsel was realistic. In any event, injuries sustained by the applicant have little, if any, relevance to a decision to impose a serious violent offence declaration.

[43] In *McDougall and Collas*, this Court observed:

> "…the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question, and, so outside 'the norm' for that type of offence…"[35]

This was an offence that might properly be regarded as beyond the norm for this kind of offending. Features of it that contribute to such a characterisation are the police pursuits involving a number of vehicles, the passenger overload, the substantial distance driven dangerously, the foiling of the police use of stingers, and the fact that the dangerous driving ceased only as a result of the collision.

[44] For these reasons, this is a case where the making of a serious violent offence declaration was justified.

[45] I am unpersuaded that the declaration has resulted in a sentence that is manifestly excessive. In the first place, the impact of the declaration has been modified by fixing the head sentence at six years and by ordering concurrent sentences for the other offending.

[46] Secondly, I consider it unsound to reason that the declaration has made the sentence manifestly excessive because the applicant must serve a longer period than in the cases cited by him before he is eligible for parole. His dangerous driving was

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31 Appeal Transcript 1-3 ll46-47; 1-6 ll3-5.

32 Intention to cause grievous bodily harm is not an element of the offence of which the applicant was convicted.

33 As stated in the report of Dr S Morgan, psychologist, dated 15 February 2016: Exhibit 14; AB100-113. This report noted that the applicant had terminated in-custody counselling of his own volition in October 2015.

34 AB36; Tr1-26. Counsel explained that he tendered the evidence of the injuries in response to an unwillingness on the part of a previous prosecutor to accept that the applicant had been injured.

35 At [21]. Citing *R v DeSalvo* (2002) 127 A Crim R 229 at 230-231 [8]-[9], and 232 [16]; *R v BAW* [2005] QCA 334 at [27]-[28].

marked by the characterising adverse features to which I have referred. In addition, the applicant has a worse history of offending than the offenders in those cases.[36] Moreover, the utility of the decision in *Wilde* for comparison purposes is diminished by the circumstance that the offender there was dealt with under a regime where the maximum sentence that could be imposed is half that of the statutory maximum for the aggravated dangerous operation offence committed by the applicant.

[47] It was also open to her Honour to consider the need for community protection when making the declaration. In that regard, McMurdo P said in *R v Benjamin*:[37]

> "Declarations are usually reserved for more serious examples of offences of that type or where there is some other feature justifying the requirement that the offender serve 80 per cent of the sentence before parole eligibility. A declaration may be made where there is good reason to postpone the date of eligibility for parole because of the circumstances which aggravate the offence. A declaration may also be made where circumstances suggest that the protection of the public or adequate punishment requires a longer period of actual custody before eligibility for parole…"[38]

[48] Adopting the test recently affirmed by French CJ, Keane and Nettle JJ in *R v Pham*,[39] I am of the view that the imposition of the serious violent offence declaration on the dangerous operation offence does not compel a conclusion that there must have been some misapplication of principle on the part of the learned sentencing judge that warrants appellate intervention.

Disposition

[49] As the stated ground of appeal has not been made out, leave to appeal against sentence must be refused.

Order

[50] I would propose the following order:

1. Application for leave to appeal against sentence refused.

[51] **DOUGLAS J:** I agree with the reasons of Gotterson JA and the order his Honour proposes.

[52] **BODDICE J:** I have read the reasons for judgment of Gotterson JA. I agree with those reasons and with the proposed order.

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36 The Court in *R v McDougall and Collas* [2007] 2 Qd R 87; [2006] QCA 365 stated at [19]: "the considerations which may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing".

37 (2012) 224 A Crim R 40; [2012] QCA 188. See also *Brown* at [103].

38 At [3].

39 [2015] HCA 39; (2016) 90 ALJR 13 at [28].