SUPREME COURT OF QUEENSLAND

CITATION:	*R v Robertson* [2010] QCA 319
PARTIES:	**R** **v** **ROBERTSON, Neil James** (applicant)
FILE NO/S:	CA No 100 of 2010 SC No 241 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 November 2010
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2010
JUDGES:	Holmes and Fraser JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal;** **2. Allow the appeal;** **a. Vary the sentence imposed for the conviction of manslaughter in relation to count 1 on the indictment by substituting a sentence of 12 years' imprisonment for the sentence of 14 years' imprisonment imposed by the trial judge; and,** **b. Vary the sentence imposed in relation to count 2 on the indictment by substituting a sentence of 10 years' imprisonment for the sentence of 12 years' imprisonment imposed by the trial judge;** **3. In all other respects confirm the orders made by the trial judge.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of manslaughter (count 1), dangerous operation of a motor vehicle causing grievous bodily harm with circumstances of aggravation (count 2) and three counts of assaults occasioning bodily harm (counts 3, 4 and 5) – where on arraignment the applicant entered a plea of not guilty to murder but guilty to the alternative charge of dangerous

operation of a motor vehicle causing death with circumstances of aggravation – where the plea was not accepted by the prosecution – where the applicant pleaded guilty to count 2 and not guilty to counts 3, 4 and 5 – where the jury found the applicant not guilty of murder but guilty of manslaughter and guilty of counts 3, 4 and 5 – where the jury did not consider that provocation was a factor in the verdict returned on count 1 – where the trial judge sentenced the applicant to 14 years imprisonment for count 1, concurrent with 12 years imprisonment for count 2, and 5 years imprisonment respectively for counts 3, 4 and 5 – where the sentence on count 1 was deemed a serious violent offence in accordance with s 161A of the *Penalties and Sentences Act* 1992 (Qld) – where the applicant appealed the sentences imposed on counts 1 and 2 – whether the sentences of imprisonment imposed on counts 1 and 2 were manifestly excessive – whether it was open to the trial judge to regard the applicant's offending as more serious than that of *R v Clark* [2009] QCA 361

Corrective Services Act 2006 (Qld), s 182(1), s 182(2)
Crimes Act 1958 (Vic), s 5
Crimes Act 1900 (NSW), s 24
Criminal Code 1899 (Qld), s 302(1)(a), s 310, s 328A(4)(b), s 328A(4)(c)
Criminal Code 1913 (WA), s 280
Penalties and Sentences Act 1992 (Qld), s 161A

Bombardieri v The Queen [2010] NSWCCA 161, cited
Lawler v the Queen [2007] NSWCCA 85, discussed
Lowndes v The Queen (1999) 195 CLR 665; [1999] HCA 29, cited
Penny v The State of Western Australia (2006) 33 WAR 48; [2006] WASCA 173, cited
R v Black [2009] QCA 198, cited
R v Borkowski [2009] NSWCCA 102, discussed
R v Burton, unreported, Andrews ACJ, Connolly and Carter JJ, Supreme Court of Criminal Appeal Queensland, No. 91 of 1983, 20 July 1983, discussed
R v Clark [2009] QCA 361, discussed
R v Corry [2006] QCA 203, discussed
R v DeSalvo (2002) 127 A Crim R 229; [2002] QCA 63, cited
R v Eade [2005] QCA 148, discussed
R v Folland [2004] QCA 209, discussed
R v Goodger [2009] QCA 377, cited
R v Janz [2008] QCA 55, cited
R v Jones & Hili [2010] NSWCCA 108, cited
R v Kelly [1999] QCA 296, discussed
R v Lavender (2005) 222 CLR 67; [2005] HCA 37, cited
R v Martin (2007) 20 VR 14; [2007] VSCA 291, discussed
R v Matthews [2007] QCA 144, cited
R v Oliver (1980) 7 A Crim R 174, cited

R v Mooka [2007] QCA 36, cited
R v Tsiaras [1996] 1 VR 398, cited
R v Whiting; ex parte Attorney-General [1995] 2 Qd R 199; [1994] QCA 425, cited
Veen v The Queen (No 2) (1988) 164 CLR 465; [1988] HCA 14, cited
Young v The Queen [2009] NSWCCA 298, discussed

COUNSEL: C W Heaton for the applicant
M B Lehane for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and with the orders he proposes.

[2] **FRASER JA:** On 12 October 2007 the applicant repeatedly drove his car into collision with a car driven by Mr Aaron Lewis-Priest. After the last collision Mr Lewis-Priest lost control of his car, which hit a power pole on the side of the road. Mr Lewis-Priest was killed almost instantly. The four passengers in his car were injured. Mr Morriss, who had undone his seatbelt to protect the 18 month child next to him, sustained grievous bodily harm by the fracture of his skull. The child suffered some bruising and minor lacerations. Mr Tetuira sustained a gash to a leg which required 50 stitches and he lost a tooth. Mr Brown suffered head injuries and required reconstructive surgery to his left ear.

[3] The applicant was charged with murder (count 1), dangerous operation of a vehicle causing grievous bodily harm, whilst excessively speeding and leaving the scene (count 2), and three counts of assault occasioning bodily harm (counts 3, 4 and 5). The applicant pleaded not guilty to murder. He entered a plea of guilty to the available alternative charge of dangerous operation of a motor vehicle causing death, whilst excessively speeding, and leaving the scene of the incident, but the prosecution did not accept that plea in discharge of the murder count. The applicant pleaded guilty to dangerous operation of a vehicle causing grievous bodily harm, whilst excessively speeding and leaving the scene. He pleaded not guilty to the three counts of assault occasioning bodily harm.

[4] On 14 April 2010, the seventh day of the trial in which the evidence had occupied some four days, the jury found the applicant not guilty of murder but guilty of manslaughter and guilty of the three charges of assault occasioning bodily harm.

[5] After a sentence hearing on the same day, the trial judge sentenced the applicant to 14 years imprisonment for manslaughter (count 1) and to concurrent terms of imprisonment of 12 years for dangerously operating a vehicle and causing grievous bodily harm (count 2) and five years for the assaults occasioning bodily harm (counts 3, 4 and 5). Because manslaughter is a "serious violent offence" and the term of imprisonment exceeded ten years, the applicant will not be eligible to apply for parole until he has served 80 per cent of the effective 14 year sentence.[1] It was

[1] *Penalties and Sentences Act* 1992 (Qld), s 161A and *Corrective Services Act* 2006 (Qld), s 182(1),(2).

declared that 915 days spent in pre-sentence custody between 12 October 2007 and 14 April 2010 was time already served under the sentence. The applicant was disqualified absolutely from holding or obtaining a driver's licence.

[6] The applicant appealed against his convictions and applied for leave to appeal against his sentence but he did not pursue the appeal against conviction.[2] The ground stated in his application for leave to appeal against sentence is that the term of imprisonment of 14 years for the offence of manslaughter is manifestly excessive. At the hearing of the application the applicant was given leave to amend the application to add the ground that the term of imprisonment of 12 years for the count of dangerous operation of a motor vehicle causing grievous bodily harm was manifestly excessive.

[7] The applicant's counsel argued that the appropriate sentencing range for the offending overall was 10 to 11 years imprisonment and that, bearing in mind the requirement that the applicant must serve 80 per cent of the effective term before being considered for release on parole, a sentence of 10 years imprisonment was the appropriate penalty. The respondent's counsel argued that the sentence imposed by the trial judge was appropriate and within the sound exercise of the sentencing discretion. I will discuss the issues raised by the arguments after I have first summarised the circumstances of the offences, the applicant's personal circumstances, and the trial judge's sentencing remarks.

Circumstances of the offences

[8] On the evening of 12 October 2007 in the carpark of a bottle shop at Browns Plains, the applicant reversed his car out of his carpark and around a blind corner near the deceased's car. The deceased and one of his passengers, who were then returning to the deceased's car, remonstrated with the applicant. An exchange of insults in offensive language then followed. Witnesses to this event remarked upon the applicant's aggressive behaviour rather than the language used by the deceased and his passengers.

[9] The applicant then drove out of the carpark onto Browns Plains Road, followed by the deceased's car. The applicant intended to go straight across the road into and then through a shopping centre to another road. As the deceased turned left out of the carpark exit onto the road he spoke to the applicant, saying "See you later, old man". The applicant heard some other words (the trial judge remarked that the applicant heard possibly offensive words), and he interpreted a gesture as being obscene. The applicant, who gave evidence in his own defence, said that he then "snapped". The trial judge accepted the applicant's evidence that he was in a rage during the following events, which occupied a period of only some 20 or 30 seconds and occurred over a distance of no more than about one kilometre.

[10] The applicant reversed his car and then drove after the deceased's car, colliding with the rear of it at a speed which was perhaps less than 60 kilometres per hour. The deceased accelerated and drove through a red light in a left hand lane that did not have traffic in it. The trial judge rejected the suggestion that this conduct by the deceased could be interpreted as a challenge to the applicant. The trial judge considered that the more likely explanation was that the deceased had seen or had been warned by his passengers that the applicant's vehicle was coming up quickly

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[2] The applicant abandoned his appeal against conviction by notice filed in the Registry on 26 August 2010.

behind the deceased's vehicle, the deceased had experienced a jolting crash, and he then accelerated through the red light because he was fearful of what else might happen.

[11] The cars accelerated up to at least 70 to 80 kilometres per hour as they drove up a rise in the road, whilst the applicant deliberately rammed the rear of the deceased's car several times. After the cars crested the rise and travelled downhill, where the road veered to the left, the applicant again repeatedly drove his car into collision with the rear of the deceased's car.

[12] The final collision was either between the passenger side of the deceased's car and the driver's side of the applicant's car or it was an "off-centre" collision. The trial judge found that when the applicant collided with the deceased's car it was travelling at perhaps 120 or 140 kilometres per hour. Those in the deceased's car were terrified. The deceased's car spun out of control and collided with a light pole, almost instantly killing the deceased and injuring his passengers. The applicant left the scene after the accident and when he arrived at his residence he parked his car some distance away from it.

[13] The applicant gave evidence that he had thought he was in control when he had bashed the deceased's car from behind on four or five occasions and until the final collision this had not caused the other driver to lose control of his car. He gave evidence that he did not intend to kill or do serious harm to the occupants of the other car. In cross examination he said that he parked his car because he thought that the police were probably going to come around and ask him about it; he "just panicked". The applicant's then partner gave evidence that the applicant had returned home after the collision frantic and agitated, saying that he had just been in an accident after an altercation. The applicant told his then partner that he had followed them to scare them and he had hit the car four or five times and it went off the road.

[14] After the jury returned the verdicts, the trial judge asked the jury whether the verdict of manslaughter was reached either partly or unanimously on the basis of the prosecution's inability to exclude provocation as a defence to the charge of murder. The jury answered that provocation was not a factor in the verdict. It follows that the jury must be taken to have accepted the applicant's evidence that he did not intend to kill or to do grievous bodily harm to the deceased or any of his passengers.[3]

The applicant's personal circumstances

[15] The applicant was 47 years old at the time of the offences and he was 49 years old when he was sentenced. He had been raised in a family characterised by domestic violence. He left home when aged 15. Later he found employment as a motor mechanic and he ultimately established and ran his own business in that trade for 15 years. He had been married but had separated in 2003 and divorced in 2004. His subsequent relationship with a different woman had broken up in 2006, when he returned to heavy use of alcohol and drugs. He had received treatment and counselling in relation to drug addiction but had last obtained treatment in 2004. His long-standing business as a motor mechanic had failed about a week before these offences. When the applicant committed the offences he was in a destructive

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3 *Criminal Code* 1899 (Qld), s 302(1)(a).

relationship with a woman who was addicted to drugs. He had been prescribed anti-depressants for some time but he had not taken the medication on the day of the offences. He had difficulties in controlling his anger.

[16] The applicant had a criminal history involving some relatively minor offences concerning dishonesty and drugs, for which he had been fined. He was also convicted of unlawful use of a motor vehicle in 1977 and 1980 and unlawful possession of a motor vehicle in 2002. He was convicted of driving a motor vehicle under the influence of alcohol in 1983 and 1984. His traffic history included nine convictions relating to driving in excess of speed limits. He committed the present offences whilst his licence was suspended as a result of the accumulation of demerit points.

Sentencing remarks

[17] The trial judge held that it must have been obvious to the applicant, an experienced motor mechanic and a man then 47 years of age, that his manner of driving and hitting the car in front was fraught with the risk of driving the other car off the road. The applicant's conduct could not be explained or justified by an argument that he had "snapped in relation to the perception of abuse, or even the reality of abuse" of the nature he described in evidence. The applicant had intended to scare the other people in the car ahead of him and even though that occurred for only some 20 to 30 seconds the applicant could not seek justification in the fact that he was not acting purely cold-bloodedly. The applicant's behaviour was disproportionate to what had occurred and his personal circumstances perhaps gave the background to the applicant's extreme overreaction to what he had regarded as insulting behaviour. What the applicant perceived as an insult to him could not be regarded as justifying his behaviour.

[18] The trial judge referred to the applicant's traffic offending and to the irresponsibility of the applicant's behaviour in respect of use of motor vehicles revealed by his criminal history. The trial judge referred to the high speeds of the applicant's vehicle and observed that the applicant must have realised the dangers of what he was doing, that there was an awareness and deliberateness in his behaviour, and it must have caused terror to the occupants of the other car. The trial judge referred also to the applicant's apparent lack of remorse, reflected in the comments he had made after the accident. When the applicant was spoken to by police shortly after the accident and told that somebody had died, the police officer asked the applicant, "Can I let you know how the people are?" The applicant replied that he did not care, and he gave the same reply to the police officer's further question, "Not even the baby?"

[19] The trial judge gave the applicant some credit for his plea of guilty to the charge of dangerous operation of the vehicle causing grievous bodily harm and his offer to plead guilty to dangerous operation of a vehicle causing death. The applicant had also offered to plead guilty to manslaughter before the trial but the prosecution had not accepted that offer and it was not entered by the applicant when he was arraigned. The applicant's pleas of guilty reflected well on him because they saved the authorities time and effort and money in prosecuting the proceedings, and they can demonstrate remorse as well as cooperation with the law enforcement agencies.

[20] The trial judge rejected the submission by defence counsel based upon *R v Clark*[4] that the appropriate range of penalties was between nine and 11 years

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4 [2009] QCA 361.

imprisonment. The trial judge considered that the applicant's dangerous driving was within the most serious category and accepted the prosecutor's submission that, bearing in mind that the maximum penalty for manslaughter was life imprisonment, an appropriate effective sentence, taking into the applicant's pleas of guilty, would be 14 years imprisonment.

Consideration

[21] The applicant's counsel emphasised the utilitarian value of his pleas and the admissions he made which narrowed the contests at trial. Those matters are relevant, although it must be borne in mind that the applicant did not plead guilty to manslaughter, he contested the three counts of assault occasioning bodily harm, he gave evidence which in some respects conflicted with the evidence of the complainants, and his counsel argued against the verdicts which were ultimately reached by the jury.

[22] The applicant's counsel also argued that the applicant's remorse was evidenced by his plea to count 2 and to the alternative offence to count 1. That must be weighed against the applicant's apparent lack of remorse when he learned of the tragic consequences of his offending and his decision to contest his guilt of the other offences. Counsel for the applicant also stressed that the applicant had not intended to kill or cause serious harm, but the maximum penalty of life imprisonment for manslaughter comprehends such a case.

[23] The applicant's counsel referred to *R v Kelly*[5] and *R v Folland*.[6] In *Kelly*, a sentence of eight years imprisonment for manslaughter was not disturbed. That offender committed his offences whilst he was still undergoing probation in relation to an earlier offence of unlawfully using a motor vehicle and stealing, the vehicle he drove when he caused the death was stolen or being unlawfully used, and although he did not ram his victims' car, he took no notice of police warnings to stop his vehicle. While he was being followed by police he drove his car repeatedly onto the incorrect side of the road, causing oncoming cars to swerve and pull over to avoid collisions. He drove at great speed for two or three kilometres and eventually collided head-on with another vehicle, killing the driver and injuring the passenger. McPherson JA observed that Kelly might perhaps have been engaging in a form of unusually reckless behaviour involving a challenge to other drivers. Other factors which were found to weigh heavily against that offender, not present in this case, were his utter disregard of police attempts to persuade him to stop and his excessive blood alcohol level when he committed his offence (0.187 per cent). However moderation in that offender's sentence was warranted by the combination of his relative youthfulness (he was 22 years old at the time of the offences and 25 years of age when sentenced), his cooperation and plea of guilty, his demonstrated remorse, and his rehabilitation in the years which intervened between the offence and sentence. The significance of the last factor was lessened by the fact that his rehabilitation occurred after he had skipped the country such as to create for himself an opportunity of demonstrating rehabilitation which is not open to offenders who face the consequences of their actions.

[24] In *Folland*, a sentence for manslaughter of nine years imprisonment with a serious offence declaration was not disturbed. That offender deliberately drove over and

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5 [1999] QCA 296.
6 [2004] QCA 209.

killed a man. The verdict of manslaughter was reached on the ground that the deceased had provoked the offender. The offender's conduct was "angry retribution" in response to an assault in which the deceased had injured the offender.[7] He was not remorseful. He had no relevant criminal history. As was submitted for the respondent, Folland's driving was less protracted than that of the applicant and there was only one victim, but on the other hand he drove directly at and over his unprotected victim.

[25] *Kelly* and *Folland* are of limited relevance because of their different facts and because this Court's decisions were only that the sentences were not manifestly excessive, but they provide some support for the contention that the applicant's sentence is excessive.

[26] Counsel for the applicant also referred to cases involving manslaughter resulting from a deliberate act in using a weapon but without an intention to kill or to do grievous bodily harm. Counsel emphasised that in *R v Matthews*,[8] where an offender was sentenced on appeal to nine years imprisonment without a declaration of a serious violent offence, the Court referred to the statement by McPherson JA in *R v DeSalvo*,[9] with whom Williams JA agreed, that:

> "For a homicide resulting from a deliberate act like the stabbing in this case, the appropriate head sentence falls properly within the range of 10 to 12 years imprisonment. Some discounting must, however, be carried out to reflect the applicant's remorse and his offer before trial to plead guilty to the offence of manslaughter of which he was ultimately convicted at trial."

[27] Although such cases have the serious feature of a direct attack with a dangerous weapon upon an unprotected victim, that range cannot be regarded as being directly applicable in a case such as this, where in addition to killing a person the applicant by his dangerous driving put at risk the lives of at least the five people in the deceased's car, caused grievous bodily harm to another, and occasioned bodily harm to three others.

[28] The respondent's counsel referred to *R v Corry*[10]and *R v Eade*.[11] In *Corry* a sentence of 17 and a half years' imprisonment was not disturbed in a case where the offender did not intend to kill or cause grievous bodily harm, but the Court regarded that as being in the category of the most serious cases of manslaughter.[12] That offender invaded the deceased's home in the dead of night armed with a carving knife and a meat cleaver, he was fuelled by drugs, he brutally attacked the deceased and left him to bleed to death, he acted on a trivial motive, he exhibited no sign of remorse and he did not cooperate in any respect with the administration of justice. In *Eade* the Court found no error in a sentence of 10 years imprisonment and held that the appropriate range for the offending in that matter was nine to 13 years. That offender pleaded guilty to grievous bodily harm with intent, assault occasioning bodily harm whilst armed and in company, dangerous operation of a motor vehicle causing grievous bodily harm whilst intoxicated, and a drink

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7 [2004] QCA 209 at [32].
8 [2007] QCA 144 at [15].
9 (2002) 127 A Crim R 229 at 231, point [11]. See also *R v Black* [2009] QCA 109 at [46]-[48].
10 [2006] QCA 203.
11 [2005] QCA 148.
12 [2006] QCA 203 per Keane JA, with whose reasons Jerrard JA and Helman J agreed, at [26].

driving offence. He repeatedly beat and kicked, and then twice drove over his victim, motivated in part by a desire for revenge for damage to his car. The nature of the offending and other circumstances in *Corry* and *Eade* was so very different from that here as to render those decisions of no real assistance.

[29] Both counsel accepted that there was no closely comparable sentencing decision, but the submissions before the trial judge focussed upon *R v Clark*[13] and it was also the most relevant decision discussed in the appeal. That offender was convicted on her own pleas of two counts of manslaughter. She had driven onto a footpath in order to get past a car which she thought was travelling too slowly and struck and killed two teenage boys standing on the footpath. The Court allowed an application for leave to appeal against a sentence of 10 years imprisonment with the automatic serious violent offence declaration and substituted a sentence of nine years imprisonment without a serious violent offence declaration.

[30] The trial judge held that the applicant's offending was criminal negligence or dangerous driving in the most severe category so that a sentence considerably in excess of that imposed in *Clark* was appropriate in the circumstances.[14] His Honour regarded *Clark* as a less serious case, principally because that offender suffered untreated mental health problems, such that it seemed unlikely that she appreciated that she was about to hit the two boys whom she killed, and she pleaded guilty to the two counts of manslaughter. The applicant's counsel submitted that the first ground of distinction was not soundly based, but in *Clark* the Court found that evidence of a causal relationship between Clark's bipolar disorder and irrational behaviour in her offences tended to lessen her moral culpability and the claims of deterrence and denunciation in sentencing.[15] The applicant's susceptibility to anger, explained to some extent by his background and upbringing, did not significantly lessen his moral culpability and the relevance of deterrence and denunciation. Whilst a mental disorder short of insanity might lessen the degree of an offender's moral culpability for an offence in some circumstances,[16] in other circumstances it might suggest that a more severe sentence is appropriate (for example, by militating against rehabilitation).[17] However there was no evidence that the applicant's personal characteristics constituted a mental disorder and, significantly, there was no ground for concluding that his offending was contributed to by any personal characteristic which substantially lessened his moral culpability.[18] The argument for the applicant is also not readily reconcilable with defence counsel's submission at sentence that the applicant's anti-social driving was consistent with someone who had used amphetamines for some time, in the sense that it was a violent reaction: that could not justify mitigation of the sentence. Nor was there evidence that the applicant had particularly good prospects of overcoming the personal difficulties which contributed to his offending.

[31] Accordingly, whilst the applicant's personal circumstances were relevant they did not justify a degree of mitigation of sentence commensurate with that which was

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13 [2009] QCA 361.

14 The maximum penalty for dangerous driving causing grievous bodily harm, with the circumstances of aggravation charged, is 14 years' imprisonment: s 328A(4)(b) and (c) of the *Criminal Code* 1899 (Qld). The maximum penalty for manslaughter offence is life imprisonment: s 310 of the *Criminal Code* 1899 (Qld).

15 [2009] QCA 361 at [23].

16 See *R v Tsiaras* [1996] 1 VR 398 at 400 and *R v Goodger* [2009] QCA 377 at [21].

17 See, for example, *R v Goodger* [2009] QCA 377 at [25]-[26].

18 C.f. *R v Janz* [2008] QCA 55 per Mackenzie AJA at [46]-[47].

appropriate in *Clark*. However the significance of that distinguishing factor should not be overstated. It was not suggested that Clark's disorder could explain her behaviour. Rather, it was one component of the explanation.

[32] The second main point of distinction between this case and *Clark* to which the trial judge adverted, that Clark had pleaded guilty to the manslaughter offences, was certainly significant, but its importance as a distinguishing factor is lessened by the circumstances that Clark's plea was late, it was treated as having little value as evidence of remorse, and it was held to have only a limited utilitarian value.[19] It is also relevant in that respect that the applicant pleaded guilty to count 2 and entered a plea of guilty to the less serious alternative charge available on count 1, and he cooperated in his trial.

[33] Furthermore, whilst the tragic consequences of the applicant's offences must be kept steadily in mind, Clark's offending was in one aspect more serious. She potentially put at great risk the lives of every one of many vulnerable pedestrians who might have been on the footpath and she caused the loss of two lives. The respondent's counsel argued that Clark's conduct did not possess the same level of determined disregard for the lives of others exhibited in the applicant's highly callous offending, but to drive a car over the footpath in a busy area simply to avoid a line of traffic was, as Keane JA observed, "extraordinarily reckless".[20]

[34] I accept that it was nevertheless open to the trial judge to regard this as a more serious case overall than *Clark*, particularly because of the deliberateness of the applicant's conduct in repeatedly ramming the deceased's car. In that respect it is significant that the trial judge had the advantage of presiding at the trial and in seeing and hearing the applicant give evidence. As the respondent's counsel also reminded the Court, the particular circumstances of manslaughter offences vary so much that it is difficult to generalise in advance about the appropriate sentence and the sentencing judge's discretion is comparatively wide.[21] Even so, and bearing in mind the other distinguishing factors, in my respectful opinion it remains difficult to reconcile the applicant's sentence of 14 years' imprisonment, with an automatic serious violent offence declaration, with the sentence in *Clark* of nine years imprisonment with no such declaration.

[35] The applicant's deliberate ramming of the deceased's vehicle, the speed at which he drove, and the callousness demonstrated by his leaving the scene and expressing a lack of concern to the police about the death and injuries he had caused, were all properly taken into account by the trial judge. A severe sentence was demanded where the applicant's grossly culpable driving caused the death of a young man, the grievous bodily harm of another young man, and the injuries to the three other passengers. The consequential devastation of the lives of friends and relatives, starkly illustrated in the victim impact statements, is also an emphatic reminder of the need for a deterrent sentence and one which denounced the applicant's conduct. However whilst this was a very bad example of the offences and an effective sentence significantly in excess of that imposed in *Clark* was appropriate, the applicant's offending, which arose out of an extravagant overreaction in the circumstances described earlier, did not have those additional features such as

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19 [2009] QCA 361 at [25].

20 [2009] QCA 361 at [20].

21 See *R v Mooka* [2007] QCA 36 per the Chief Justice at p 9 and *R v Whiting; ex parte Attorney-General of Queensland* [1994] QCA 425 per Davies JA, McPherson JA and Derrington J at p 7.

evasion of the police, disregard of a police direction, or considered persistence in highly dangerous driving over a long period and distance, which would have put this into the worst category of dangerous driving or criminal negligence.

[36] For those reasons, I would hold that the sentences of imprisonment of 14 years and 12 years on counts 1 and 2 were manifestly excessive and that those sentences should be varied by instead imposing sentences of imprisonment of 12 years and 10 years respectively.

Proposed order

[37] I would grant the application for leave to appeal, allow the appeal, vary the sentence imposed for the conviction of manslaughter in relation to count 1 on the indictment by substituting a sentence of 12 years' imprisonment for the sentence of 14 years' imprisonment imposed by the trial judge, and vary the sentence imposed in relation to count 2 on the indictment by substituting a sentence of 10 years' imprisonment for the sentence of 12 years' imprisonment imposed by the trial judge. In all other respects I would confirm the orders made by the trial judge.

[38] **McMEEKIN J:** I have had the advantage of reading Fraser JA's reasons in draft and agree with his Honour's conclusions but I wish to add a few words of my own.

[39] The reasons that the learned sentencing judge gave for the sentence imposed disclose no error of principle nor can it be said that he overlooked any relevant matter. Thus we are concerned with a complaint that the discretion exercised by his Honour has gone so far awry as to be outside the range open.

[40] In *R v Jones & Hili*[22] Rothman J, with McClellan CJ at Common Law and Howie J agreeing, explained concisely the task of a court on an appeal such as this:

> "This Court's task is to correct error and not to substitute one exercise of discretion for another, where error has not been shown. That error must be either identifiable or manifest from the sentence imposed: *House v The King* [1936] HCA 40; (1936) 55 CLR 499. Manifest error is not to be equated with mere inadequacy or excess. But manifest error is fundamentally intuitive. It arises because the sentence imposed is out of the range of sentences that could have been imposed and therefore there must have been error, even though it is impossible to identify it."

[41] Reviewing the sentencing discretion is particularly difficult in cases of manslaughter. As was observed by Gleeson CJ, McHugh, Gummow and Hayne JJ in *R v Lavender*,[23] of all serious offences manslaughter attracts the widest range of possible sentences, as manslaughter throws up the greatest variety of circumstances affecting culpability. Generally speaking, there is no "tariff" to guide the process and that has been evident here. No case cited to us was relevantly comparable. As McPherson JA remarked in *R v Kelly*,[24] that makes the task of attempting to upset the primary judge's view of the matter "much more difficult".

[42] It is the combination of the deliberate use of the vehicle as a weapon, not once but repeatedly, the driving of the vehicle in a manner dangerous to many members of

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22 [2010] NSWCCA 108 at [41].

23 [2005] HCA 37 at [22]. See also the cases cited by Fraser JA at fn 21 above.

24 [1999] QCA 296.

the public as well as to the occupants of the vehicle that he was attacking, combined with the jury's finding that the applicant lacked intent to cause serious harm that distinguishes this case and makes finding truly comparable decisions difficult.

[43] That lack of guidance has caused me considerable difficulty. Fraser JA has, with respect, analysed the previous decisions cited to us carefully and accurately and I need not repeat the exercise. *Clark*,[25] in my view, was so different in terms of the moral culpability of the applicant as to be an unhelpful guide. The existence of the bipolar disorder, its causal significance in the commission of the offence, and the very different nature of the driving, serve to significantly distinguish the two cases.

[44] Being then in uncharted waters, so to speak, I am particularly conscious of not simply substituting my own view of what is appropriate for the view taken by the sentencing judge: see *Lowndes v The Queen*.[26]

[45] It hardly needs to be said that the circumstances of this offence, which Fraser JA has described, put it in the upper range of seriousness of offences of this type. Further, the applicant's criminal and traffic history demonstrates a certain continuing disregard for the law and his responsibilities.[27] There was a trial and so no early plea of guilty that might cause one to ameliorate an otherwise appropriate sentence. The objective facts of the offending conduct and the subjective factors relevant to sentence all dictate a significant term of imprisonment.

[46] However the prosecution were unable to cite a case to the Court in which a sentence as long as 14 years has been imposed for a driving manslaughter case. Indeed I have not found a case where a sentence as long as 12 years has been imposed in anything like similar circumstances.

[47] Whilst conscious of the differing legislative regimes in place in different States, a review of decisions in driving manslaughter cases in other States suggests that sentences in excess of 10 years are rare: *Penny v The State of Western Australia* [2006] WASCA 173; (2006) 33 WAR 48 [80]-[87] per Buss JA;[28] *Bombardieri v The Queen* [2010] NSWCCA 161 at [19]; [40]-[49].[29] I do not think that the sentencing norms in those States are so different as to make the accumulated experience of those jurisdictions unhelpful.

[48] The significant point, it seems to me, is that cases of driving manslaughter in which sentences in excess of 10 years imprisonment have been imposed are not only unusual, but the period of imprisonment does not seem to ever exceed 10 years by any great amount. This appears to be the case in Queensland as well. Those cases where longer sentences of imprisonment have been imposed have involved circumstances which, in my view, are only slightly less serious than the circumstances here. The question here is whether a forty percent increase in the term of imprisonment is justified when comparison is made with those cases.

[49] *Lawler v The Queen*,[30] is an example of such a case. A sentence in excess of 10 years was imposed but the offender's conduct lacked the quality of deliberate

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25 [2009] QCA 361.

26 (1999) 195 CLR 665 at 671-672, [15].

27 As to the potential significance of which see *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477.

28 In WA the maximum sentence is 20 years imprisonment for manslaughter (s 280 *Criminal Code* (WA)) compared with life imprisonment in this State: s 310 of the *Criminal Code.*

29 In NSW the maximum sentence is 25 years imprisonment for manslaughter (s 24 *Crimes Act* 1900 (NSW)).

30 (2007) 169 A Crim R 415.

aggressiveness of the applicant's behaviour. An appeal in respect of an effective head sentence of 10 years eight months imprisonment with a non-parole period of eight years imposed in respect of one count of manslaughter and two counts of aggravated dangerous driving causing grievous bodily harm was dismissed. The offender was the driver of a prime mover carrying 18 tonnes with, as he knew, defective brakes. Due to his inability to slow his vehicle as it descended a slope and into a line of traffic the prime mover collided with no fewer than 35 vehicles in all. The driver of one vehicle was incinerated whilst two other drivers were seriously injured. The trail of destruction which resulted was described as resembling a "war zone". The offender, who was aged 46, had numerous driving offences and the vehicle that he was driving was not only in poor condition, but it was also uninsured and unregistered.

[50] A sentence of 12 years imprisonment was said to be appropriate by the New South Wales Court of Criminal Appeal (but not in fact imposed) in *R v Borkowski*,[31] a street racing case, where the offender faced two counts of manslaughter, had a criminal and traffic history of significance, and pleaded guilty.

[51] In *R v Martin*,[32] a nine year sentence was substituted for a 12 year term imposed by the primary judge.[33] There the applicant, whilst attempting to flee from the police in a stolen car, drove 50km on the wrong side of the highway at speed in a voluntary drug-induced state of psychosis and collided with a car, killing the driver. Here the reckless and dangerous driving was for a much shorter period and distance but the vehicle used more deliberately as a weapon. The drug affected state of the offender was held to be relevant as an aggravating, not mitigating, factor.

[52] The feature of using the vehicle as a weapon was relevant in *Young v The Queen*,[34] where an appeal against a sentence of eight years imprisonment with a non-parole period of five years that had been imposed in respect of an offence of manslaughter was dismissed. There the appellant had used his vehicle to attack a group of people on the footpath following a verbal altercation. He mounted the footpath intending to frighten them but struck and killed the victim. He then left the scene of the accident. The similarity in the factual situations is evident but there were significant matters in mitigation not present here. There was an early plea. He was 22 years old, had no criminal convictions, and he had only one violation of a relatively minor nature on his traffic record. Whilst the offender was heavily intoxicated at the time of the offence, the primary judge accepted that the offence was out of character, that he was genuinely remorseful, and that he had good prospects of rehabilitation and was unlikely to re-offend.

[53] *R v Burton*[35] is another case involving aggressive driving causing, on this occasion, two deaths. That case involved an intoxicated driver of mature years driving a semi-trailer for many kilometres in an aggressive and dangerous manner before going through a red light at a major intersection and killing the occupants of another vehicle, the offender having a significant history of previous offences. Andrews ACJ (as his Honour then was) said, in increasing the sentence to 10 years

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31 [2009] NSWCCA 102.

32 (2007) 20 VR 14; [2007] VSCA 291.

33 In Victoria the maximum sentence for manslaughter is 20 years imprisonment with or without a fine: s 5 *Crimes Act* 1958 (Vic).

34 [2009] NSWCCA 298.

35 [1983] QCCA 110 discussed in *R v Kelly* [1999] QCA 296 by McPherson JA at p 9.

imprisonment: "It is difficult to imagine a more serious case of criminal negligence than this in the handling of a motor vehicle". Connolly J spoke of a "frightening feature of deliberation" in the driving. Both comments apply with equal force here.

[54] As Fraser JA's analysis and the above recitation demonstrate, one struggles to find truly comparable cases that can offer guidance. What does seem clear to me is that the sentence imposed is well above any remotely comparable sentence that has been imposed by the Courts in this State, and indeed, so far as I can discover, in this country, to date. That conclusion, of course, does not determine the matter. Such cases are only a guide.[36] But acceptance of his Honour's approach would require a significant step up in the severity of penalty for such conduct as has hitherto seemed appropriate. I do not think that step up is warranted. In my view the applicant has demonstrated that the sentence imposed by the primary judge is outside the range open.

[55] I agree with the orders that Fraser JA has proposed.

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[36] See *R v Oliver* (1980) 7 A Crim R 174 at 177, Street CJ (Begg and Slattery JJ agreeing).