SUPREME COURT OF QUEENSLAND

CITATION:	*R v Maher* [2012] QCA 7
PARTIES:	**R** **v** **MAHER, Raymond Patrick** (applicant)
FILE NO/S:	CA No 280 of 2011 DC No 83 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	10 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	1 February 2012
JUDGES:	Chief Justice, White JA and Atkinson J 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 – SENTENCE MANIFESTLY EXCESSIVE – where applicant pleaded guilty to dangerous operation of a vehicle causing death – where applicant sentenced to imprisonment for three years suspended after nine months – where applicant contends insufficient regard had to mitigating factors – where applicant contends sentencing judge erred in characterising offence as a sustained course of dangerous driving due to fatigue rather than momentary inattention – whether sentence manifestly excessive *Criminal Code and Civil Liability Amendment Act* 2007 (Qld), s 4 *Victims of Crime Assistance Act* 2009 (Qld), s 15(8) *Jiminez v The Queen* (1992) 173 CLR 572; [1992] HCA 14, cited *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, cited *R v Damrow* [2009] QCA 245, discussed *R v Dwyer* [2008] QCA 117, cited *R v Gruenert; ex parte A-G (Qld)* [2005] QCA 154, cited *R v Hardes* [2003] QCA 47, cited *R v Harris; ex parte A-G (Qld)* [1999] QCA 392, cited

R v Hart [2008] QCA 199, distinguished
R v McGuigan [2004] QCA 381, cited
R v Manners; ex parte A-G (Qld) (2002) 132 A Crim R 363; [2002] QCA 301, cited
R v Murphy [2009] QCA 93, discussed
R v Newman [1997] QCA 143, cited
R v Pellow [1997] NSWSC 286, cited
R v Price [2005] QCA 52, cited
R v Proesser [2007] QCA 61, cited
R v Ruka [2009] QCA 113, discussed
R v Ryan; ex parte Attorney-General (Qld) [1996] QCA 434, cited
R v Vance; ex parte A-G (Qld) [2007] QCA 269, discussed
R v Wilson [2009] 1 Qd R 476; [2008] QCA 349, discussed

COUNSEL: K Prskalo for the applicant
S P Vasta for the respondent

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

[1] **CHIEF JUSTICE**: I have had the advantage of reading the reasons for judgment of White JA. I agree that the application should be refused, for those reasons.

[2] I wish respectfully to commend the primary Judge for his having declined to accept unquestioningly Counsel's common characterization of the case. His Honour pursued that issue on full notice, and with measure. He thereby discharged his independent judicial obligation.

[3] It is disturbing to think an attitude erroneously distilled at the bar table, fortunately uncommon, could nevertheless control the exercise of judicial discretion. This case provides a reassuring example that it has not, and must not.

[4] **WHITE JA**: On 23 September 2011 the applicant pleaded guilty in the District Court at Mackay that on 12 August 2009 he dangerously operated a motor vehicle at the intersection of Connors Road and East Boundary Road, Paget causing the death of Brian Russell Gibson. The applicant was sentenced to imprisonment for three years to be suspended after serving nine months with an operational period of three years. He was disqualified from holding or obtaining a driver's licence for four years.

[5] The applicant contends that the sentence imposed was manifestly excessive and that:

- insufficient regard was had to mitigating factors in favour of the applicant;
- the sentencing judge erred in characterising the offence as a sustained course of dangerous driving rather than one of momentary inattention; and
- as a consequence of that characterisation his Honour erred in regarding the sentence imposed as the lowest possible sentence in the circumstances.

The applicant does not challenge the disqualification from driving.

[6] The applicant was aged 44 at the time the offence was committed and 46 at sentence. He had limited criminal and traffic histories which will be detailed more fully later in these reasons but which were accepted by his Honour as being well in the past. Neither alcohol nor speed were involved in the collision which occurred at night in a well-lit street in the course of the applicant undertaking a right-hand turn into the path of an oncoming motorcycle ridden by the deceased.

Schedule of facts

[7] The sentence proceeded on an agreed schedule of facts.[1] The deceased was a 26-year-old man who was working a 2.30 pm to 11.00 pm shift at Paget. He had returned home at approximately 8.30 pm for dinner and about 25 minutes later left on his black 2004 Honda CBR1000RR motorcycle which he had purchased new in 2005. It had recently been serviced. That model of motorcycle automatically turned the headlight on upon ignition. The lights could not be switched off without turning off the engine. The options for the lights were low or high beam. The deceased had travelled approximately two kilometres down Connors Road southbound in the centre of his lane. The area was described as "well lit, even at night and quite a busy stretch of road … straight and flat without any dips or blind spots."[2] The speed limit was 60 kilometres per hour.

[8] The applicant was travelling with a front seat passenger northbound on Connors Road in a white Nissan utility. He turned his vehicle right into East Boundary Road "straight into the oncoming path of the deceased".[3] The impact occurred in the centre of the deceased's lane. The deceased activated his brakes leaving a five metre skid mark on the road. The applicant's utility sustained impact damage on its left front corner incorporating the nose panel; a broken left headlamp assembly; deflated front left tyre from inner rim damage during the impact; a scuffed bullbar and a bent number plate. This damage indicated that the motorcycle struck the front passenger corner of the vehicle. The impact lifted the back tyres of the utility off the road.

[9] Witnesses 90 metres away heard the crash and observed the utility continue travelling over the top of the motorcycle and rider and not stop until it had turned fully into East Boundary Road parking approximately 24 metres down the street.

[10] The deceased suffered extensive internal injuries and would likely have died instantly.

[11] The applicant told police who attended at the scene that he had turned his vehicle at a speed of approximately 30 kilometres per hour. The passenger told police that he had not seen the motorcycle or any headlights apart from car headlights about a kilometre away but he was not paying "much attention".[4] Neither the deceased nor the applicant, who were tested, were found to have consumed alcohol or drugs in their systems.

[12] The applicant told police he believed that the crash occurred due either to the speed of the deceased's motorcycle or that its lights were not illuminated. Forensic reconstruction of the scene was conducted although no tests were able to determine

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1 AR 40-41.
2 AR 40.
3 AR 40.
4 AR 41.

the speed or force of the collision as the utility did not stop moving on impact. The scientific traffic expert opined that because of the limited damage and spread of debris it was a low speed crash consistent with the deceased's motorcycle travelling at the speed limit immediately before the collision. Forensic testing of the light bulbs of the headlights of the motorcycle showed the low beam light was illuminated at the time of impact. There were no mechanical defects in either vehicle which could have contributed to the collision.

[13] The schedule of facts stated in its penultimate paragraph:

> "Later investigations revealed the [applicant] had just finished working a 16-hr day and it was his 10th consecutive day of [working] as a concrete driller."[5]

This was a statement which assumed significance in the sentencing judge's approach to the characterisation of the nature of the dangerous driving.

[14] The applicant was charged and issued with a notice to appear on 9 October 2010, almost 14 months after the collision, after declining a formal interview.

[15] The schedule of facts stated in conclusion:

> "The Crown accepts that the [applicant's] criminality is one of momentary inattention resulting in him not noticing the deceased before executing the turn across the deceased's path."[6]

Criminal and traffic history

[16] The applicant had a number of drug related offences dealt with in the Magistrate's Court in Mackay in the 1980s and 1990s, although the most recent was a conviction for possession of a dangerous drug on 12 February 2001 and possession of property reasonably suspected of being tainted property for which he was fined $750. His criminal history included an offence of being in charge of a motor vehicle whilst under the influence of liquor or drugs in 1984 for which he was fined $325 and disqualified for 10 months. The following year he was similarly convicted but additionally, he was convicted of dangerous driving, fined $400 and disqualified from driving for two years.

[17] The applicant's traffic history (in addition to those mentioned in the criminal history) included two offences of driving under the influence of liquor in 1983 and 1985 respectively and four offences of exceeding the speed limit but not egregiously so. The last entry was in October 2009. The sentencing judge remarked that this offending was largely confined to matters which had occurred when the applicant was a young man.

Prosecution case below

[18] The prosecution proceeded on the basis that the applicant's dangerous driving was to be characterised as "momentary inattention" in not seeing the deceased before executing the turn across the path of the oncoming motorcycle. The prosecutor submitted for a head sentence from 18 months to two years, extending from a wholly suspended sentence to one in which actual imprisonment could be required. The prosecutor relied upon the authorities of *R v Hart*[7], *R v Gruenert;*

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5 AR 41.
6 AR 41.
7 [2008] QCA 199.

ex parte Attorney-General (Qld)[8] and *R v Price*.[9] However, early in the prosecutor's submissions the sentencing judge intervened stating that he needed to be persuaded that the applicant's conduct could be characterised as "momentary inattention".

[19] The victim impact statements from the deceased's widow (the deceased was the father of a seven-month-old child), father and step-mother spoke of the family's sadness and loss. The father made a further statement in court pursuant to s 15(8) of the *Victims of Crime Assistance Act* 2009. He told the court that his son was a very good motorcycle rider who had been well-trained in riding a motorcycle.[10]

Defence submissions at sentence

[20] Defence counsel told the court that the applicant had always been gainfully employed but had been diagnosed with a post-traumatic stress disorder as a consequence of the accident and suffered from overwhelming feelings of guilt and was on periodic WorkCover. He was financially supporting his elderly mother because other members of the family due to serious ill health were unable to assist. Any incarceration would affect her.

[21] Defence counsel submitted that there was no demonstrated course of dangerous driving prior to the collision which permitted the driving properly to be categorised as anything other than "momentary inattention". The judge again expressed his reluctance to accept this categorisation, noting that the road was long and straight and the vehicles' lights were operating. Counsel explained that his client saw lights in the distance but thought they were far enough away to turn safely so that the traffic misconduct could be characterised at most as borderline miscalculation.[11]

[22] Defence counsel relied on *R v Gruenert; ex parte Attorney-General (Qld)*[12]; *R v Ryan; ex parte Attorney-General (Qld)*[13] and *R v Proesser*[14] and submitted that it was open to the court to impose a wholly suspended sentence.

[23] The judge continued to press defence counsel for facts which supported the conclusion of momentary inattention because of his submission that, although not in the schedule of facts, the applicant had seen, as had the passenger, distant lights and thought there was ample time to turn. The prosecutor produced the statement to police at the scene in which the applicant had said that he had slowed down to about 30 kilometres an hour to make the right-hand turn and did not see any traffic coming towards him "only a car about 500 metres away". He had started the turn, had not seen any lights and the motorcycle was "there at my [bullbar]".[15] Those distant lights were described, as the judge pointed out to counsel, as car lights.

[24] The prosecutor further directed the court's attention to the statement of the crash investigator who had given evidence at the committal hearing that the scatter of the debris was consistent with a low speed collision and with the deceased travelling at the speed limit immediately before the collision.

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8 [2005] QCA 154.
9 [2005] QCA 52.
10 AR 14-15.
11 AR 20.
12 [2005] QCA 154.
13 [1996] QCA 434.
14 [2007] QCA 61.
15 AR 26.

[25] His Honour reserved the matter until after the luncheon adjournment. He then queried whether the indicator on the applicant's vehicle was operating when it was turning. Defence counsel was instructed that it had been activated although there was no specific reference to it in any of the statements. His Honour then pronounced sentence.

Approach of the sentencing judge

[26] His Honour immediately identified as the important issue whether the driving could be categorised as dangerous driving as a result of momentary inattention or should be given a more serious descriptor. He noted, by reference to the aerial photograph tendered, that a substantial length of the roadway was straight and that there was no obstruction to vision nor was there other traffic to obscure the view that the applicant had of the motorcycle or of the motorcyclist's view of the applicant's utility. His Honour said:

> "Because of the length of the straight [road] and the fact that your vision was unobscured and it is common ground that the motorcyclist's headlight was activated, it seems to me that there must have been a very significant period when you should have had him under observation. On that basis, it does not seem to me that the event can be described as one arising from momentary inattention.
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> I think there is a serious and in terms of driving accidents, prolonged failure to keep a proper lookout. Because I make that finding, I ask what could be the cause and I wonder if it's not found in the last paragraph or the second last paragraph of the statement of facts, which records that you were at the end of a 16 hour working day and it was your tenth consecutive day of work as a concrete driller. It seems to me that you must have been so tired that you should not have been driving."[16]

The judge accepted that the applicant intended no harm but observed that driving when very tired was "a serious breach of the standard of driving that other road users are entitled to expect". His Honour referred to community concerns with the prevalence of long shifts of work and driving significant distances.

[27] It was for that characterisation of culpability – a prolonged period of inattention likely brought about by fatigue – that his Honour concluded that the appropriate sentence was not one of 18 months which would have been the case on the basis of momentary inattention but three to four years imprisonment. His Honour referred to the applicant's favourable circumstances of a hard working man who was a good provider for his family; that imprisonment would in effect punish other members of the family who would be deprived of his support; that he himself had suffered significantly (emotionally) since the accident; his remorse; the plea of guilty; and the significant delay in having the case brought to court. His Honour observed that the delay allowed the applicant to demonstrate his usefulness to the community and to his family and that he was unlikely to re-offend. Advantageously for the applicant his Honour did not regard his traffic and criminal histories as relevant to sentence.

Applicant's submissions on application for leave to appeal

[28] Ms Prskalo, for the applicant, submitted that a finding that fatigue was the significant cause of the applicant's failure to see the oncoming motorcycle and thus

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16 AR 31-32.

contributed to his culpability was not reasonably open on the evidence. She argued that even if the conduct was to be characterised as something more serious than momentary inattention neither the quality of the applicant's driving nor his antecedents justified an escalation of penalty from 18 months to two years imprisonment to between three and four years imprisonment. She submitted that there was no aggravating feature to the driving such as excessive speed, a substantial traffic history, careless driving of a heavy vehicle or a deliberately dangerous course of reckless driving to justify a higher sentence. She referred to *R v Wilson*[17] where the offender was sentenced to four years imprisonment with parole eligibility after 18 months. That offender had a serious traffic history and he was convicted after a four day trial. The driving involved overtaking on his motorbike in an unsafe manner. It was unsafe because there was another motorcyclist travelling in the opposite direction with which he collided. The other cyclist died and his pillion passenger suffered grievous bodily harm. The appeal did not concern the issue of the sentence imposed since the conviction appeal was successful. In *obiter dictum* observations the President stated that the authorities did not support a sentence over three years for an offence of a similar kind involving a serious error of judgment over a short period by an offender with a concerning traffic history but without prior convictions and without the exacerbating factor of intoxication[18] referring to *Gruenert*; *R v Manners; ex parte Attorney-General (Qld)*[19]; *R v Price*[20]; *R v Hart*[21] and *R v Newman*.[22] Her Honour's comment was made in respect of cases for which the maximum penalty[23] was seven years imprisonment.

[29] Ms Prskalo also referred to *R v Murphy*[24] to demonstrate that the sentencing judge's appreciation of the range where the culpability was worse than momentary inattention was, nonetheless, too high. That offender was sentenced to three and a half years imprisonment suspended after serving 12 months. He was charged with dangerous driving causing death and grievous bodily harm. He drove on or below the speed limit of 90 kilometres per hour but permitted his car to drift to the outside of his lane at a point where the highway curved. He attempted to correct the path of the car, but oversteered, causing the car to cross the double unbroken centre line into the path of an oncoming car. His passenger, who was his cousin, died as did the driver of the oncoming car. That driver's wife, who was a front seat passenger, sustained multiple life threatening injuries which left her with significant disabilities. There was a finding that the car was driven at a speed which was excessive in the circumstances. There had been some allegation that an animal had unexpectedly crossed the road but that was not resolved. The judge rejected the submission that the dangerous driving was momentary inattention but, rather, found it to be momentary misjudgement. Again, that sentence was imposed where the maximum penalty was seven years. It was not interfered with on appeal. Fraser JA, with whom Keane JA and Wilson J agreed, mentioned a "marked upward trend" in

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17 [2008] QCA 349.
18 At [26].
19 (2002) 132 A Crim R 363; [2002] QCA 301.
20 [2005] QCA 52.
21 [2008] QCA 199.
22 [1997] QCA 143.
23 *Criminal Code and Civil Liability Amendment Act* 2007 (Qld), Act No 14 of 2007, s 4, assented to on 20 March 2007 increased the maximum penalty to 10 years imprisonment.
24 [2009] QCA 93.

the penalties imposed in cases of dangerous driving causing death or grievous bodily harm.[25]

Discussion

(i) Procedural fairness

[30] The applicant contends that his counsel ought to have been alerted by the sentencing judge that he intended to depart from the agreement between the parties that the collision occurred because of his momentary inattention. From the outset of the sentence hearing the judge alerted the prosecutor and thus defence counsel that he was concerned at the characterisation of the driving misconduct as momentary inattention. He raised this on several occasions and later with defence counsel. In *R v Ruka*[26] a similar complaint was made of lack of warning about the basis on which the judge would sentence where the facts were not in dispute. Wilson J (as her Honour then was) said:

> "Whether the conduct should be characterised as momentary inattention or as something more serious was a matter of evaluation of admitted facts. In those circumstances, the sentencing judge was not obliged to warn counsel for the applicant that his contention might be rejected. There was no breach of the rules of procedural fairness."[27]

That is the case here. It is true that fatigue was not discussed with counsel but the facts which pointed to that inference were not in dispute. The applicant had given no interview after his initial statement which might have rebutted that inference.

(ii) Characterisation of the driving

[31] His Honour looked for an explanation for the failure of the applicant to observe the oncoming motorcycle on the long, straight stretch of road which, according to the agreed schedule of facts, was free of obstruction including other traffic and was well lit. That was hardly surprising. The only explanation offered by the undisputed facts was that the applicant was so fatigued that he did not register the presence of the deceased's motorcycle. The conclusion was open to his Honour that the applicant had engaged in a prolonged period of failure to keep a proper lookout.

(iii) Manifest excess?

[32] As the sentencing judge was informed, the maximum penalty for the offence of dangerous driving causing death or grievous bodily harm (without circumstances of aggravation) was increased in 2007 from seven years to 10 years imprisonment. Accordingly, authorities which pre-date that amendment may be regarded of some limited value in indicating a range. In exchange with counsel it was recognised that there had been an upward trend in sentencing for this offence in more recent times.[28]

[33] Mr S Vasta, for the respondent, submitted that since *R v Damrow*[29] and *R v Ruka*[30]were the only post-2007 cases to which the increased penalty was applied they would give the most assistance. It is useful to consider those decisions first.

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25 At [22].
26 [2009] QCA 113.
27 At [12].
28 AR 21.
29 [2009] QCA 245.
30 [2009] QCA 113.

[34] In *Damrow* the applicant was found guilty after a two day trial in the District Court of the dangerous operation of a motor vehicle causing death. She was sentenced to 18 months imprisonment suspended after eight months with an operational period of 18 months and was disqualified from holding or obtaining a licence for two years. She was also driving unlicensed. The applicant contended that since neither speed nor alcohol/drugs were factors, an actual period of imprisonment was not justified. She drove her car into an unfamiliar intersection and collided with a truck. There had been a stop sign facing where she entered the intersection but it had been removed earlier and the stop line on the road had faded. The pending intersection was indicated by traffic signs and, as Fraser JA commented,[31] the jury must have accepted the prosecution case that those features were sufficient to alert a reasonable driver that she was approaching an intersection. At the time she and the other occupants of the car were singing along to music on the car radio. The collision caused the death of a passenger in her car. The applicant had no prior criminal convictions and was otherwise of good character. She was unlicensed because she had not responded to a letter which offered her the opportunity of getting her licence back with only one demerit point.

[35] Fraser JA responded to the submission that the level of dangerousness of the driving was very low:

> "I accept that the level of seriousness of the applicant's driving was at a relatively low level within the range of driving which might be stigmatised as "dangerous", but I am nevertheless not persuaded that the sentencing judge erred in concluding that this was not a case of mere momentary inattention or otherwise a rare case which necessarily attracted a non-custodial sentence."[32]

His Honour distinguished the offender's driving from that in *Gruenert*[33] where the driving was described as mere momentary inattention. His Honour emphasised that the *quality* of an offender's driving is significant and driving which is more culpable than mere momentary inattention calls for a higher penalty. Keane JA in *Gruenert* had observed that a head sentence of 18 months imprisonment was at the bottom end of the range for a case of dangerous driving causing death.

[36] The offender in *Ruka*[34] pleaded guilty to dangerous operation of a motor vehicle causing death. He was sentenced to two years imprisonment with a parole release order after serving six months. He was automatically suspended from holding or obtaining a licence for six months. The offender contended that a fully suspended sentence was appropriate and that the judge had erred in finding that it was not a case of momentary inattention. He had just finished a 12 hour shift at 6.00 am and it was the tenth consecutive day on which he had worked such a shift. He proceeded to drive home along the Mount Lindesay Highway and after stopping for petrol and something to drink resumed his journey. Fifteen minutes later he fell asleep at the wheel, his vehicle drifted to the wrong side of the road into the path of an oncoming vehicle with which his vehicle collided. The driver of the oncoming vehicle was killed. There was no suggestion that the offender had been speeding or was affected by alcohol.

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31 At [5].
32 At [16].
33 [2005] QCA 154.
34 [2009] QCA 113.

[37] There is, of course, no question here that the applicant fell asleep at the wheel. Wilson J, with whom Muir and Chesterman JJA agreed, noted in *Ruka* that the sentencing judge appreciated the importance of identifying the level of seriousness of the offender's driving (immediately before falling asleep[35]) and that it was more blameworthy than a case of momentary inattention. The offender had conceded that he ought to have appreciated his fatigue and pulled over before falling asleep. Here there is no such concession. Fatigue was an inference drawn by the sentencing judge seeking an explanation for the prolonged failure to observe the deceased's motorcycle. Wilson J observed that fatigue has been widely recognised as a major cause of traffic accidents and the courts must be vigilant to ensure community appreciation of a driver's responsibility not to endanger the lives of others by driving when he or she is too tired to do so safely. The offender in *Ruka* was 37 at the time of the offence, 39 at sentence and had no criminal history. He did, however, have a traffic history which involved five speeding offences over 10 years. He was of good character with a solid work history. He was deeply remorseful for his conduct and its catastrophic effect. The court particularly referred to *Vance*[36] and concluded that the sentence was not manifestly excessive.

[38] In *R v Vance; ex parte Attorney-General (Qld)*[37] the offender pleaded guilty to the dangerous operation of a motor vehicle in 2006 (when the maximum penalty was seven years). He was sentenced to two years imprisonment suspended after six months with an operational period of two years and disqualified from driving for five years. He was 20 and his prior history included convictions earlier in 2006 for a minor drug offence and two years earlier for failing to stop at a red light. The deceased was a 54-year-old man who was riding his bicycle between 5.15 am and 5.30 am along a main arterial road at Burleigh Waters in a lane to the left of lanes available to motorists. The offender, driving his motor vehicle in the same direction, approached the deceased on his bicycle from the rear. There was little traffic and street lights were still illuminated and the weather fine. At a point where the road started to curve to the right the offender's vehicle crossed into the emergency lane where the bicycle was situated and collided with the guard rail. The vehicle then collided head on with the rear of the bicycle. The deceased was thrown many metres forward. The offender did not stop at the scene. Other motorists found the deceased lying face down on the road. He died shortly afterwards. The following day police were notified by the offender's solicitors and several days later police attended at his home and took possession of his vehicle. Although the offender had been drinking alcohol he had consumed his last alcoholic drink by 7.00 pm the previous day. He had drunk only water thereafter but had driven with friends to establishments in and around Surfers Paradise and at 4.30 am had decided to drive home.

[39] It was submitted on his behalf that he had no recollection of a collision and did not see the deceased before or after. He looked at the damage to his vehicle (presumably because of the impact with the guard rail on the road) but then drove home. It was the offender's contention that he must have fallen asleep. He was sentenced on the basis that the only factor which contributed to the collision was fatigue. He had pleaded guilty on ex officio indictment. He had expressed remorse to the family and had undertaken driving rehabilitation. The Attorney-General contended that the sentence was manifestly inadequate. The Chief Justice observed:

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35 *Jiminez v The Queen* (1992) 173 CLR 572; [1992] HCA 14; *R v Pellow* [1997] NSWSC 286.

36 [2007] QCA 269.

37 [2007] QCA 269.

> "The predominantly important features of this case, for a sentencing Judge were, first and foremost, that a fellow human being was killed because of the [offender's] dangerously neglectful driving."[38]

His Honour further emphasised that the offender should have appreciated that he was unfit to drive through fatigue yet nevertheless chose to do so. The characterisation of the neglect as surpassing momentary inattention was said to be correct since the offender had driven over an appreciable period while grossly fatigued. The other factor of significance was leaving the scene of the accident and failure to surrender promptly to police.

[40] The Attorney-General submitted for a sentence in the order of three and a half years imprisonment after taking into account the offender's youth and his plea of guilty on ex officio indictment and the lack of any relevant prior criminal history. His Honour referred to *R v McGuigan*[39] and *Rv Hardes*.[40] In *McGuigan* a three and a half year sentence was imposed with parole after 18 months. The driving had caused grievous bodily harm not death. In *Hardes* a term of imprisonment of three years was imposed. Each offender had a bad traffic history. In *Hardes* three years was described as "at the very bottom of the range for such an offence". The Chief Justice concluded that Vance's sentence was manifestly inadequate. He said:

> "Fundamental considerations in cases like these are the ultimate gravity of causing the death of a fellow human being, and the primacy of the Courts continuing to do their utmost to secure general deterrence in a potentially very dangerous sphere of human activity.
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> While past decisions of the Court of Appeal are helpful in suggesting a general range in cases like these, the determination of penalty is, in the end, a value judgment in which the Court must carefully balance all relevant considerations."[41]

As is customary with Attorney's appeals against sentence a moderate approach was taken to increasing the sentence. The head sentence was increased to three years requiring the offender to serve 12 months actual imprisonment. The Chief Justice added:

> "I accept the submission for the Attorney-General that a range appropriate to this case was of the order of three to four years' imprisonment."

Keane JA and Mullins J agreed.

[41] Mr Vasta also referred to *R v Hart*[42] (a sentence imposed when the maximum penalty was seven years). The offender pleaded guilty to one count of dangerous operation of a motor vehicle causing death and grievous bodily harm. He was sentenced to 18 months imprisonment suspended after four months with an operational period of 18 months and disqualified from driving for 12 months. That offender contended that the sentence was manifestly excessive. At about 10.00 pm in January 2005 the applicant was driving a taxi from Townsville approaching the

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38 At p 9.
39 [2004] QCA 381.
40 [2003] QCA 47.
41 At p 14.
42 [2008] QCA 199.

intersection of the Bruce Highway and Mount Low Parkway. The deceased was a front passenger in the taxi. The offender was following another vehicle which executed a right-hand turn into Mount Low Parkway. The offender then executed his own right-hand turn and collided with a motorcycle driven by a police constable travelling in a southerly direction on the Bruce Highway. The offender did not see the motorcycle until it was too late to avoid the collision. The passenger was killed as a consequence of injuries sustained in the collision and the police constable suffered grievous bodily harm. The intersection was described as hazardous, it was dark and the road surface was wet because it had been raining. There were no traffic lights and the overhead lighting at the time was deficient. The speed limit was 100 kilometres per hour but excessive speed was not involved. No explanation was advanced by the offender to explain why he failed to see the oncoming motorcycle. The collision was said to have been caused by momentary inattention. The offender was 63 at the time of the offence. He had no criminal history and a minor traffic record. He was said to be of good character and as a result of the offence he had lost his livelihood. It was contended for him that the term of imprisonment should have been wholly suspended.

[42] The present case is not one of momentary inattention so *Hart* is not of great assistance. Keane JA, with whom de Jersey CJ and Fraser JA agreed, identified the crucial issue as the level of seriousness of the actual driving of the offender[43] quoting Thomas JA in *R v Harris; ex parte Attorney-General (Qld).*[44] In *Hart* the offender's inattention was momentary although described as a "serious fault".[45] Importantly Keane JA referred to *R v Dwyer*[46] which deprecated:

> "… An approach which seeks to grade the criminality involved in such cases by a close comparison of aggravating and mitigating factors, as if there is only one correct sentence, … [it involves] the illusion of a degree of precision which is both unattainable, and, in truth, alien to the sentencing process …"

Conclusion

[43] The question is whether the range proposed by his Honour of three to four years reflects a consistency of approach with previous sentences for broadly comparable conduct taking into account not dissimilar background facts. Once it is accepted that his Honour was entitled to reject the characterisation of the driving as momentary inattention, the range of comparable sentences was enlarged. Furthermore, the increase in the maximum penalty from seven to 10 years in 2007 is a clear indication of the legislative intent that dangerous driving causing death is to attract a greater level of penalty than might hitherto have been the case. The death of any valued family member will always cause grief and be described as a tragedy. As the Chief Justice observed in *Vance*, there is a strong role for general deterrence in this area. Driving a vehicle tends to be taken very much for granted. It tends to be regarded as a right rather than a privilege. The public must have a level of understanding that those who engage in driving must do so carefully to protect other users of the road. If they drive dangerously by prolonged inattention, whether resulting from fatigue, distraction from passengers or some other reason, and cause thereby the death or serious injury of another, punishment which strongly

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43 At [17].
44 [1999] QCA 392.
45 At [18].
46 [2008] QCA 117 at [37]-[38]. See also *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27].

denounces that conduct will be imposed. The head sentence of three years was not outside the range of a sound sentencing discretion.

[44] In suspending the sentence at nine months his Honour appropriately recognised the mitigating features of good character, hard work, remorse and the plea of guilty. Furthermore, his Honour was generous in his characterisation of the applicant's criminal and traffic history as not of great relevance and confined to the applicant's youth. I am not persuaded that his Honour erred in his approach to the sentence and I would refuse the application for leave to appeal against sentence.

[45] **ATKINSON J**: For the reasons given by White JA, I would refuse the application for leave to appeal against sentence.