SUPREME COURT OF QUEENSLAND

CITATION:	*R v Glenbar* [2013] QCA 353
PARTIES:	**R** **v** **GLENBAR, Brett Walter** (applicant)
FILE NO/S:	CA No 67 of 2013 SC No 163 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2013
JUDGES:	Margaret McMurdo P, Morrison JA and Mullins J Separate reasons for judgment of each member of the Court, Morrison JA and Mullins J concurring as to the order made, Margaret McMurdo P dissenting
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant drove a motor vehicle under the influence of alcohol at high speed after refusing to stop for police – where the applicant failed to negotiate a bend, struck and killed two pedestrians and caused grievous bodily harm to his passenger – where the applicant pleaded guilty to two counts of manslaughter, one count of doing grievous bodily harm and four related summary offences – where the applicant was sentenced to 10 years imprisonment on each count of manslaughter, four years imprisonment on the count of doing grievous bodily harm and convicted but not further punished in respect of the summary offences – where the applicant contended that the sentencing judge erred in giving insufficient weight to mitigating factors such as demonstrated rehabilitation, remorse and insight, together with an early guilty plea – where the applicant contended that the sentencing judge erred in considering that the nine year term in *R v Clark* constrained her from imposing a similar sentence in the present case – where the applicant contended that the

sentencing judge erred in failing to have proper regard to the serious aggravating effect of a sentence of 10 years imprisonment – whether sentencing judge erred

Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
R v Armstrong, Unreported, Supreme Court of Queensland, Indictment Nos 399 of 2010 and 657 of 2011, Mullins J, 10 August 2011, cited
R v Collins, Unreported, Supreme Court of Queensland, Indictment Nos 71 and 519 of 2012, Mullins J, 19 November 2012, cited
R v Clark [2009] QCA 361, distinguished
R v Derks [2011] QCA 295, considered
R v Folland [2004] QCA 209, cited
R v Frost; ex parte A-G (2004) 149 A Crim R 151; [2004] QCA 309, cited
R v Kelly [1999] QCA 296, distinguished
R v Lavender (2005) 222 CLR 67; [2005] HCA 37, cited
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v Noble and Verheyden [1996] 1 Qd R 329; [1994] QCA 283, cited
R v Robertson [2010] QCA 319, considered
R v Wooler [1971] QWN 10, cited

COUNSEL: J B Godbolt for the applicant (pro bono)
B J Power for the respondent

SOLICITORS: AW Bale & Son for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicant, Brett Glenbar, was driving a motor vehicle whilst under the influence of alcohol and at high speed along Chambers Flat Road, Park Ridge, on 4 December 2009 after refusing to stop for police. He failed to negotiate a bend and struck and killed two pedestrians, Jacqueline Sylvester and Ronald Ellison, and caused grievous bodily harm to his passenger, Phillip Chang. On 25 January 2013, he pleaded guilty to two counts of manslaughter and one count of doing grievous bodily harm. On 28 February 2013, he pleaded guilty to four related summary offences: failing to stop for police; disobeying the speed limit; failing to remain at or near a road incident to assist injured persons; and driving a motor vehicle over the general, but under the high, blood alcohol content limit. He was sentenced to 10 years imprisonment on each count of manslaughter, four years imprisonment on the count of doing grievous bodily harm and convicted but not further punished on the summary offences. His presentence custody of 1,181 days was declared as time served under the sentence. He was disqualified from driving absolutely. He has applied for leave to appeal against his sentence, contending that it was manifestly excessive and that the sentencing judge erred in failing to give appropriate weight to his efforts at and prospects of rehabilitation and in failing to have proper regard to the serious aggravating effect of a sentence of 10 years imprisonment.

The applicant's antecedents

[2] The applicant, an Aboriginal man, was 45 at sentence and 42 at the time of the offending. He had prior criminal convictions and a significant and relevant traffic history. Between 1985 (when he was 17) and 1988 he was convicted of relatively minor examples of assault, stealing and traffic offences, including dangerous driving and driving a motor vehicle with a blood alcohol content of .06 per cent. He breached community based orders in 1987 and 1988. He did not re-offend for seven years until 1995 when he was convicted and fined for drug related offences. In 1997 he was convicted and fined for further drug offences. In 1998 he was convicted and fined $30 for a street offence. To his credit, he had no further criminal convictions for over 11 years until this dreadful lapse in December 2009.

[3] Of most significance in his traffic history, he was convicted in August 1998 of driving with a blood alcohol content of .194 per cent for which he was fined and disqualified from driving for 13 months. And then in April 2009, he was convicted of driving with a blood alcohol content of .127 per cent. He was fined and disqualified from driving for five months so that, at best, he regained his driving licence about three months prior to his present offending.

The circumstances of the offences

[4] The horrific and tragic circumstances of his present offending were as follows. On 4 December 2009, he was employed by a mining company in Western Australia and returned on a break to the Logan area. He hired a Holden Statesman sedan and picked up his friend, Phillip Chang. They drank bourbon and coke at another friend's home from about 7.00 pm. Sometime after 9.30 pm, he drove Mr Chang down a long, straight stretch of Chambers Flat Road in a semi-rural area on the way to the Glen Hotel. He was travelling so quickly that Chang told him to slow down. The weather was fine and clear and the bitumen road surface was dry. Police officers travelling in the opposite direction activated their marked patrol car's mobile radar and measured his speed at 134 kph. The police switched on their vehicle's blue lights and did a U-turn. The applicant continued to speed away. Mr Chang persistently yelled at the applicant to slow down and pull over, even threatening to engage the handbrake.

[5] Whilst attempting to negotiate a right hand curve, the applicant's vehicle drifted off the marked lane and crossed the left edge line of the roadway with the left hand wheels moving onto the adjoining road shoulder. Tragically, the car struck two pedestrians, a couple with two children, killing them instantly. The resulting carnage resembled a horror movie. The impact severed Ms Sylvester's body. Her upper body and head hit and broke the windscreen, struck Mr Chang causing him grievous bodily harm and came to rest in the back seat. Body parts were later recovered from an extended area at the accident scene. Mr Ellison's body was thrown about 30 metres. The applicant did not stop but attempted to overtake another car, striking it from behind and pushing it off the road. Fortunately, the two occupants, though naturally shaken, were uninjured. He drove a further three kilometres, stopping only when he crashed into a street sign.

[6] When the police arrived, he asked if "the people were ok"[1] and repeatedly stated "I'm going to jail".[2] When police found Ms Sylvester's partial remains in the rear

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1 Ex 5, 5.

2 Above.

of the car, he told them that he thought he "hit a couple of people"[3] and stated that he had "done a bad thing. I'm going to jail for what I did. Oh man, I fucked up."[4] Police administered a breath test which indicated a positive result for alcohol. His blood alcohol level taken two hours after the crash was later analysed at .146 per cent.

[7] Both the applicant and Mr Chang contracted hepatitis C as a result of coming into contact with the blood of Ms Sylvester, who suffered from hepatitis C. Mr Chang also sustained facial fractures requiring surgical repair with titanium mesh and has been left with facial scarring. He will likely have nerve numbness which will continue to improve. Without treatment he would probably have suffered long term double vision. The applicant was not seriously injured.

The submissions at sentence

[8] The prosecutor at sentence tendered victim impact statements from the deceased's two daughters and Ms Sylvester's mother and sister. They vividly described the family's understandable anger towards the applicant and their raw, heart-wrenching grief following the loss of the much-loved deceased. The prosecutor noted that the applicant had entered guilty pleas to dangerous driving causing death and grievous bodily harm with the circumstance of aggravation of intoxication at his committal hearing in September 2010. This was an indication that he was not substantially contesting the matter and demonstrated cooperation with the administration of justice. He was originally charged with two counts of manslaughter. Although those charges were reduced at the committal hearing, an indictment charging manslaughter was presented in the Supreme Court in March 2011. The matter was originally listed for trial but after legal argument the applicant informed the prosecution prior to December 2012 that the matter was likely to resolve. In those circumstances, the guilty pleas were timely.

[9] The prosecutor emphasised that the applicant had caused the death of two people and grievous bodily harm to a third in circumstances where Mr Chang asked him to slow down. The offending occurred in the context of flight from police due to his speeding and he was significantly intoxicated. His blood alcohol level at the time of the accident would have been in the range of .168 and .224 per cent. He drove at high speeds on a road with driveways and a service station. He continued to drive after striking the two deceased when he could have been in no doubt that he had hit them. He then struck another car, forcing it off the road and stopped only when his vehicle crashed. He was a mature man with a concerning driving history. Taking into account all the mitigating features, the sentencing range was between nine and 11 years imprisonment. A sentence of 11 years imprisonment was appropriate.

[10] Defence counsel submitted that the presence of the two deceased on or at the edge of the semi-rural road would not have been expected at 10 pm. At the committal, the two people in the other vehicle expressed their surprise at seeing the two pedestrians on the side of the road as if they were readying to cross. The area was bushland, not a built-up suburban area, and the lighting was poor. The reckless driving occurred over a short distance and time period. The applicant needed his driver's licence for his employment and, knowing that he had been drinking and realising his licence was in jeopardy, panicked when he saw the police. When

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3 Above, 6.

4 Above.

cross-examined at the committal proceeding, the police agreed that this was not a police chase situation. It was clear from his statements to police that he was in shock. Nevertheless, he immediately expressed remorse. His failure to stop after hitting the two pedestrians was consistent with panic and shock rather than a deliberate, callous decision. The applicant had contracted hepatitis C as a result of his offending, a relevant sentencing consideration as recognised in *R v Noble and Verheyden*.[5]

[11] The applicant's parents and two sisters were present in court. He was the youngest of five siblings. He initially grew up in Woodridge before moving to Townsville when he was in about grade 10. His father worked with Telstra and his mother with Centrelink. In 1988, he became the first Indigenous civilian to complete a cabinet maker apprenticeship with the Australian Army. He then worked in this and other fields in Queensland, Victoria and the Northern Territory before joining the mining industry in 2001. At the time of his offending, he was an open-cut mining machine operator in Western Australia. To his credit, he had overcome his early difficulties with the law and over the past 15 years had found and maintained excellent employment.

[12] He had been in custody since his arrest and had busied himself in his rehabilitation, becoming a model prisoner. Defence counsel tendered a large bundle of material supporting that submission. In the applicant's relapse prevention and management plan, he stated that he recognised his problem with social binge drinking; he needed to abstain from alcohol and would join Alcoholics Anonymous and obtain counselling. He had mentored and tutored prisoners, especially Aboriginal and Torres Strait Islander prisoners, in literacy. He had completed several certificate courses; diplomas of business and management; and the "ending offending" program which included anger management, relapse prevention; healthy community living; drug and alcohol abuse; and remorse/grief and loss. He had also completed a mental health first aid course and a work readiness course.

[13] The applicant's family wrote a letter of support, noting that he was a loving and involved son, brother and uncle and "a very proud, respectful, compassionate, honest, reliable, loving, generous, determined and strong willed Aboriginal man".[6] A character reference from his brother referred to the applicant as "extremely remorseful and wish[ing] that he could undo his part in the events that occurred on that fateful night in December 2009".[7] Other references from friends supported the contention that this offending was out of character.

[14] The applicant wrote to the presiding judge noting his "deep regret and remorse" and acknowledging that his actions have affected "not only the friends and family of the victims, but also [his] own family and friend[s]".[8] He stated that "no words can erase or change the feelings of those who have been eternally [a]ffected by the death of both Jacqueline Sylvester and Ronald Ellison" and offered "his sincerest and deepest apology" for his actions.[9] He especially acknowledged the deceased's daughters and hoped that they did not continue to suffer. He referred to his "neglect and lack of responsibility from that horrible night" and realised that "every action in

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5 [1996] 1 Qd R 329.
6 Ex 10.
7 Above.
8 Above.
9 Above.

life has a set of consequences" and that he was responsible for his own actions.[10] He stated that he will live the rest of his life knowing that his actions caused the deaths of two people. Since his detention in custody, he had worked to improve himself and assist those less fortunate so that he can repay the community the debt that he owed as a result of his offending. He had finally realised that he had an alcohol problem and that he needed assistance in ensuring he did not relapse into alcohol abuse. He was no longer the person he was at the time of his offending. His "atrocious act" was committed "in a moment of sheer stupidity".[11] His actions meant that he "will live with this torment for the rest of [his] days".[12]

[15] He also wrote an open letter to the families and friends of the two deceased, expressing his deep regret and acknowledging the devastating consequences for them, especially the deceased's daughters. He stated:

> "There is not a day that goes by that I do not think of what my actions have caused and I pray that only good will befall you all.
>
> If I could turn the clock back I would and I can only hope that one day that you may be able to forgive me for what I have done."[13]

[16] Defence counsel submitted that, after consideration of *R v Clark*,[14] *R v Derks*,[15] *R v Folland*,[16] *R v Collins*,[17] *R v Armstrong*[18] and *R v Robertson*,[19] the appropriate sentence was nine years imprisonment with no recommendation for parole eligibility. This sentence properly reflected the short period of actual dangerous driving; the circumstances of the driving; the timely plea and genuine expressions of remorse; the applicant's excellent work history; his efforts whilst in custody; and his excellent prospects of rehabilitation.

[17] In reply, the prosecutor sought to distinguish *Collins*, *Armstrong* and *Clark* and submitted that a heavier penalty than that imposed in *Clark* was warranted. If the judge imposed a nine year sentence, there should be a serious violent offence declaration. The applicant caused the death of two people and grievous bodily harm to a third person after consciously deciding to flee from police; it was deliberately anti-social conduct.

[18] After being invited by the judge to speak, the applicant stated, "I'm just deeply sorry for what happened on that night. I have written that letter, but I don't think I'll be able to read it."[20]

The judge's sentencing remarks

[19] In sentencing, her Honour listed the offences and the applicable maximum penalties. She noted that the case involved a horrific accident with tragic

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10 Above.
11 Above.
12 Above.
13 Above.
14 [2009] QCA 361.
15 [2011] QCA 295.
16 [2004] QCA 209.
17 Unreported, Supreme Court of Queensland, Indictment Nos 71 and 519 of 2012, Mullins J, 19 November 2012.
18 Unreported, Supreme Court of Queensland, Indictment Nos 399 of 2010 and 657 of 2011, Mullins J, 10 August 2011.
19 [2010] QCA 319.
20 T2-25.25-27.

consequences of enormous proportions for many people in the courtroom. After summarising the facts of the offending and its results, her Honour observed that it was a serious aspect that the applicant continued to drive, even after Ms Sylvester's body had shattered the windscreen. The applicant had pleaded guilty at an early stage. Her Honour considered the cases referred to by counsel and referred to the victim impact statements, quoting from some of them.

[20] Her Honour noted that *Clark* was the only case involving two deaths and it was therefore highly relevant in determining the penalty. The Court of Appeal reduced Clark's sentence from 10 to nine years because her moral culpability was diminished as a result of her bipolar disorder. By contrast, the applicant not only killed two pedestrians but caused grievous bodily harm to his passenger who had asked him to slow down. His dangerous driving occurred in the context of flight from police. He was intoxicated with a blood alcohol level of between .168 and .224 per cent. He drove at a very high speed where it was unsafe to do so, particularly given the poor lighting and the curve in the road. He continued to drive after striking the deceased and stopped only after crashing. He was a mature man with a concerning driving history.

[21] He showed some remorse at the scene and confessed to police that he had hit the pedestrians. He entered a timely guilty plea, saving the community additional cost and the victims' families' further trauma. He had developed hepatitis C as a result of the accident. The material tendered on his behalf demonstrated that he had admirably committed to change and had good prospects, having completed many courses in prison. He had family support and a good work history. The community expected that his actions in causing this tragedy would require him to serve a long period in jail. Her Honour noted, "On the basis of *R v Clarke* [sic], I do not consider that I can impose a penalty of nine years."[21] Her Honour sentenced the applicant to 10 years imprisonment for the manslaughter offences; four years imprisonment for the offence of doing grievous bodily harm; convicted but did not further punish him on the summary offences; declared each count of manslaughter to be a serious violent offence; declared presentence custody as time served under the sentence; and disqualified him absolutely from driving.

The contentions in this application

[22] In oral submissions, counsel for the applicant conceded that the 10 year sentence was within range but argued two interconnected points. The first was that the judge erred in giving insufficient weight to the mitigating factors and in considering that the nine year term of imprisonment imposed in *Clark* constrained her from imposing a similar sentence in this case. In support of that submission, he referred to *R v Kelly*;[22] *Clark*; *Robertson* and *Derks*. Whilst conceding this was a dreadful case and that deterrence was important, rehabilitation was also relevant. The applicant had demonstrated remorse and insight, and had pleaded guilty at an early time. If he was given proper benefit for the many mitigating factors, the judge must have commenced from a starting point well in excess of 10 years imprisonment.

[23] The second point concerned the serious violent offence declarations on the manslaughter counts which meant that the applicant will serve eight years before becoming eligible for parole. In determining a sentence where the range spans

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21 Transcript of sentencing remarks, 3.11-13.

22 [1999] QCA 296.

10 years, courts must not ignore the serious aggravating effect of imposing a sentence of 10 rather than nine years: *R v McDougall and Collas*.[23] The sentencing judge erred in not giving proper weight to this factor.

[24] The applicant contends that the application for leave to appeal should be granted, the appeal allowed and the sentence on the manslaughter counts varied to nine years imprisonment with no serious violent offence declaration.

[25] Counsel for the respondent contended that *Clark*, *Robertson* and *Derks* supported the sentence imposed. The judge gave appropriate weight to the applicant's rehabilitation and mitigating factors, specifically acknowledging them in her sentencing remarks. As her Honour stated, the sentence imposed had to appropriately punish the applicant for his actions. Her Honour's sentencing remarks do not indicate that she was constrained by *Clark* to impose a sentence of 10 years. *Clark* does support, however, the sentence imposed which appropriately reflects the applicant's deliberately anti-social conduct causing the death of two people and grievous bodily harm to a third. The sentencing process does not reveal any error.

Conclusion

[26] Where manslaughter rather than dangerous driving causing death is charged in respect of offending involving a motor vehicle accident causing death, the penalty will ordinarily be higher than if dangerous driving causing death had been charged. This follows from the maximum penalty applicable to manslaughter (life imprisonment)[24] and the maximum penalty for dangerous driving causing death with a circumstance of aggravation (14 years):[25] see *R v Frost; ex parte A-G*[26] and *R v Wooler*.[27]

[27] A useful starting point in resolving the contentious issues in this application is a discussion of the sentences imposed in *Kelly*, *Clark*, *Robertson* and *Derks*.

[28] In *Kelly*, the applicant unlawfully used a baker's van at 5.30 am one Saturday after being out all night. He drove at speeds of up to 130 kph and wandered over the road for about 23 kilometres. A marked police vehicle with its siren activated pursued him but he did not stop. He drove onto the incorrect side of the road and into the path of an oncoming car which swerved to avoid a collision. A kilometre or so later, he forced another vehicle to pull onto the shoulder to avoid a collision. The police attempted to overtake him but he blocked them by again driving onto the incorrect side of the road. About two and a half kilometres later, with the police still in pursuit, he drove onto the incorrect side of a bridge as the deceased's vehicle approached in the opposite direction. The bridge guardrails prevented the deceased from avoiding the van. The driver was killed and the passenger injured. Kelly's blood alcohol level was .187 per cent. He discharged himself from hospital and flew to South Africa where he was born and lived until coming to Australia at age 11. He later consented to his extradition. He was 22 at the time of his offending and 25 at sentence. He had some minor criminal history including unlawful use of a motor vehicle and stealing for which he was on probation at the time of his latest

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23 [2006] QCA 365.
24 Section 310, *Criminal Code* 1899 (Qld).
25 Section 328A(4), *Criminal Code*.
26 [2004] QCA 309.
27 [1971] QWN 10.

offending. He had rehabilitated in South Africa where he obtained employment and married. He had become a committed Christian and had ceased drinking alcohol. He pleaded guilty and showed genuine remorse. This Court found that his eight year sentence was not manifestly excessive.

[29] In *Clark*, the applicant pleaded guilty at a late stage to two counts of manslaughter and was sentenced to 10 years imprisonment. In a hurry to keep an appointment, she drove onto the footpath so as to pass a car which she considered was travelling too slowly. She struck and killed two teenage boys on the footpath. She had a blood alcohol concentration of .04 but she had ingested valium, oxazepam, temazepan, cannabis, morphine and codeine. All drugs other than the oxazepam were present in concentrations higher than the therapeutic range. When the police spoke to her, she falsely claimed the youths had stepped onto the road and she denied misusing drugs. She was unlicensed and had been involved in other accidents whilst under the influence of prescription drugs. Her husband had hidden the car keys in an effort to prevent her from driving and had reported the car as stolen so that police would apprehend her. She had past convictions for offences including burglary and possession of dangerous drugs after breaking into a pharmacy and stealing prescription medication. She was on probation at the time of her offending. She was 35 at the time and her husband remained supportive.

[30] She had a history of mental health problems, including bipolar disorder, benzodiazepine dependency disorder and alcohol abuse. A psychiatric report recorded that she was in a manic state with emotional irritability which would have impaired her decision-making at the time of the offending. Her intoxication was the major component in the offences. Her abuse of benzodiazepines may have been linked to her mental illness. A psychological report stated that her intoxication, coupled with her untreated mental health problems, significantly impaired her capacity both to understand the consequences of her actions and to control her actions. She would be assisted by future relapse prevention strategies and had the cognitive abilities to respond to them.

[31] After referring to *R v Kelly*,[28] this Court noted that Clark's very reckless driving was not on a roadway but on a footpath. Her irrational behaviour, however, was in part a consequence of her bipolar disorder which tended to lessen her moral culpability. The sentencing judge erred in failing to act upon the evidence that Clark's behaviour was not solely the consequence of voluntary stupefaction. Although her plea was late it had limited utilitarian value and entitled her to some mitigation; the judge did not give sufficient weight to this. These errors did not demonstrate that the sentence was manifestly excessive but they required that the sentence be set aside and that this Court resentence. Clark unlawfully killed two innocent youths but her behaviour was irrational rather than deliberately anti-social, to some extent a consequence of her bipolar disorder. This reduced her moral culpability so that questions of general and personal deterrence were less pressing upon the sentencing discretion. Her degree of recklessness and its consequences were so grave that, even giving weight to the mitigating factors, a sentence heavier than that imposed in *Kelly* was proper. This Court substituted a sentence of nine years imprisonment.

[32] In *Robertson*, 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

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[28] [1999] QCA 296.

(counts 3-5). He pleaded not guilty to murder (count 1) but guilty to the available alternative charge of dangerous operation of a motor vehicle causing death whilst excessively speeding and leaving the scene of the accident. The prosecution did not accept that plea. He pleaded guilty to count 2 and not guilty to counts 3-5. After a seven day trial, the jury found him not guilty of murder but guilty of manslaughter (count 1) and guilty of counts 3-5. He was sentenced to 14 years imprisonment for manslaughter and to lesser concurrent terms of imprisonment on all remaining counts. Ultimately, he only applied for leave to appeal against sentence.

[33] The circumstances of Robertson's offending were as follows. After an altercation in a bottleshop car park between Robertson, the deceased and one of the deceased's passengers, the deceased drove off saying, "See you later, old man". Robertson claimed other offensive words were used and an obscene gesture given. He drove after the deceased's car, ramming it at a speed of less than 60 kph. This caused the deceased to accelerate and drive through a red light and Robertson followed. The cars accelerated with Robertson deliberately ramming the rear of the deceased's vehicle several times. The fatal ramming occurred with the vehicles travelling at between 120 and 140 kph. The deceased's car spun out of control and collided with a light pole, almost instantly killing the deceased and injuring his passengers, including an 18 month old child. The jury indicated that they reached their verdicts, not on the basis of provocation, but because they were not satisfied that Robertson intended to kill or do grievous bodily harm to the deceased or his passengers.

[34] He was 47 at the time and 49 at sentence. He had had a troubled upbringing, a series of unsuccessful long term relationships and difficulty in anger management. He had a criminal history for minor offences of dishonesty and drugs, unlawful use of a motor vehicle, unlawful possession of a motor vehicle and two convictions for driving a motor vehicle under the influence of alcohol. He had a significant traffic history including nine convictions for exceeding the speed limit. His licence was suspended at the time of the offending as a result of accumulated demerit points. When police spoke to him, he expressed disinterest in the condition of the victims. He subsequently offered to plead guilty to manslaughter. The prosecution did not accept that offer and he pleaded not guilty to murder when arraigned.

[35] This Court considered that *Clark* was the closest comparable decision. Robertson did not suffer from a mental disorder lessening his moral culpability. He did not have good prospects of overcoming the personal difficulties which contributed to his offending. Whilst Clark's driving over a footpath in a busy area was extraordinarily reckless, Robertson's conduct was even more serious in that he continuously rammed the deceased's vehicle at speed and then callously left the scene without concern for the victims. It was nevertheless not in the worst category of offending. This Court reduced Robertson's sentence for manslaughter to 12 years and for count 2 to 10 years.

[36] In *Derks*, the applicant pleaded guilty to vehicular manslaughter; stealing; three counts of unlawfully using a motor vehicle; dangerous operation of a motor vehicle; unlawful possession of a motor vehicle; dangerous operation of a motor vehicle with a circumstance of aggravation; and a related summary offence. He was sentenced to 13 years imprisonment for manslaughter and to lesser concurrent terms on the remaining counts. He was 21 at the time and 22 at sentence. He had a concerning criminal and traffic history commencing as a child.

[37] The manslaughter offence occurred in this way. Derks was driving a stolen Commodore in excess of 120 kph along a two way service road off the Bruce Highway where police were conducting a road side breath test. Apparently intending to gain police attention, he sounded the horn and both accelerated and braked, causing a burnout. He then accelerated through the roundabout in a fishtail motion. Police activated their emergency lights and attempted to intercept him. He reversed at speed towards a police motor cyclist who had requested him to stop. He then accelerated over a traffic island onto the incorrect side of the road and continued over another traffic island to the northbound lanes of the Bruce Highway. He proceeded south into oncoming traffic at speeds of up to 140 kph in an 80 kph area. He travelled about 580 metres before hitting a vehicle head on. The driver died in hospital the following day. Derks blood alcohol content was about 0.219 per cent. He fractured both legs. He had a personality disorder with moderate levels of psychopathy and was a serial alcohol and drug abuser. He expressed remorse which was genuine although "somewhat shallow"[29] and lacked normal levels of empathy, blaming his drunkenness for his offending. Jail provided a break from alcohol abuse and treatment for his mental health issues and was his best hope of rehabilitation.

[38] This Court determined that his criminal rampage warranted a sentence of at least 10 years imprisonment for manslaughter with some additional punishment for the remainder of his offending. The 13 year sentence was not in itself manifestly excessive, but the judge erred in imposing a global sentence on an offence subject to a serious violent offence declaration to take into account offences which were not serious violent offences. The Court substituted a sentence of 11 years imprisonment for the manslaughter offence to reflect the totality of the offending.

[39] The present applicant's sentence should have been considerably less than Robertson's 12 years imprisonment. Robertson went to trial and deliberately and persistently rammed the deceased's vehicle over an extended time period and distance until it spun out of control and hit a pole, killing one person, doing grievous bodily harm to another and injuring three others. This applicant and Robertson had similar traffic and criminal histories but Robertson did not enter an early guilty plea and nor did he demonstrate this applicant's remorse, cooperation with the authorities or have his rehabilitative prospects.

[40] This case also warranted a lesser sentence than *Derks*. Although Derks had but one count of vehicular manslaughter, he also pleaded guilty to four counts of unlawful use. His reckless driving was even worse than this applicant's and he lacked this applicant's remorse and insight. Despite Derks's youth, he lacked this applicant's excellent rehabilitative prospects. The above review of *Kelly*, *Clark*, *Robertson* and *Derks* demonstrates, as both counsel agree, that the sentencing range here is between nine and ten years imprisonment.

[41] This raises the difficulty in sentencing arising from Pt 9A *Penalties and Sentences Act* when the range is between nine years imprisonment (with the result that the offence is not automatically a serious violent offence and the offender may be eligible for parole after serving 50 per cent) and 10 years imprisonment (with the result that the offence must be declared a serious violent offence and the offender is eligible for parole only after serving 80 per cent of his sentence). As this Court

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29 [2011] QCA 295, [21].

noted in *R v McDougall and Collas*,[30] in these circumstances courts cannot ignore the serious aggravating effect of imposing a sentence of 10 rather than nine years. Courts, however, should not attempt to subvert the intention of Pt 9A and can take into account its consequences by imposing a sentence below 10 years only if the sentence imposed is otherwise within the appropriate range. The relevant sentencing principles are those listed in s 9(2)(b)-(r) and s 9(4)(a)-(k) *Penalties and Sentences Act*.

[42] It is inconceivable that her Honour, an experienced sentencing judge, was not acutely cognisant of the impact of the 10 year sentence. It is equally clear from her Honour's reasons that, after considering *Clark*, *Robertson* and *Derks*, she determined that this case was more serious than *Clark* whose moral culpability was diminished as a result of her mental health issues and that therefore a sentence of 10 years, rather than the nine years given in *Clark*, should be imposed. Her Honour was not referred to *Kelly*.

[43] As the sentencing judge appreciated, *Clark*'s comparability to the present case lay in the fact that both involved double vehicular manslaughters whilst affected by alcohol or drugs and both had histories of driving under the influence of alcohol or drugs. Clark had some criminal history and, unlike the present applicant, was on probation at the time. In some ways, her driving was even worse than the applicant's in that she drove onto the footpath in a built-up area killing two innocent youths, conduct which this Court considered was "extraordinarily reckless".[31] The applicant's reckless driving, shocking though it was, was not in a built-up area and did not involve deliberately driving onto the footpath. Whilst Clark's moral culpability was lessened because of her mental illness, she was not cooperative with the authorities and nor were her rehabilitative prospects nearly as promising. She entered a guilty plea at a late stage whereas the applicant immediately expressed remorse, indicated an early guilty plea and demonstrated real insight into his offending. The applicant, however, not only killed two people but also caused grievous bodily harm to his passenger. In *Kelly*, to which her Honour was not referred, eight years imprisonment was imposed. Both Kelly and the present applicant were under the influence of liquor and had unimpressive criminal and traffic histories. Although Kelly committed but one count of vehicular manslaughter and one count of doing grievous bodily harm and was a young man, he had unlawfully used the vehicle he was driving and was on probation for unlawfully using a vehicle. Kelly's driving was over a much longer time period and distance and he fled the jurisdiction. Like the present applicant, Kelly pleaded guilty, had excellent rehabilitative prospects and had shown genuine remorse.

[44] A careful consideration of *Kelly*, *Clark* and the present case demonstrates that it was well open to her Honour to impose a sentence of nine years imprisonment. Her Honour erred in considering that the case was necessarily more serious than *Clark* and that therefore a sentence of nine years imprisonment could not be imposed. This Court should grant the application for leave, allow the appeal and re-exercise the sentencing discretion.

[45] Whilst this was unquestionably a serious case of vehicular manslaughter in that the applicant decided to drive his vehicle, after drinking heavily, at high speed on a straight stretch of semi-rural road where the speed limit was 80 kph. The area,

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30 [2006] QCA 365, [18].

31 [2009] QCA 361, [20].

though not a built up suburban area, did traverse driveways and was in the vicinity of a service station. Although the weather was fine and the road dry, there was a real potential that others could be injured or killed as ultimately they were. When police caught him speeding and activated their emergency light, instead of stopping and facing the consequences of his unlawful and irresponsible actions, he drove off at speed and was unable to control his car as the road curved to the right. Tragically, he struck two innocent pedestrians, killing them and injuring his passenger. He did not stop when he realised he had hit the pedestrians and, no doubt in a state of panic and shock, drove a further three kilometres until he crashed.

[46] But from that point, the applicant's conduct and statements have demonstrated his remorse and his desire to make amends for his disgraceful anti-social behaviour. He pleaded guilty at an early stage and has demonstrated insight into the seriousness of his actions and their effect on the families of the deceased. He now understands that his reckless, drunken actions caused two deaths and serious injury to his friend and appreciates that he must not drink alcohol. He is making considerable efforts to improve not only his life, but the lives of others.

[47] In determining the appropriate sentence in cases of unintentional road carnage like this, judges must be astute not to be emotionally overwhelmed by the horrific effect of the impact during the collision on the bodies of the deceased. Of course, no penalty, no matter how severe, can bring back the deceased to their loving daughters and family. And, regardless of the penalty, an insightful offender like this applicant will carry the lifelong burden of the result of his drunken recklessness. After balancing the competing considerations, I am persuaded that a sentence of nine years imprisonment on each manslaughter offence is appropriate. This conclusion is supported by my review of *Kelly*, *Clark*, *Robertson* and *Derks*.

[48] The respondent contends that, even if a sentence of less than 10 years is imposed, the manslaughter offences should be declared to be serious violent offences. *Kelly* and *Clark* do not support that submission. There must be some consideration out of the ordinary to warrant such declarations, at least where, as here, the serious violent offences are not intentional. The fact that sentences of 10 years with automatic declarations could have been imposed is not a relevant consideration. Despite the horrific results of the applicant's drunken driving, the many mitigating features persuade me that no declarations should be made.

[49] The sentence I propose allows the applicant to be eligible for release on parole after four and a half years imprisonment and, whilst he conforms to his parole conditions, to serve the balance of his sentence in the community. His release would no doubt be subject to supervision and conditions, including about the consumption of alcohol, so that any return to binge drinking would render him liable to be returned to prison.

[50] For these reasons, I would grant the application for leave to appeal and allow the appeal. I would set aside the sentences imposed on counts 1 and 2 and instead order that the applicant be imprisoned for nine years. I would otherwise confirm the sentence imposed at first instance.

[51] **MORRISON JA:** I have had the advantage of reading the reasons prepared by the President. As a consequence I am able to adopt much of what appears in paragraphs 1 to 25 of those reasons. There are, however, some qualifications and additional matters to which I will need to refer.

Circumstances of the offences

[52] When the applicant and Chang left their friend's home the applicant accelerated to a speed which Chang thought was over the 80 kilometre per hour speed limit. Chang immediately asked the applicant to slow down. He did not do so. This was evident because shortly thereafter the police patrol car measured the applicant's speed at 134 kilometres per hour. That is when the police activated their flashing lights and indicated to the applicant to stop.

[53] The applicant knew that the police had signalled him to stop, but did not do so. So much was accepted by the applicant's counsel, and is consistent with his plea of guilty to the charge of failing to stop a motor vehicle. What the applicant then did was not simply drive away, but accelerated again, having exclaimed "fuck" when he saw the police lights come on.[32] At the same time Chang yelled at the applicant to slow down, saying "it is only a ticket".[33]

[54] The combination of these short facts demonstrate that the applicant made a deliberate decision to accelerate even more in an effort to escape police attention, knowing that they had directed him to stop, and that there was a risk to his licence if he was apprehended. That could only have been from a realisation of the effects of his drinking that evening, as well as the speed at which he had been travelling.[34]

[55] Chang continued to request that the applicant slow down, and at one stage threatened that he would pull on the handbrake. The applicant told him not to touch the handbrake and Chang decided against doing so because he thought the car would lose control. However, he continued to yell at the applicant to pull over. Chang remembers thinking that he was going to die.

[56] By the time the applicant's car passed the United service station on Chambers Flat Road, the speed had increased significantly. Calculations using the CCTV cameras on the service station resulted in an estimate of the speed at over 190 kilometres an hour.[35] That estimate was not accepted by counsel for the applicant during the sentencing hearing, on the basis that use of CCTV cameras could not give an accurate measurement.[36] Be that as it may, it is evident that the applicant increased his speed from the 134 kilometres (when he was the subject of the police radar) and, on any view, achieved very significant speeds by the time he passed the service station.

[57] In the area where the applicant started to lose control of the vehicle, and drift to the left hand edge of the road, Chambers Flat Road was largely unlit and not as densely populated as a suburban built up area. However, there were a number of driveway entrances on that section of road. Indeed, the rubbish bin that the applicant hit was left somewhere near the entrance of one of those driveways.[37]

[58] The force of the impact ripped Ms Sylvester's body into pieces. Not only was her upper torso separated from the lower, but the lower torso was ripped apart with one leg ending up over 10 metres from the other.[38]

[59] Notwithstanding the damage to the vehicle, and the fact that part of Ms Sylvester's body had come through the windscreen, the applicant continued to drive the vehicle

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32 AR 54.
33 AR 55.
34 See AR 28.
35 AR 55.
36 AR 27.
37 See AR 56.
38 See AR 60.

for some distance. The pedestrians were hit 250 metres after the intersection of Chambers Flat Road and Park Ridge Road.[39] Approximately 1,200 metres after that intersection, but still on Chambers Flat Road, the applicant's vehicle collided with the rear of another vehicle travelling in the same direction.[40] The force was enough to send the other vehicle into an uncontrollable spin, coming to rest in a ditch after it had spun three times. By that point the police vehicle had caught up enough to be able to see that the applicant's vehicle had run into the back of the other vehicle. However, the police officers were then unaware that the pedestrians had been hit.

[60] Having hit the rear of the other vehicle, the applicant continued to drive north, turning left into Bumstead Road, and travelling along Bumstead Road until it reached the intersection with Clarke Road. It was at this point that the applicant's vehicle crashed into a street sign and stopped.

[61] The entire course of driving from when the applicant left his friend's house, to where his vehicle came to a stop, was about 4.3 kilometres.[41] From where the applicant hit the pedestrians to where he stopped was about three kilometres.[42]

[62] The police took the applicant out of his vehicle, assisted Chang, and waited for an ambulance and for police back up to arrive. It was after that when the applicant asked one of the police officers if "the people" were okay?[43] He also repeated the words "I'm going to jail, I'm going to jail".[44] A short time later another police officer attended the scene and ascertained the presence of the dismembered body in the rear seat footwell. He asked the applicant who it was in the back seat of his car. The applicant replied, "I don't know who she is", and asked if it was only one person. When asked what he meant by that, the applicant replied: "I think I hit a couple of people".[45] He then said: "I've done a bad thing. I'm going to jail for what I did. Oh man, I fucked up".[46]

[63] Clearly the applicant was well aware that he had hit pedestrians and that one of them had come in through the windscreen into the car. He also knew enough to identify that the person who had come through the windscreen was female, even though that was not suggested to him by the police officer.

[64] Two hours after the collision the applicant's blood alcohol was at 0.146 per cent.[47] Calculations estimated that the blood alcohol level at the time of the collision was probably between 0.168 per cent and 0.224 per cent.[48]

Consideration of the comparable cases

[65] Counsel for the applicant referred to the decisions in *R v Kelly*[49], *R v Robertson*[50], *R v Clark*[51] and *R v Derks*.[52] The President has summarised the facts in respect of

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39 AR 56. The United service station was on the corner of these two roads: AR 36.
40 AR 19-20, 29 and 36-37.
41 AR 26.
42 AR 37.
43 AR 57.
44 AR 57.
45 AR 57.
46 AR 57.
47 AR 58.
48 AR 40.
49 *R v Kelly* [1999] QCA 296.
50 *R v Robertson* [2010] QCA 319.
51 *R v Clark* [2009] QCA 36.
52 *R v Derks* [2011] QCA 295.

most of those decisions, and therefore I am content to adopt those summaries, with some additional comments.

[66] In paragraph 28 of the President's reasons *Kelly* is dealt with. A feature of the facts in that case was that Kelly was not, except right at the start, travelling at speeds similar to those of the applicant in the present case. A customer who followed Kelly at the start of his use of the motor vehicle recorded him travelling at speeds which at times reached 130 kilometres per hour. However, during the attempts by the police to bring Kelly's driving to a halt, the speed of his vehicle was between 70 and 100 kilometres per hour. The circumstances were described by the court as being "particularly serious".[53] Kelly had, on at least three occasions, gone to the wrong side of the road in the face of oncoming traffic. Further, his refusal to stop showed an "utter disregard of police attempts to persuade him to pull over".[54] The court doubted the utility of comparable cases where manslaughter was involved stating:

> "Manslaughter it was said, in R v Whiting in 1995:
>
> > 'is above all an offence in which particular circumstances vary so much that it is difficult and perhaps undesirable to try to generalise in advance about the appropriate sentence to be imposed.'
>
> That being so, it makes the task of attempting to upset the head sentence in this case much more difficult than perhaps it might otherwise be where there was an identifiable or uniform tariff for offences of a particular kind."[55]

[67] *R v Clark* is dealt with by the President in paragraphs 29 to 31. In addition to what is set out there, I would add only a few comments. The court described Clark's conduct as "extraordinarily reckless".[56] Her irrational behaviour was, in part, a consequence of her bipolar disorder. Recognition of that lessened her moral culpability, and the claims of deterrence and denunciation as considerations bearing upon the imposition of a proper sentence. Her conduct was described as "irrational, rather than deliberately anti-social".[57]

[68] The other feature of *Clark* is that any reading of the court's discussion of the issues could not avoid its discussion of *R v Kelly*.[58] Indeed, Keane JA's reasons expressly refer to the fact that "a sentence heavier than that imposed in *R v Kelly* is proper".[59]

[69] *R v Robertson* is outlined in paragraphs 32 to 35 of the President's reasons. Apart from what appears there, I add the following. Factually *Robertson* is well removed from the present case. It was a situation where Robertson reacted to perceived offensive remarks and "snapped".[60] As a consequence he embarked upon some 20 or 30 seconds of rage, over a distance of no more than a kilometre. During that time he travelled at speeds between 60 and up to 120 or 140 kilometres per hour,

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53 *R v Kelly* [1999] QCA 296 at p 9.
54 *R v Kelly* [1999] QCA 296 at p 10.
55 *R v Kelly* [1999] QCA 296 at pp 8-9.
56 *R v Clark* [2009] QCA 36 at [20].
57 *R v Clark* [2009] QCA 36 at [27].
58 *R v Clark* [2009] QCA 361 at [20].
59 *R v Clark* [2009] QCA 36 at [28].
60 *R v Robertson* [2010] QCA 319 at [9].

ramming another vehicle several times until he caused the other vehicle to spin out of control and collide with a light pole. There was a degree of deliberateness about the conduct, in that Robertson intended to scare the occupants of the other car in what was an extreme over-reaction to the circumstances. The court accepted that it was open to the trial judge to regard Robertson's case as more serious overall than that of *Clark*, "particularly because of the deliberateness of the applicant's conduct in repeatedly ramming the deceased's car".[61] The court once again cautioned against the utility of comparable cases in manslaughter offences saying:

> "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.[62],[63]

[70] Those comments were echoed in the reasons of McMeekin J:

> "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*,[64] 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*,[65] that makes the task of attempting to upset the primary judge's view of the matter 'much more difficult'."[66]

[71] I am unable to agree that in *Robertson* the court considered that *Clark* was the closest comparable decision. The analysis of *Clark* occurred in circumstances where both counsel accepted that there was no closely comparable sentencing decision, but the submissions before the trial judge had focussed on *Clark*. It was therefore the most relevant decision discussed in the appeal.[67] It was in that context that the court dealt with *Clark*, reviewing the trial judge's consideration of that case[68] and distinguishing it from the facts in *Robertson*.[69]

[72] Once again one could not read *Robertson* without being confronted by the facts and observations in *Kelly*. It was dealt with in detail at paragraph 23 of the reasons of Fraser JA.

[73] *R v Derks*[70] is dealt with in paragraphs 36 to 38 of the President's reasons. Once again, one could not read the discussion in *Derks* without going through the facts and consideration in *Kelly*, as it is dealt with in paragraph 31 of that judgment.

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61 *R v Robertson* [2010] QCA 319 at [34].

62 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.

63 *R v Robertson* [2010] QCA 319 at [34].

64 [2005] HCA 37 at [22].

65 [1999] QCA 296.

66 *R v Robertson* [2010] QCA 319 at [41].

67 *R v Robertson* [2010] QCA 319 at [29].

68 *R v Robertson* [2010] QCA 319 at [30].

69 *R v Robertson* [2010] QCA 319 at [31]-[33].

70 [2011] QCA 295.

Discussion

[74] Counsel for the applicant conceded that the 10 year sentence imposed by the learned primary judge was within range. Three points were argued on appeal. First, insufficient weight was given to the mitigating factors such as demonstrated rehabilitation, remorse and insight, together with an early guilty plea. Secondly, the primary judge considered that the nine year term of imprisonment imposed in *Clark* constrained her from imposing a similar sentence in this case. Thirdly, the imposition of the 10 year sentence meant an automatic serious violent offence declaration, resulting in the applicant being required to serve eight years before becoming eligible for parole. It was said insufficient regard was paid to this fact. The applicant contended that a nine year sentence was the appropriate one, with no serious violent offence declaration.

[75] For the respondent, it was contended that *Clark*, *Robertson* and *Derks* supported the imposition of a 10 year sentence, and appropriate weight was given to the questions of rehabilitation and other mitigating factors. It was also contended that when the sentencing remarks are properly reviewed, the primary judge was not constrained by *Clark* to impose a sentence of 10 years.

[76] There can be little doubt that the primary judge was fully cognisant of the nature of the offence. She described the facts as revealing "an horrific accident, and a tragedy of enormous proportions for so many people seated here in the court room".[71] The aspects of the applicant's conduct which were specifically noted included drinking heavily before driving the vehicle, ignoring Chang's requests to slow down, travelling at about 135 kilometres per hour before being aware of the police vehicle, refusing to obey the police direction to stop, and then further accelerating once the police flashing lights were seen. Following that, as the primary judge recorded, further pleas to slow down and pull over were ignored; instead the applicant continued to accelerate.[72] By the time the vehicle passed the service station it was travelling "at a very high speed",[73] following which it drifted off the marked lane and crossed the left edge on the roadway.

[77] At that point the speed limit was 80 kilometres per hour and the applicant's speed was well in excess of that. The agreed facts contained the estimation of a speed between 190 and 200 kilometres per hour at that point. Whilst that fact was not the subject of agreement, with counsel for the applicant explaining that the estimations were done from fixed cameras and contingencies such as lens type or potential for parallax error were not taken into account, counsel for the applicant accepted that the applicant "was travelling at a very high speed indeed" with no sign of braking until almost at the point where the rubbish bins were hit at the driveway entrance to number 437 Chambers Flat Road.[74] That was very close to the point where the pedestrians were hit. Counsel for the applicant also accepted that after the police had measured the applicant's speed at 134 kilometres per hour, the applicant accelerated away, having made a deliberate decision not to stop but to continue driving and to accelerate.[75]

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71 AR 35.
72 AR 36.
73 AR 36.
74 AR 27; see also AR 59.
75 AR 28.

[78] The primary judge observed the serious aspect of the applicant's offending was that he continued to drive after hitting the pedestrians. Though her Honour did not refer to it, the applicant had accepted that the distance between hitting the pedestrians and hitting the other vehicle was about 950 metres.[76] After that, as the primary judge did record,[77] the applicant travelled for another three kilometres until he finally stopped due to the damage to the vehicle and the fact that he crashed into a street light. I pause to observe that but for the crash into the street light, it was quite probable that the applicant would have continued to drive for some distance.

[79] The primary judge recorded the level of alcohol in the applicant's blood, at 0.146 per cent, two hours after the incident.[78] Though the applicant declined to be interviewed, the primary judge accepted that there was a timely plea of guilty.

[80] The primary judge noted what she described as "aggravating features in your case",[79] which were that the applicant's driving caused the death of two people, who were pedestrians, and caused grievous bodily harm to Chang, who had asked the applicant to slow down. Further, the offending occurred in the course of the applicant's flight from police, "due to your original speeding and driving whilst intoxicated".[80] The primary judge noted that the estimated blood alcohol level was probably between 0.168 per cent and 0.224 per cent.[81] The factors of the "very high speed", on roads where that speed was unsafe, particularly given the poor lighting and the curve, were all recorded.[82]

[81] Her Honour specifically noted that the applicant "did show some remorse at the scene", and confessed to police that he had hit the pedestrians.[83] The timely plea of guilty was also taken into account.

[82] In terms of rehabilitation her Honour had this to say:

> "I accept that the material which has been submitted by your counsel shows that you are committed to change, which is admirable. You also have good prospects, and you have completed a significant number of courses in prison, which is commendable.
>
> I note you have good family support, and your family are here supporting you, and will continue to support you.
>
> I note your previous good work history in the mines. You clearly have some talent."[84]

[83] In my respectful opinion the passage quoted above demonstrates that the learned primary judge was acutely aware of the substantial rehabilitation that had already been undertaken by the applicant whilst in custody, and the high likelihood that his rehabilitation would continue. The primary judge referred to the applicant as being

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76 AR 29.
77 AR 37.
78 AR 37.
79 AR 40.
80 AR 40.
81 AR 40.
82 AR 40.
83 AR 41.
84 AR 41.

"committed to change",[85] a comment signifying the applicant's determination to rehabilitate himself, in particular to avoid the social binge drinking which he identified as an element in this offence.[86] The "change" to which her Honour was evidently referring was not only change in the applicant's personal respects, but his demonstrated efforts to assist others to prevent them from reoffending.[87]

[84] Clearly the primary judge paid close regard to the material tendered which showed the significant number of courses which the applicant had completed in prison, that being a significant aspect of his rehabilitation. Her Honour's comment that he had "good prospects", noting his "previous good work history" and that the applicant had some talent, are all clear references to the applicant's history, skills and likely future once he left custody.

[85] The learned primary judge referred to the family support, noting that it would continue in the future. That is a significant aspect of assured rehabilitation.

[86] In my respectful opinion it cannot be demonstrated that the learned primary judge erred in failing to have due regard to the various mitigating factors including demonstrated and likely rehabilitation, remorse and insight, and the early guilty plea. There is no doubt that the applicant has demonstrated, during his time in custody, a determined effort to turn his life around. As the primary judge remarked, he is to be commended for that. Further, the applicant's remorse and insight are evident in the material, and at the forefront of her Honour's consideration. She said: "I am sure you are aware of the enormous impact your actions have had on so many people".[88] Nor had her Honour forgotten that as a consequence of the incident the applicant himself had sustained injury, particularly contracting hepatitis C as a result of coming into contact with the blood from the pedestrian. Her Honour refers to that expressly in her comments.

[87] In my respectful opinion the sentencing remarks demonstrate that the learned primary judge did not fall into error in her assessment and recognition of the various mitigating factors advanced in the applicant's favour.

[88] The second contention before this Court was that the learned primary judge considered that the decision in *Clark* constrained her from imposing a similar sentence in this case.

[89] There is no doubt that her Honour was well aware of the decision in *Clark*, as well as those of the other authorities to which she was referred, including *Derks* and *Robertson*. Indeed, her Honour recorded that the material had been sent over in advance of the sentencing hearing, which had allowed her to read and consider it in some detail.[89] Specifically in relation to the comparable cases, her Honour confirmed that she had had a chance, before the sentencing hearing, to read all of the cases and to note the submissions in relation to their utility and the sentence and range based upon them.[90]

[90] When her Honour referred to the decision in *Clark*, she noted that it was the only decision where two deaths were involved. She described it as being "highly

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85 AR 41.
86 See, for example, the applicant's "Relapse, Prevention and Management Plan", AR 71-77.
87 See, for example, AR 68.
88 AR 39.
89 AR 16.
90 AR 24.

relevant in determining the penalty which I will impose".[91] She then went on to review the essential facts in *Clark*, including that the reduction in penalty was on the basis that Clark's moral culpability had been diminished as a result of her bipolar disorder.[92] She then noted the cases that counsel for the applicant had relied upon, but considered "*R v* [*Clark*] is the decision which is most persuasive to me".[93] Having said that much, the primary judge then reviewed the aggravating features in the case, the nature of the offence, and matters relevant to the applicant including the various mitigating factors that I have referred to above. She then said:

> "Having considered the cases, I consider that for each offence of manslaughter, a sentence of 10 years' imprisonment be imposed. On the basis of *R v* [*Clark*], I do not consider that I can impose a penalty of nine years. I consider 10 years is the appropriate penalty, taking into account all of the factors."[94]

[91] There can be little doubt that her Honour considered the present case to be one more serious than *Clark*. However, I do not share the view that her Honour felt **constrained** by *Clark* to impose a sentence of 10 years. In particular, I do not read that into the sentence: "On the basis of *R v* [*Clark*], I do not consider that I can impose a penalty of nine years". In my respectful opinion all her Honour was saying, particularly in light of the earlier references to *Clark* as being "highly relevant" and "most persuasive", is that she did not consider that *Clark* was a decision that persuaded her to impose something as low as nine years. Her Honour described 10 years as "the appropriate penalty, taking into account all of the factors".[95]

[92] Further, whilst it is correct to say that the decision in *Kelly* was not proffered to the primary judge as a separate comparable case, I do not consider that her Honour was ignorant of it, or what was imposed by way of sentence in that case, by this Court. Her Honour had clearly read *Clark*, *Robertson and Derks* with some care. As indicated above, one could not do that without being repeatedly reminded of the circumstances and sentence in *Kelly*.

[93] In my respectful opinion it was open to the learned primary judge to form the view that the applicant's case was one more serious than that in *Clark*. Clark was a 35 year old who, whilst unlicensed, took her husband's car, driving it whilst under the influence of a cocktail of drugs, almost all of which were present in concentrations higher than the therapeutic range for those drugs. Further, at the time she was on probation, but not in respect of offences to do with vehicles or accidents, but rather drug related offences. She was in a hurry to keep an appointment and as a consequence drove onto the footpath in order to get past a car in front of her, which she considered was travelling too slowly. In the process she struck and killed two teenage boys who were standing on the footpath. After striking them, she travelled a short distance and then parked in a car park. She lied to police about what happened, and what drugs and alcohol she had taken. She had been involved in other accidents whilst under the influence of prescription drugs, so much so that her husband had attempted to prevent her from driving and hidden the keys.

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91 AR 39.
92 AR 40.
93 AR 40.
94 AR 42.
95 AR 42.

[94] The court described her driving as "extraordinarily reckless" and referred to *Kelly* as a point of distinction, that being a case of very reckless driving but on the roadway, and not on the footpath.[96] However, the significant feature in *Clark* is that the bipolar disorder was connected to her addiction to prescription drugs, and that affected her conduct at the time. The court described her conduct as "irrational behaviour … in part, a consequence of her bipolar disorder".[97] The court concluded that her bipolar disorder was a component in the irrational behaviour leading to the commission of the offences, and that "tends to lessen her moral culpability and the claims of deterrence and denunciation as considerations bearing upon the imposition of a proper sentence".[98]

[95] The court came to the view that there must be recognition that Clark's behaviour was "irrational, rather than deliberately anti-social",[99] and that the irrationality was, to some extent, the consequence of the bipolar disorder, so that her moral culpability was reduced. Nonetheless, it was a case where a sentence heavier than that in *Kelly* was appropriate.

[96] By contrast, the applicant was a 42 year old person, who made a number of deliberate decisions (albeit whilst intoxicated) which led to the death of two pedestrians, and serious injury to his passenger. Those decisions were to drive whilst he must have known he was intoxicated,[100] to ignore the police direction to stop, to then accelerate from an already excessive speed, and to continue accelerating whilst ignoring the repeated pleas of his passenger to slow down or stop. Whilst the applicant disputed the calculation derived from the service station CCTV, namely between 190 and 200 kilometres per hour, it was conceded that he had accelerated from 134 kilometres per hour after detection by the police and that as a result he was "travelling at a very high speed indeed". Those deliberate decisions were made, no doubt, because the applicant realised that if he was convicted of drink driving he would likely lose his licence, which he required for work.

[97] Unlike *Clark*, the applicant did have a relevant history of offences involving vehicles and drink driving. That included a drink driving conviction in 1987,[101] dangerous driving and unlicensed driving in 1987, a drink driving offence in 1998,[102] and another drink driving offence in 2008.[103] The last offence involved a disqualification which would have ended only a few months before the applicant committed the offences in question.

[98] The nature of the previous offence for dangerous driving in 1987, resonates with that under consideration. The applicant, then 19, was driving a vehicle at night and pursued by police because he was exceeding the speed limit. The police vehicle reached speeds of about 110 kilometres per hour, but the applicant's vehicle was pulling away from it. The applicant failed to negotiate a corner, crossed the other lane of the road and the car smashed into a power pole. At the time there were three

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96 [2009] QCA 361 at [20].
97 [2009] QCA 361 at [23].
98 [2009] QCA 361 at [23].
99 [2009] QCA 361 at [27].
100 Particularly, given the intoxication levels that were present, estimated at between 0.168 per cent and 0.224 per cent.
101 Alcohol level 0.06 per cent: AR 45.
102 Alcohol level 0.194 per cent: AR 17.
103 Alcohol level 0.127 per cent: AR 17.

passengers in the car. The applicant admitted to police the reason he had driven away at speed was because he was aware he was driving under a court suspension.[104]

[99] In my respectful opinion the matters which distinguish *Clark* from the applicant's case centre not solely on the number of people killed, but the broader nature of the conduct leading to the offence. The applicant's decisions were deliberate and in defiance of police directions to stop. They involved driving at high speed to start, then accelerating to extremely high speed, all in the face of pleas by the passenger to slow down or stop. The speed was so extreme that the impact dismembered one pedestrian, and threw the other one 30 metres from the point of impact. Then the applicant made the deliberate decision to continue driving, colliding with another car, putting the occupants at serious risk. Then, having collided with the car, the applicant continued to drive for some kilometres before being stopped by colliding with a sign.

[100] By contrast, the driving in *Clark*, whilst extraordinarily reckless, did not involve anything like the same speed, and was in circumstances where the behaviour was irrational, rather than deliberately anti-social, and the moral culpability of the driver was reduced by a bipolar disorder which led to the taking of significant quantities of drugs.

[101] Whilst it is true to say that Clark was not as cooperative with the authorities, nor were her rehabilitative prospects nearly as promising, those were matters affected by the bipolar disorder and the prescription drug addiction. I do not see those features as leading to a conclusion that the circumstances in *Clark* are on a par with those of the applicant.

[102] If one considers the facts in *Kelly*, it does not, in my respectful opinion, lead to a conclusion that the learned primary judge should have sentenced at nine years for the manslaughter. Kelly was a much younger person, 22 at the time of the offences and 25 at the time of sentence. Whilst severely intoxicated[105] he stole a bakery van and drove off. The first part of the journey involved him being followed by a customer of the bakery, during which time it was noted he was travelling at speeds which reached 130 kilometres per hour. When the police intercepted him he ignored the various signs to pull over and continued to drive, on several occasions on the wrong side of the road. His speed during this time was between 70 and 100 kilometres per hour. Not only did he ignore the signs to slow down, but he blocked a manoeuvre to stop him, by driving onto the wrong side of the road. On the third occasion when he went onto the wrong side of the road, he collided with an oncoming vehicle, killing the driver. Kelly discharged himself from hospital and went to South Africa, from where he was then extradited some years later. In the meantime he had become an active member of the church, involved in meetings of the church and in running a youth group, had turned away from liquor, and married. In his time in custody he completed a number of courses and took an active part in groups that were designed to encourage mutual assistance and reform. Further, he had shown genuine remorse for his actions.

[103] I have previously referred to the statement by the court in *Kelly*[106] in which the court referred to the difficulty of generalising about a sentence for manslaughter.

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104 AR 17-18.

105 His blood alcohol level was 0.187 per cent: *R v Kelly* at p 4.

106 Paragraph 66 above.

The court considered that whilst Kelly had shown himself capable of rehabilitation, nonetheless a person had been "recklessly killed and deprived of all chance of further enjoyment of his life".[107]

[104] *Kelly*, in my view, is not as serious as the case of the applicant. Whilst the overall distance driven was longer (23 kilometres), the speed was nothing like that of the applicant. Further, the applicant caused the death of two pedestrians, at the same time causing significant injury to his own passenger, who had been pleading with him to slow down or stop, and who feared for his own life. Following that the applicant continued at high speed and collided with another car, endangering those occupants as well.

[105] Looking at *Kelly* and *Clark*, and the circumstances of the applicant's offence, I do not consider that it can be said that the appropriate sentence was nine years, rather than 10 years. In other words, those decisions do not, in my respectful opinion, compel the conclusion that 10 years was out of the range.

[106] The last point of contention was that concerning the impact of the serious violent offence declaration which would follow on a sentence of 10 years, but would not automatically do so on a sentence of nine years. There is no question that the learned primary judge was well aware of the impact of a 10 year sentence in terms of a serious violent offence declaration. That had been the subject of submissions before her, with the respondent contending that even if the sentence was as low as nine years, a declaration should still be made. I agree with the conclusion of the President that it is "inconceivable that her Honour, an experienced sentencing judge, was not acutely cognisant of the impact of the 10 year sentence".

[107] I do not consider that it can be shown that the primary judge erred in selecting 10 years as the appropriate penalty, knowing that the consequence was that a declaration would follow. I consider that her Honour was correct in viewing the case as more serious than *Clark*, involving, as it did, deliberate decisions to drive at extreme high speed, regardless of the conditions and heedless of the police directions, but more particularly the pleas of the passenger to slow down or stop, and even after hitting two pedestrians.

Conclusion

[108] For the reasons above, I do not consider that it has been demonstrated that the learned primary judge fell into error in relation to the sentence imposed on the applicant. I would, therefore, refuse the application for leave to appeal.

[109] **MULLINS J:** The ground of appeal set out in the application for leave to appeal against sentence was that the sentence imposed was manifestly excessive in all the circumstances. That ground was, in effect, conceded by Mr Godbolt of counsel (who appeared for the applicant at the sentence and appeared *pro bono* on this application), when he made quite properly the concession that the sentence of 10 years' imprisonment for each manslaughter offence was within range. The focus of the application for leave to appeal against sentence was looking for error in the sentencing process.

[110] In the course of the sentencing remarks, the learned sentencing judge carefully analysed the circumstances of the offences, referred to the authorities relied upon

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[107] [1999] QCA 296 at p 10.

by the prosecutor and defence counsel, but dealt in detail with *R v Clark* [2009] QCA 361 as the only comparable authority where two deaths were also involved, making the observation that it was "highly relevant in determining the penalty" in the applicant's case. The sentencing judge referred to the applicant's antecedents and dealt with the mitigating factors in the applicant's favour, expressly noting his good prospects, but then concluded:

> "But nothing can wipe away this tragedy and the impact your conduct has had on this family and the community. The community, through me, needs to punish you appropriately for your actions. You need to serve a long period of time in gaol.
>
> Having considered the cases, I consider that for each offence of manslaughter, a sentence of 10 years' imprisonment be imposed. On the basis of *R v* [*Clark*], I do not consider that I can impose a penalty of nine years. I consider 10 years is the appropriate penalty, taking into account all of the factors."

[111] It is implicit in the sentencing judge's conclusion that 10 years was the appropriate sentence, that the applicant's offending was overall more serious than that of the offender in *Clark* and that sentence should be imposed, despite the fact it followed automatically that the applicant was convicted of a serious violent offence. The sentencing judge's approach was a classic instance of instinctive synthesis: *Markarian v R* (2005) 228 CLR 357 at [37] and [84].

[112] I respectfully agree with the analysis undertaken by Morrison JA in paragraphs [93] to [101] of his reasons to show that there was no error in the conclusion of the sentencing judge that the applicant's case was more serious than *Clark*. I also agree with Morrison JA's conclusion in paragraphs [106] and [107] of his reasons that there was no error in the sentencing judge's conclusion in imposing a sentence of imprisonment of 10 years, even though it carried with it the serious violent offence declaration.

[113] The Court of Appeal in *R v McDougall & Collas* [2007] 2 Qd R 87 at [18] identified as a relevant consideration in determining the appropriate sentence for an offence which is a serious violent offence, if a sentence of 10 or more years is imposed, "that courts cannot ignore the serious aggravating effect upon a sentence, of an order of 10 years rather than, say, nine years," but the Court also pointed out at [18] "that courts should not attempt to subvert the intention of pt 9A of the Act by reducing what would otherwise be regarded as an appropriate sentence." On a fair reading of the sentencing remarks, the sentencing judge in this matter took into account all relevant considerations where the appropriate sentence is in the vicinity of 10 years.

[114] The sentence of 10 years for each offence of manslaughter was not outside a sound exercise of the sentencing discretion in the circumstances. In the absence of any error in the sentencing process, the application for leave to appeal against sentence must be dismissed.