SUPREME COURT OF QUEENSLAND

CITATION:	*R v Etheridge* [2016] QCA 241
PARTIES:	**R** **v** **ETHERIDGE, Noa Ronnie** (applicant)
FILE NO/S:	CA No 277 of 2015 DC No 156 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Rockhampton – Date of Sentence: 15 October 2015
DELIVERED ON:	23 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2016
JUDGES:	Morrison JA and North and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. Set aside the orders made on 15 October 2015 in so far as it was ordered that the offender be imprisoned for a period of six years, and that the date the offender is eligible for parole be fixed at 14 October 2017.** **4. Order in lieu thereof, the offender be imprisoned for a period of five years, and that the offender be released on parole on 15 June 2017.** **5. Otherwise confirm the orders made on 15 October 2015.** **Order delivered ex tempore on 23 September 2016:** **In respect of order 4, delete "the offender be released on parole"; and order in lieu thereof "the offender be imprisoned for a period of five years, and that the date the offender is eligible for parole be fixed at 15 June 2017."**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to charges of dangerous operation of a vehicle causing death – where the applicant was sentenced to six years imprisonment, with parole eligibility set

at two years – where the applicant was also disqualified from holding or obtaining a driver's licence for five years – where the applicant went to a social event with friends and consumed alcohol and cannabis – where the applicant left the event, with his friends who were also inebriated and who nominated him as the designated driver – where the applicant drove the car at night and struck a man, who later died of the injuries – where the applicant did not stop the vehicle and did not allow another passenger to call emergency services – where the applicant was a disqualified driver at the time – where the applicant had a history of traffic offences – where the applicant contends that the sentence was manifestly excessive having regard to other cases of similar circumstances – whether the sentence was manifestly excessive

R v Blanch [2008] QCA 253, cited
R v Coutts [2016] QCA 206, cited
R v Grabovica [2012] QCA 180, considered
R v Maher [2012] QCA 7, considered
R v Nikora [2014] QCA 192, considered
R v Ruka [2009] QCA 113, considered
R v Schoner [2015] QCA 190, considered
R v Vance, ex parte Attorney-General (Qld) [2007] QCA 269, considered
R v Wilde, ex parte Attorney-General (Qld) (2002) 135 A Crim R 538; [2002] QCA 501, considered

COUNSEL: C F C Wilson for the applicant
M R Byrne QC for the respondent

SOLICITORS: South Geldard Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** On 29 March 2014 Mr Etheridge, then just 20 years old, went to a social event with several friends. He consumed both cannabis and alcohol. He left at about 3 am, driving a car owned by one of the friends. The friends were passengers. At the time he was a disqualified driver.

[2] The car struck a man who died of the injuries sustained.

[3] He pleaded guilty to charges of dangerous operation of a vehicle causing death, and leaving the scene. He was sentenced on 15 October 2015 to six years imprisonment, with a parole eligibility date set at 14 October 2017 (two years later). He was also disqualified from holding or obtaining a driver's licence for five years.

[4] Mr Etheridge seeks leave to appeal against the sentence on the sole ground that it is manifestly excessive.

The objective nature of the conduct

[5] An agreed schedule of facts was tendered.[1] A number of things should be noted about the schedule. First, the schedule was agreed as the facts relevant to the charged offence.

1 AB 44-46.

Secondly, though the indictment charged Mr Etheridge with dangerous operation of the vehicle only on Rockonia Road, as will become apparent the facts dealt with in the schedule commence at an earlier point, when Mr Etheridge was at the social gathering with his friends. Thirdly, whilst the indictment charged the circumstance of aggravation as leaving the scene, the schedule also dealt with facts after that time, including the hiding of the car, and numberplates. Fourthly, the submissions for Mr Etheridge accepted that the schedule set out the "circumstances of the offence",[2] and counsel for Mr Etheridge addressed various facts in the schedule as relevant and as matters relied upon in the application.[3]

[6] Without objection certain facts were also given to the learned sentencing judge. What follows is drawn from both sources.

[7] The friends had been socialising for most of the night and had consumed a large amount of alcohol. Mr Etheridge consumed alcohol and cannabis.

[8] The car owner had become so intoxicated and tired that he felt he could not drive. All of the friends had consumed alcohol. For that reason Mr Etheridge was judged by all of them as the least affected. He offered to drive to his mother's home.[4]

[9] The road was dry and illuminated by street lighting. The conditions were clear.

[10] Mr Etheridge was "speeding, causing periods of rapid deceleration and turning corners at significant speed".

[11] The prosecutor read out from a statement by one of the friends in the car.[5] The salient features of that account were:

(a) the statement giver was in the back right seat (behind the driver);

(b) in order to avoid police they took back streets heading to the home of Mr Etheridge's mother;

(c) they were "all yelling and screaming" and the music was "up real loud";

(d) Mr Etheridge "kept putting his head out the window and yelling";

(e) Mr Etheridge was "driving real fast around corners", to the extent that she was thrown around in the back seat;

(f) suddenly she saw someone in front of the car; the car hit that person;

(g) there was a dip in the road so the car went a little faster just before impact;

(h) Mr Etheridge sped up after he hit the person, then stopped;

(i) when asked if they were going to stop Mr Etheridge said no; all the occupants told her not to ring an ambulance.

[12] The deceased was 17 years old and had a blood alcohol level of 0.211. He was wearing dark clothing. When hit he was standing in the middle of the road, facing the car, near the centreline. He was struck about 30 metres into a 50 kph zone, the speed having dropped from 60 kph.

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2 Applicant's outline, paragraph 11.
3 For example, paragraphs 15 and 17 of the applicant's outline.
4 Proffered by counsel for Mr Etheridge: AB 17.
5 AB 9-10.

[13] Forensic analysis revealed that Mr Etheridge had first identified the hazard posed by the deceased prior to entering the 50 kph zone, but commenced braking inside that zone. From the evidence including skid marks, the car was travelling between 78 kph and 90 kph at the commencement of braking, and slowed to between 68 kph and 82 kph at the point of impact. The car did not swerve before hitting the deceased.

[14] The deceased landed on the road about 30 metres from where he was hit, then rolled another 10 metres. Significant damage was caused to the car. The deceased would have suffered severe injuries.

[15] Mr Etheridge did not stop, but drove off. He and the two male friends later parked the car in the rear of the yard, and put a tarpaulin over the front of the car. The car was positioned so that it could not be seen from the road, with the front of the car facing the rear of the yard. The number plates were removed and put in a toolbox under the house.

[16] In the car grill police found a smashed beer bottle, matching the type of beer bottle that the deceased was holding when he was struck.

[17] The deceased suffered numerous and catastrophic injuries, including fractures to both legs, multiple skull fractures, brain haemorrhages, lacerations to the liver, internal injuries, and numerous cuts and abrasions. There was permanent brain damage and bilateral amputations would be required. Life support was turned off 10 days later.

[18] An inspection of the car found that: (i) the front right and left rear brakes were inoperative, and had been for some time prior to that night; (ii) both rear tyres and the front left tyre had insufficient tread; and (iii) two headlight globes were off at the time the deceased was struck.

[19] Mr Etheridge agreed to an interview and went to the police station with a legal representative. He admitted he had been driving when the car hit the deceased, and said that it was not his car. Counsel for Etheridge added that: (i) he had told police where the car was and where the number plates could be found; and (ii) neither of those facts were known by police before that.[6] That account was questioned by the prosecutor who read the passage from the interview.[7] It revealed that Mr Etheridge only said that he was the driver of the car that hit the deceased, and that it was not his car. He said nothing as to the number plates. He was asked if he wished to say more, and his solicitors then answered "no", and that he declined to answer further questions, exercising his right to silence.

[20] The prosecutor told the learned sentencing judge that whilst there was "some alcohol at least taken during the course of the preceding events", Mr Etheridge was not prosecuted on the basis that alcohol or drugs were an operative consideration at the relevant time. Further, that whilst he categorised the driving as being at an excessive speed it was not "excessive speeding in the way that term is defined in the Code".[8]

Defence counsel's submission

[21] Counsel for Mr Etheridge submitted that the appropriate sentence should be three to four years, with suspension at the one-third mark.[9] Further, whilst Mr Etheridge had

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6 AB 19 lines 17-22.
7 AB 26 lines 21-44.
8 AB 12.
9 AB 23 lines 3-26.

a poor traffic history he "has turned that around in the last 19 months and he's been living under the cloud of knowing that he would be going to prison for this as well as some expressions of displeasure by friends and family of [the deceased] which is probably, in the circumstances, understandable".[10]

Antecedents and history

[22] Mr Etheridge's traffic history showed his licence had been disqualified about one month before this offence, for a period of two years. In addition he had traffic offences spanning the period from when he was 15 years old, including:

(a) in May 2009 (aged 15), unlicensed driving by attempting to drive a car when his blood alcohol level was 0.063;

(b) in 2011 when he was a learner driver and as a new driver: failing to display L plates, twice using a defective vehicle, starting or driving a car in a way that caused excessive noise or smoke, and speeding between 13 and 20 kph above the limit;

(c) in February 2012 (aged 18), driving with a level of 0.033 resulting in disqualification;

(d) in 2012, late night driving restrictions, starting or driving a car in a way that caused excessive noise or smoke, and driving an unregistered vehicle;

(e) in 2013, twice driving at a speed between 13 and 20 kph above the allowed limit, driving whilst unlicensed, failing to display P plates, and driving a defective vehicle; and

(f) in 2014, driving whilst disqualified, and driving a defective vehicle.

[23] His criminal history included relatively minor offences, but two of which postdated this offence:

(a) unlawful use of a vehicle in May 2009, when he went for a joyride to Yeppoon; this resulted in a referral to a youth justice conference;

(b) breaches of bail relating to the charged offence; and

(c) two drug related offences in 2013 and 2014.

[24] Counsel for Mr Etheridge told the learned sentencing judge a number of things about him:[11]

(a) he suffered from dyslexia and epilepsy; since the collision he started to suffer anxiety and depression, and as a consequence a mental health plan was commenced;

(b) he had completed three years of a plumbing apprenticeship, and he had always been in employment; he had worked at his father's business;

(c) he had a four year old child from a previous relationship, who he saw regularly;

(d) he had a supportive family, many of whom were in court for the sentencing;

(e) he was extremely sorry for what had occurred, and that he had been responsible for the death troubled him greatly; and

(f) he referred to a statement from the car owner in which he had said that Mr Etheridge expressed his sorrow as early as the next morning; in fact the statement said: "When I woke up, [Mr Etheridge] was awake as well. He was saying things like "sorry" to me and that he was going to give me his car to fix me up".[12]

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10 AB 23 lines 30-33.

11 AB 17-19.

12 AB 22 lines 44-47; AB 25 lines 39-44.

Mr Etheridge's statement to the court

[25] At the sentencing hearing Mr Etheridge read the following out, written by his sister:[13]

> "There's nothing I can give back what I have taken from you, your family. I was not only careless but irresponsible. I cannot forgive myself and … I'm not asking for your forgiveness but I need everybody to know from the bottom of my heart that I am and always will be sorry. [indistinct] will always be [indistinct]. Thank you."

The approach of the learned sentencing judge

[26] The learned sentencing judge was referred to *R v Nikora*,[14] *R v Blanch*,[15] *R v Grabovica*,[16] *R v Wilde, ex parte Attorney-General (Qld)*,[17] and *R v Vance, ex parte Attorney-General (Qld)*.[18]

[27] In his sentencing remarks[19] the learned sentencing judge referred to the following matters taken into account:

(a) the early plea of guilty;

(b) Mr Etheridge's age, 20 at the time of the offence and 21 at sentence;

(c) the remorse shown, albeit late;

(d) his excellent work history, and the references;

(e) his medical conditions and the fact that he was receiving treatment for them;

(f) Mr Etheridge had chosen to get into the car and drive it, after having consumed alcohol and drugs;

(g) he was disqualified and should not have been driving;

(h) that whilst the prosecution accepted that it could not show a causal link between the drugs and alcohol and the driving, that was because he "did a runner and you didn't present yourself to police for two days later, so it was never going to be possible to work out whether you were affected by alcohol or drugs at the time";

(i) the car was mechanically unsound and the speed was dangerous because "there's always the prospect that there will be someone on the road";

(j) his Honour inferred that "after at least some period of driving it, you may have had some idea that the brakes were dodgy, but it's not otherwise said";

(k) the speeds before and at the impact, and that the car did not swerve;

(l) the injuries that the deceased suffered;

(m) the "relatively minor criminal history" … which is of only limited significance";

(n) the "significant traffic history";

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13 AB 25 lines 3-12.
14 [2014] QCA 192.
15 [2008] QCA 253.
16 [2012] QCA 180.
17 [2002] QCA 501.
18 [2007] QCA 269.
19 AB 30-36.

(o) the mental health plan; his Honour accepted that Mr Etheridge had suffered from anxiety, depression and post-traumatic stress disorder; the medical assessment was of "limited assistance";

(p) the references tendered, showing he was a conscientious worker; and

(q) that he was devoted to his child.

[28] The learned sentencing judge described the admissions made to the police as "very, very limited". His Honour said he could not resolve the issue as to whether Mr Etheridge had told the police about the number plates, but:[20]

> "The reality was that you were fairly quickly identified, because they searched your place, found the car, found the numberplates, also found some – some marijuana seeds as well, which is the only matter on your criminal history since these events, other than two breaches of bail. But those are the circumstances for which you are to be sentenced."

[29] His Honour characterised the driving as:[21]

> "… driving well in excess of the relevant speed limit, which was 50 kilometres at the time, the estimate being that you started braking at around 78 to 90 kilometres, which is at least 50 per cent more than the speed limit, and approaching twice the speed limit."

[30] The learned sentencing judge also expressed his view of the aggravating factor, namely leaving the scene, as "gross callousness".[22]

[31] As to the circumstances of the driving the learned sentencing judge summarised it in this way:[23]

> "… you made the choice to get into a vehicle that was mechanically defective after you had apparently consumed alcohol and drugs – but it's not known how much, whether – if at all – it affected you – in a car full of other young people, some of whom were apparently very affected by alcohol and drugs, and … you chose to drive that vehicle dangerously – we're not sure how far or for how long, but we have a description of the manner of driving immediately before this collision which indicates some significant concerns about your driving – and … as a result of that, while speeding – although not excessively, inverted commas, as the law defines it – you collided with [the deceased], who was standing on the road, himself significant[ly] affected by alcohol – and it was a dry road; the conditions were clear; the roadway was illuminated by street lighting, so there was no reason that you couldn't have seen him ...".

[32] The learned sentencing judge described the circumstances in which Mr Etheridge did not stop, but drove off, as "unbelievable, because I cannot comprehend how a human being could have done that and then drove away".[24]

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20 AB 31 lines 29-33.
21 AB 33.
22 AB 33.
23 AB 30 lines 15-26.
24 AB 30 lines 37-38.

[33] His Honour accepted the prosecutor's characterisation of the apology the next day, as:[25]

> "… be more about expressing an apology to the owner of the car than for what you'd done with his car to another being who, as we now know, died about nine days later. That clearly indicates, at least in the short to medium term, placing your self-interest well above the interests of others, and the other matters, of course, which the prosecutor has pointed out is the profound impact of the loss."

[34] The learned sentencing judge summarised the seriousness of the driving in Mr Etheridge's case:[26]

> "… a young man who has, for a relatively short period of time, driven dangerously. That dangerousness involved the manner of driving in the car, and driving it at speed, while the car was, it seems, mechanically defective, and in circumstances where you were driving while you were disqualified and, for reasons that no one is able to explain, on a clear night with clear visibility, you ran into a young man standing in the middle of the road. That's not been explained to me. No one seems to be able to explain how that could have occurred. The driving, in my view, in that context, is a very serious example of dangerous driving."

[35] In doing so his Honour expressly adopted a passage in the reasons of Keane JA in *Nikora*:

> "While a sentencing court must bear in mind the youthfulness of an offender is an important consideration in mitigation of sentence, the strong need for deterrence in cases of this kind is not lessened by the circumstance that the offender is young. The very nature of this offence is such that it is usually committed by young men who, by reason of the excessive self-confidence of immature youth, are recklessly indifferent to their own safety, and the safety of others, on the road. It is to deter precisely this category of potential offender that condign punishment is imposed on offenders."

[36] His Honour ended by saying that he found the driving "completely and utterly recklessly indifferent to your own safety, and the safety of others".

Discussion

[37] As in all such cases as this, the seriousness of the driving is the matter that must be addressed rather than trying to fit the driving into categories such as momentary inattention or prolonged recklessness.

[38] Here the indictment only charged Mr Etheridge with dangerous driving on one road, Rockonia Road, not on the entire journey from the social event. That said the facts established this about the driving on that road:

(a) he saw the obstacle presented by the deceased before the start of the 50 kph zone;

(b) the braking happened inside the 50 kph zone;

(c) he was driving between 78 kph and 90 kph at the commencement of braking;

(d) that means that he was exceeding the 50 kph limit, and even the 60k ph limit, by a considerable margin;

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25 AB 33-34.

26 AB 34.

(e) by impact he had slowed to between 68 kph and 82 kph;

(f) in a practical sense the forensic evidence meant that there was no chance that Mr Etheridge was going to avoid the collision with the deceased; at the minimum speed he was doing at impact, 68k ph, it would take 1.58 seconds to cover the 30 metres from the start of the 50 kph zone and the point of impact; at the maximum speed, 1.32 seconds, and at the mean speed, 1.44 seconds; the actual times will be less than that, given that when he entered the 50 kph zone he was doing between 78 kph and 90 kph;

(g) the only evidence of a change of speed is that of a passenger who said that the car went faster shortly before the impact because of the dip in the road; however, the learned sentencing judge did not seem to sentence on the basis of this evidence;

(h) there was no evidence of any evasive action other than to slow down from one excessive speed to another excessive speed;

(i) the speed at which he was driving at was enough to cause at least one passenger to be thrown from side to side; and

(j) in the moments before the impact he was driving at excessive speed, causing rapid deceleration and driving through corners at significant speed.

[39] The aggravating feature was that he left the scene of the impact. Whilst the circumstances of hiding the car and numberplates adds colour to the narrative, the only aggravating feature is leaving the scene.

[40] The contentions were that the learned sentencing judge placed too much weight on three factors: (i) the tragic consequences; (ii) the departure from the scene; and (iii) the mechanical defects in the car. Further, that insufficient weight was placed on (i) the actual manner of driving, and (ii) Mr Etheridge's youth.

[41] I shall deal with each in turn. However, that discussion must acknowledge that the weight to be attached to a particular factor is a matter for the sentencing judge's individual discretion, and a contention that insufficient weight has been given does not, of itself, justify interference with the sentence. Such a contention is not an allegation that the sentencing judge acted upon a wrong principle, took into account extraneous or irrelevant matters, mistook the facts, or failed to take into account a material consideration.[27]

The consequences

[42] It is true that the learned sentencing judge referred in some detail to the consequences, and the impact upon the family of the deceased. That is hardly surprising given that the impact caused the death of a 17 year old man, and in circumstances where his family had to endure about 10 days of his suffering before life support was switched off. The family were represented at court, and a victim impact statement was read by the deceased's mother.

[43] And it is true that his Honour used a number of phrases that expressed the depth of the tragedy, such as:

(a) "the sadness and grief, which is obvious in this courtroom"; "profound sadness";

(b) "we all grieve at the unnecessary loss of any precious human life, and this was as unnecessary as any loss possibly could be";

(c) "many people are deeply affected by what you've done"; and

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27 *R v Coutts* [2016] QCA 206, at [4].

(d) "the loss of [the deceased] has spread far and wide. Now, that's inevitable, but it's profoundly sad. It's had a profound effect on his parents, no doubt on many others in his family and friendship circle, and in his community, and it can never be taken back".

[44] However, for a number of reasons I do not accept that undue weight was placed on this factor. First, much of what his Honour said was simply factual. Secondly, the sentencing remarks are a time, like few others that are afforded to a court, where the judge gets to speak personally to an accused person. Thirdly, much of what was said was done to drive home the impact, as a safeguard against the future. In my view, it is evident that his Honour wished to encourage Mr Etheridge to join a programme of community information sessions against dangerous driving. That is shown is this passage, just before his Honour discussed the effects of the programme:[28]

> "What I hope is that you not only have understood clearly the seriousness of your offending, but that perhaps with time, as you mature, you might think about something that I ask of every defendant standing where you stand, and this is not me talking as a judge; this is me talking as one human being to another. You've been personally responsible for the sadly unnecessary loss of another human life, tragically young loss of another human life."

The departure from the scene

[45] It is true that the learned sentencing judge referred to this aspect of the case in scathing terms, such as:

(a) "Those circumstances are simply unbelievable. They're unbelievable, because I cannot comprehend how a human being could have done that and then drove away";

(b) "… most chillingly, once you collided with him you took off, and you not only took off, but you concealed the car. You took off the numberplates, and two days later you finally went to police with your lawyers and made a very, very limited confession"; and

(c) "… as the prosecutor has characterised it – it's hard to disagree with this – gross callousness in leaving the scene in the light of the obvious serious injury of the young man".

[46] However, it is difficult to criticise the learned sentencing judge for this considering the agreed facts. Mr Etheridge knew he had hit a person and that he was seriously injured, yet he refused to stop. Even though one passenger asked to phone an ambulance, that was rejected. Whilst his Honour did not sentence on the basis that Mr Etheridge was the one who rejected that request, or even joined in it, it was, nonetheless, part of the circumstances in which he refused to stop. Further, Mr Etheridge's counsel used the phrase "callously fleeing from the scene" to characterise what occurred.[29]

Mechanical defects in the car

[47] The learned sentencing judge referred to the defects[30] and that, as a result, the car was mechanically unsound. However he did not impute knowledge of that to Mr Etheridge, as he did not own the car. His Honour said:[31]

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28 AB 36.

29 Applicant's outline, paragraph 14.

30 Front right and left rear brakes inoperative, both rear tyres and the front left tyre had insufficient tread, and two headlight globes were off.

31 AB 31.

> "You should never have been driving this vehicle, given the circumstances of the vehicle. You may not have had knowledge of that, although I can infer that after at least some period of driving it, you may have had some idea that the brakes were dodgy, but it's not otherwise said. That's what the mechanical inspection reveals."

[48] The inference was not far reaching, only that at some point Mr Etheridge may had some knowledge that the brakes were faulty. In the end all his Honour said was that: (i) the car was mechanically unsound, and that was true; and (ii) the "dangerousness [of the driving] involved the manner of driving in the car, and driving it at speed, while the car was, it seems, mechanically defective". In my view, that does not sustain the conclusion that undue weight was given to the mechanical defects, nor I do not consider that he was sentenced on the basis that he knew of the defects.

The manner of the driving

[49] The thrust of this contention was that the driving was not as serious as in some of the comparable cases, which involved police chases, driving on the wrong side of the road, extreme speed, disobedience to traffic lights, and the like.

[50] The driving had these features:

(a) Mr Etheridge was adversely affected by alcohol and cannabis when he commenced driving, though he was sentenced on the basis that a causal link between the alcohol and drugs, and his driving, could not be established; but he was driving because he was selected as the **least** affected person;

(b) he knew he was a disqualified driver; the route was selected to avoid encountering police;

(c) once on Rockonia Road the driving was no longer on a back road, but on a significant suburban street, two lanes wide with space for parking on each side;[32]

(d) driving at between 78 kph and 90 kph in a 60 kph zone, then in a 50 kph zone;

(e) causing periods of rapid deceleration and turning corners at significant speed, such that a passenger was thrown about the back seat;

(f) speeding up around corners;

(g) driving in that fashion in an urban area, at about 3 am;

(h) notwithstanding that it was a clear night with good conditions and an illuminated roadway, not seeing the hazard of a person on the road until it was too late to do anything about hitting the person; and

(i) there was no evasive action other than to slow down from one excessive speed to another excessive speed.

[51] Mr Etheridge's driving history was poor. I accept the submission from senior counsel for the Crown that it shows that the driving on the night in question was not out of character, and points to recklessness.

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[32] In the course of addresses to this Court, senior counsel for the Crown stated, without objection: "I suspect my learned friend will allow me to observe, contrary to his submission, it's not a back street. It's certainly not part of the highway in Rockhampton, but it is a significant street in a suburban area – that is, two lanes wide – and allows for parking on the side of the road. So it's a significant suburban street." Transcript 1-16 lines 38-41.

[52] Ultimately this ground falls to be resolved by reference to comparable cases, on the basis that they will reveal whether the sentence was manifestly excessive. However, it must be noted that whether a sentence is manifestly excessive is not established merely by the fact that the sentence is different, even markedly different, from sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle, or that the sentence is "unreasonable or plainly unjust".[33]

[53] In *Nikora* a young man (19 at the offence and 20 at sentence) was sentenced on a plea of guilty to seven year's imprisonment for dangerous operation of a vehicle causing two deaths, and while his blood alcohol level was more than 0.171. He drove after admitting he was drunk, and after his friends considered taking the keys away. He caused two deaths after a period of prolonged reckless driving, at speeds well over 100 kph in suburban streets. He sped through intersections, through a red light and over a roundabout. At a speed of about 130 kph the car braked heavily, crossed onto the wrong side of the road, crossed the footpath, and then rolled, hitting a fence and a house.

[54] The offender in *Nikora* had an inconsequential driving and criminal history, and did not leave the scene. He displayed significant remorse as the two deceased were cousins.

[55] The submission for Mr Etheridge was that this was a more serious case than his. I accept that submission, but the sentence was also higher than here.

[56] One of the decisions referred to in *Nikora* was that of *R v Gray*.[34] It was decided when the maximum was 10 years. It involved an 18 year old man driving a utility with three passengers in the tray. As he drove he started to swerve, "fishtailing" on the road. The passengers tried to make him adjust his driving. He lost control and the vehicle slid sideways, hitting some trees, and rolled. One girl in the back was killed, and another suffered serious injuries. An hour after the accident the offender's blood alcohol level was 0.125.

[57] He was sentenced to four years, suspended after 18 months. He had profound remorse, good character and no relevant criminal and traffic history. The Court took the view that it was a case of "deliberate bad driving", and that the sentence was not manifestly excessive.

[58] In *Nikora* the court referred with approval to passages from the judgment of Keane JA in *Blanch*:[35]

> "Keane JA said:
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> > "The applicant's Counsel was not able to point to any case where it has been said that the sentencing discretion for this serious offence does not extend to six years, even in the case of a youthful offender with a good record. The simple but tragic fact is that the applicant's offence has caused the loss of a human life by deliberate acts of wanton recklessness.
> >
> > In my respectful opinion, his Honour was right to refuse to regard the death of Mr Tierney as merely a tragic accident. To accept such a description as appropriate is to go a long way

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33 *Hili v The Queen* (2010) 242 CLR 520, [2010] HCA 45, at [58]-[59].

34 [2005] QCA 280.

35 *Nikora* at [58], citing *Blanch* at [20]-[21]. Internal footnotes omitted.

> towards accepting that the community cannot do anything about the carnage on our roads which is the consequence of deliberately dangerous behaviour by young men."

[59] The Court in *Nikora* also cited, with approval, the following passage from *Gray*:[36]

> "[12] The Court is dealing with a young man with no previous convictions, and they are important considerations when it comes to determining the appropriateness of the sentence imposed on him. But equally it cannot be overlooked that causing the death of a fellow citizen is one of the most, if not the most, serious offence known in our society. Killing by grossly negligent conduct is, of course, significantly less serious than intentional killing, but the criminal law for centuries has recognised that the consequences of criminal conduct play a critical role in determining the appropriate sentence. For example, dangerous driving causing death must attract a more severe penalty than similar driving which fortunately does not have such a consequence. ...
>
> [13] This was not simply a case of negligent driving. From the outset it is clear that the applicant knew that there were people in the tray of the utility who were in a very vulnerable position; knowing that, he was under a duty to drive even more carefully. Notwithstanding that, he deliberately drove in a dangerous manner by causing the vehicle to fishtail. He was then berated not only by the person beside him in the front of the vehicle, but he was reminded of the perilous situation in which the girls were placed by their banging on the cabin and calling out for him to drive safely. Notwithstanding all of that he continued to drive in a deliberately reckless manner which ultimately resulted in the death and serious injury."

[60] Each of the passages referred to above are apposite to consideration of this case and the manner of driving.

[61] In *Grabovica* a 17 year old man was sentenced on a guilty plea to five years imprisonment. He drove a turbo charged manual car (neither of which was permitted on his provisional licence), in close vicinity to a school where people were collecting their children. He was seen by police who pursued him. He accelerated from about 80 kph to between 130 and 141 kph, before braking heavily because a car was turning in front of him. He left skid marks 33 metres long to the point of impact. The other car became airborne and rolled for 50 metres. The occupants of the other car suffered serious harm, as did the two passengers in his vehicle.

[62] The driving there was described as being "of the most serious kind", and "deliberate and contemptuous of other road users".[37] The maximum penalty was, as here, 14 years. However that was not a case involving a death caused by the driving, albeit that there were serious injuries to two victims. The Court said that the sentence was "although perhaps at the upper limit of the sentencing discretion … not so severe as to evidence an error which justifies this Court's interference".[38]

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36 *Nikora* at [64], citing *Gray* at [12]-[13].
37 *Grabovica* at [12].
38 *Grabovica* at [30].

[63] The refusal of leave to appeal in *Grabovica* was because it had not been demonstrated that the sentence was manifestly excessive. Acknowledging that, and the limitations referred to above, *Grabovica* nonetheless provides only limited guidance in a case where the driving is deliberate, but short in duration.

[64] In *Wilde* the Attorney-General appealed against a sentence imposed, on a plea of guilty, of three years. The maximum at the time was seven years. The offender was a mature (41 year old) woman with a long criminal history. The driving was considerably worse than here, being described in this way:

> "The case approaches the category of the worst examples of the offence, when one fully acknowledges the aggregation of the respondent's reckless inattention over a substantial distance, her reduced alertness through fatigue, her callous flight from the scene, her lengthy criminal and traffic history, her being unlicensed at the time, her then being on bail for other charges … and her driving a stolen vehicle".[39]

[65] The sentence was increased to five years. However, the fact that it was an Attorney's appeal, the then maximum penalty, and the substantially different circumstances, render it of no assistance here.

[66] Senior counsel for the Crown referred the Court to the recent decision in *R v Schoner*.[40] That was a plea of guilty, entered on the fourth day of a trial, to dangerous operation of a vehicle causing death and grievous bodily harm. The offender was 37 years old at the offence, and 38 at sentence. She was sentenced to five years imprisonment, suspended after two years.

[67] Her criminal history included armed robbery and theft when she was 24. Her traffic history was not good, and included offences for using her phone while driving (twice), speeding, and having a blood alcohol level between the base level and mid-range. She was disqualified at the time of the offence in question.

[68] She had driven over 1,600 kilometres from Melbourne, when she was given a speeding ticket at Tenterfield. The police officer noticed she looked tired. At about Stanthorpe she overtook another car using an overtaking lane. Shortly afterwards she crossed double unbroken lines as she approached a sweeping left-hand bend. She travelled round the bend on the wrong side of the road, and collided with another car. A person in that car died and two others suffered injuries, one seriously. She then immediately collided with another car but the occupants were not injured.

[69] The offender had drugs in her blood but at a low level, and she was not sentenced on the basis that she was adversely affected. She did not leave the scene. It was urged that it was a "prolonged case of reckless driving". She showed no remorse, the plea being a reflection of a strong case against her.

[70] The Court referred to the driving as having become dangerous (because of tiredness) some 300 metres before the collision, and that, over that distance she drove within the speed limit, but on the wrong side of the road, for a number of seconds. She had reached the point where her tiredness started to materially affect her driving. Her fault lay in her failure to appreciate the risk that she had taken, and her failure to ensure that she had sufficient rest to enable her to continue safely.[41]

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39 *Wilde* at [27].
40 [2015] QCA 190.
41 *Schoner* at [76].

[71] Quite a number of authorities were reviewed in *Schoner*, in an exercise which evidently sought to find cases where fatigue played a part in the events. Those from the period before the maximum penalty was increased from seven to 10 years included *Wilde*, *R v Gallagher*,[42] *R v Hoad*,[43] *R v Evans*,[44] *R v Sheedy*,[45] *R v Vance, ex parte Attorney-General (Qld)*,[46] and *R v Murphy*.[47]

[72] Cases after the increase in penalty were reviewed, including *R v Ruka*,[48] *R v Hopper*,[49] *R v Maher*,[50] *Nikora*, *R v Huxtable*[51] and *R v Osborn*.[52]

[73] *Ruka* was a case where a mature aged driver fell asleep and drifted into the path of an oncoming vehicle, colliding with it and killing the other driver. No speed or alcohol was involved, but he conceded that he should have appreciated he was fatigued and pulled over. He was deeply remorseful, had a good character and work history, and had only speeding offences in his history. He was sentenced to two years. That was held not to be manifestly excessive.

[74] *Maher* involved a driver who turned right at an intersection, and failed to see an oncoming motorcyclist, riding with his lights on along a straight road. The driver had finished his 10th consecutive 16 hour shift, and the sentencing judge found that there was a prolonged failure to keep a proper lookout, saying that the driver must have been so tired he should not have been driving. The offender had a poor criminal history which included old convictions for dangerous driving, and a traffic history that included old offences of drink driving and speeding.

[75] The offender was sentenced to three years, and that was found to be within "the range of a sound sentencing discretion".[53]

[76] The Court considered that none of the cases supported a sentence of five years imprisonment. P Lyons J[54] said:[55]

> "In my view, none of the cases to which reference has been made would support a head sentence of five years in the present case. While some of the aggravating features in the present case are of greater significance than in *Huxtable* and *Osborne*, those cases each involved a professional driver with a higher duty of care. The driving in the present case bears some similarity to that in *Maher*, at least because both involve fatigue, operative for an appreciable, though relatively short, period of time before a tragic accident occurred. The driving of the defendant in *Ruka* might be regarded as somewhat similar, though, if anything, more culpable, as he acknowledged that he ought to have

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42 [2004] QCA 240.
43 [2005] QCA 92.
44 [2005] QCA 455.
45 [2007] QCA 183.
46 [2007] QCA 269.
47 [2009] QCA 93.
48 [2009] QCA 113.
49 [2011] QCA 296.
50 [2012] QCA 7.
51 [2014] QCA 249.
52 [2014] QCA 291.
53 *Maher* at [43]-[44].
54 With whom Gotterson JA and P McMurdo J concurred.
55 *Schoner* at [79].

> appreciated that he was fatigued, and ought to have pulled over before he fell asleep. The difference in the sentences cannot be explained by the fact that there was not an additional victim in *Maher*; nor in the different circumstances of these defendants and the applicant."

[77] Acknowledging that *Schoner* was focussed on cases involving fatigue as the cause of the culpable driving, nonetheless there is useful guidance in that decision. Cases such as *Ruka* and *Maher*, and *Schoner* itself, involved scenarios where the culpable driving occurred over a relatively short period, and did not involve the more severe forms of driving such as where extreme speed is involved, prolonged recklessness, or deliberate or defiant behaviour such as tailgating or racing. These are mentioned as mere examples, lest it be taken to establish some sort of new category of driving to be considered, rather than making an objective assessment of the nature of the conduct. As *R v MacDonald*[56] reiterated, categorisation such as the conduct being a matter of momentary inattention is not appropriate.

[78] Serious as the driving of Mr Etheridge was, and aggravated as it was by the fact that he knew he should not drive and he was affected by alcohol and drugs, the driving was not, in my view, at the most serious end of the spectrum. Speed was involved, well above the speed limit and such as to make it unlikely that Mr Etheridge could react meaningfully to any obstacle in the road, but it was not extreme or prolonged. The time of day would lead to the reasonable expectation that it was unlikely that persons would be on the road. True it is that the roads were selected in order to avoid detection by the police but that says nothing about the manner of driving as opposed to the belief of Mr Etheridge as to whether he should be driving or not.

[79] It is the fact that Mr Etheridge's consumption of alcohol and cannabis could not be linked to the manner of his driving, and there is no doubt that was the result of his fleeing the scene and not revealing his involvement for some days. It may be said that is an unpalatable circumstance to the overall justice of the case, especially as Mr Etheridge was "selected" to drive on the night, not because he was unaffected by the alcohol and cannabis he had consumed, but because he was the **least affected** of his group. It is nonetheless the fact that the consumption was not linked to the manner of driving.

[80] Therefore an objective analysis of the offending conduct reveals that, knowing that he was disqualified and possibly affected by alcohol and cannabis, Mr Etheridge drove at a speed well above the speed limit, such that when a person on the road was encountered, he could not avoid hitting. However, that is not at the highest level of offending driving for this offence.

[81] On the other hand, this is a case of deliberate bad driving. It is unlike the fatigue cases reviewed in *Schoner*, where the driving is not otherwise objectionable, but rather, the driver simply failed to recognise that the tiredness had become a factor. Mr Etheridge deliberately got in the car to drive, knowing he was disqualified and knowing he was, at least to some extent, affected by alcohol and drugs; he was the "least affected" of the group. When he drove at speeds well above the speed limit, that was not, in my view, mere negligent driving. The agreed facts stated he was driving so that there were periods of rapid deceleration and turning corners at significant speed. The reckless nature is attested by the account that he was putting his head out of the window, and yelling as he drove.

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56 [2014] QCA 9 at [17].

[82] One must take into account the circumstance of aggravation, callously leaving the scene of the impact and leaving a man for dead. And that was accompanied by the determined efforts to avoid detection, such as hiding the car and the numberplates. Yet that still does not, in my view, put this particular offence at the highest end of offences for dangerous operation of a vehicle causing death.

[83] In my view, based on the cases reviewed, the sentence of six years is manifestly excessive for this particular conduct. Taking into account the cases reviewed in *Schoner*, the appropriate sentence is five years imprisonment, after taking the circumstance of aggravation into account. That result is supported in particular by *Gray*, acknowledging that it was decided before the maximum penalty was increased, and allowing for the fact that the court did not re-sentence but merely found that it was not manifestly excessive: see paragraphs [56]-[57] above. It is also supported to some extent by *Grabovica*, acknowledging that *Grabovica* did not involve a death, nor fleeing the scene, although it did involve a circumstance of aggravation, namely excessively speeding. In *Grabovica* the offender was fleeing from police and engaged in driving that was described as deliberate and contemptuous of other road users. Mr Etheridge can be said to have engaged in something similar, driving to escape police attention, which resulted in his driving on a suburban road, albeit in the early hours, in a manner that could be described as deliberate and contemptuous of other road users.

[84] Mr Etheridge's criminal and traffic history compel the conclusion that supervision would be more appropriate than mere suspension. Therefore release on parole is appropriate, at the one-third mark, namely 20 months. That would mean release on parole on 15 June 2017.

[85] No other aspect of the sentencing orders were challenged.

Conclusion

[86] For the reasons expressed above, I would grant leave to appeal and vary the sentence imposed.

[87] I propose the following orders:

1. The application for leave to appeal is granted.
2. The appeal is allowed.
3. Set aside the orders made on 15 October 2015 in so far as it was ordered that the offender be imprisoned for a period of six years, and that the date the offender is eligible for parole be fixed at 14 October 2017.
4. Order in lieu thereof, the offender be imprisoned for a period of five years, and that the offender be released on parole on 15 June 2017.
5. Otherwise confirm the orders made on 15 October 2015.

[88] **NORTH J**: I have read the reasons of Morrison JA. I agree with those reasons and the orders proposed.

[89] **HENRY J:** I have read the reasons of Morrison JA. I agree with those reasons and the orders proposed.