# DISTRICT COURT OF QUEENSLAND

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| CITATION: | *Goulding v Commissioner of Police* [2021] QDC 52 |
| PARTIES: | **JESSICA MAY GOULDING**<br>(appellant)<br>**v**<br>**COMMISSIONER OF POLICE**<br>(respondent) |
| FILE NO: | D59/2020 |
| DIVISION: | Appellate |
| PROCEEDING: | Appeal pursuant to s 222 of the *Justices Act* 1886 (Qld) |
| ORIGINATING COURT: | Magistrates Court at Mackay |
| DELIVERED ON: | 31 March 2021 |
| DELIVERED AT: | Southport |
| HEARING DATE: | 11 March 2021 |
| JUDGE: | Smith DCJA |

ORDER:

1. **The appeal is allowed to the extent that I set aside the term of 12 months' imprisonment imposed on charge 24 and in lieu thereof I impose four months' imprisonment.**
2. **I order the date the appellant be released on parole be fixed as at 25 May 2021.**
3. **The appeal is otherwise dismissed.**
4. **I find the breach of probation proved.**
5. **I set aside the probation orders imposed on 12 November 2019.**
6. **I resentence the appellant.**
7. **On each count a conviction is recorded.**
8. **On the count of supplying a dangerous drug I sentence her to six months imprisonment and on the count of possessing a dangerous drug I sentence her to three months imprisonment. Those terms of imprisonment are to be served concurrently with each other and concurrently with the other terms of imprisonment.**
9. **I order the date the appellant be released on**

**parole be fixed as at 25 May 2021.**

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| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – WHETHER ERRORS ESTABLISHED – appellant pleaded guilty to failing to remain at the scene of an accident – whether sentence was manifestly excessive – whether cumulative sentence for drug offence excessive<br><br>CRIMINAL LAW- Breach of probation order- whether should be resentenced |
| LEGISLATION: | *Justices Act 1886 (Qld)* ss 222, 223, 225<br><br>*Penalties and Sentences Act 1992 (Qld)* ss 9, 126<br><br>*Transport Operations (Road Use Management) Act 1995 (Qld)* s 92 |
| CASES: | *Crack v Post; ex parte Crack* [1984] 2 Qd R 311, cited<br>*Forrest v Commissioner of Police* [2017] QCA 132, applied<br>*Hili v R* [2010] HCA 45; (2010) 242 CLR 520, cited<br>*Markarian v R* [2005] HCA 25; (2005) 228 CLR 352, cited<br>*Mill v R* [1988] HCA 70; (1988) 166 CLR 59, cited<br>*Parsons v Raby* [2007] QCA 98, cited<br>*R v Hardes* [2003] QCA 47, discussed<br>*R v Jackson* [2011] QCA 103, applied<br>*R v McCoy* [2015] QCA 48, discussed<br>*R v Nagy* [2003] QCA 175; [2004] 1 Qd R 63, cited<br>*R v Vance; Ex Parte Attorney-General* [2007] QCA 269; 48 MVR 375, discussed<br>*Teelow v Commissioner of Police* [2009] QCA 84; 2 Qd R 489, applied<br>*Wong v R* [2001] HCA 64; (2001) 207 CLR 584, cited |
| COUNSEL: | Mr S Byrne for the appellant<br>Mr Godfrey for the respondent |
| SOLICITORS: | Strutynski Law for the appellant<br>Office of the Director of Public Prosecutions for the respondent |

**Introduction**

[1] On 2 October 2020, the appellant received a head sentence of three years imprisonment with a parole release date after serving 12 months in custody for a number of offences. The parole release date was set as at 13 August 2021 taking into account the pre-sentence custody.

[2] This is an appeal pursuant to s 222 of the *Justices Act 1866* (Qld) alleging this sentence was manifestly excessive.

**Nature of appeal**

[3] Where a person pleads guilty, the sole ground of appeal is that the penalty is excessive.[1]

[4] Section 223(1) of the *Justices Act* provides that the appeal is to be way of rehearing on the evidence given in the proceeding before the Justices.

[5] In *Forrest v Commissioner of Police*[2] it was said that an appeal by way of rehearing requires the Appellate Court to decide the case for itself. It must conduct a real review of the evidence and make up its own mind about the case giving due weight to the Magistrate's view.[3]

[6] Section 225(1) of the *Justices Act* provides that:

> "On the hearing of an appeal, the judge may confirm, set aside or vary the appealed order or make any other order in the matter the judge considers just."

[7] Finally, in *Teelow v Commissioner of Police*[4] Muir JA noted that usually the powers of an Appellate Court are exercisable only where the appellant can demonstrate that, having regard to all the evidence before the Appellate Court, the decision the subject of the appeal is the result of some legal, fact or discretionary error.

**Charges**

[8] The appellant pleaded guilty to the following charges and the following penalties were imposed:

| Charge Number | Charge | Date | Penalty |
|---|---|---|---|
| (1) | Unlawful use of motor vehicles aircraft or vessels | 15.01.2020 and 21.01.2020 | One month imprisonment |
| (2) | Possess utensils or pipes etc. for use | 20.01.2020 | Seven days imprisonment |
| (3) | Failure to appear in accordance with undertaking | 17.02.2020 | Convicted and no further penalty was imposed |
| (4) | Driver fail to remain at incident and render assistance | 01.03.2020 | Two years imprisonment |

1 Section 222(2) (c) of the *Justices Act 1886* (Qld).
2 [2017] QCA 132.
3 *Parsons v Raby* [2007] QCA 98 at [23].
4 [2009] QCA 84; 2 Qd R 489 at [4].

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| | | | and disqualified from holding or obtaining a driver licence for a period of three years |
| (5) | Possessing dangerous drugs | 13.05.2020 | One month imprisonment |
| (6) | Possess property suspected of having been used in connection with the commission of a drug offence | 13.05.2020 | Seven days imprisonment |
| (7) | Possess utensils or pipes etc. for use | 13.05.2020 | Seven days imprisonment |
| (8) | Offences involving registration certificates – used/permitted use of vehicle with registration label/plate/permit belonging to another vehicle | 13.05.2020 | Convicted and no further penalty was imposed |
| (9) | Offences involving registration certificates – used/permitted use of vehicle with registration label/plate/permit belonging to another vehicle | 13.05.2020 | Convicted and no further penalty was imposed |
| (10) | Possess tainted property | 13.05.2020 | Convicted and no further penalty was imposed |
| (11) | Possession of a knife in a public place | 13.05.2020 | Convicted and no further penalty was imposed |
| (12) | Receiving tainted property | 31.05.2020-6.07.2020 | Convicted and not further punished |
| (13) | Stealing | 1.06.2020 | No evidence offered |
| (14) | Unlawful use of a motor vehicle | 13.06.2020 | Two months imprisonment |
| (15) | Possessing dangerous drugs | 14.06.2020 | Six months imprisonment |

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| (16) | Possess property suspected of having been used in connection with the commission of a drug offence | 14.06.2020 | Seven days imprisonment |
| (17) | Offences involving registration certificates – used/permitted use of vehicle with label/plate recorded cancelled/lost/stolen/destroyed | 05.07.2020 | Convicted and no further penalty was imposed |
| (18) | Possess utensils or pipes etc for use | 05.07.2020 | Seven days imprisonment |
| (19) | Possessing dangerous drugs | 06.07.2020 | Seven days imprisonment |
| (20) | Possessing dangerous drugs | 06.07.2020 | Six months imprisonment |
| (21) | Possess property suspected of having been acquired for the purpose of committing a drug offence | 06.07.2020 | Seven days imprisonment |
| (22) | Possess utensils or pipes etc for use | 06.07.2020 | Seven days imprisonment |
| (23) | Safe but otherwise defective vehicle | 06.07.2020 | Convicted and no further penalty was imposed |
| (24) | Possessing dangerous drugs | 05.08.2020 | 12 months imprisonment |
| (25) | Possess utensils or pipes etc that had been used | 05.08.2020 | Seven days imprisonment |
| (26) | Possess property suspected of having been used in commission of a drug offence | 05.08.2020 | Seven days imprisonment |
| (27) | Receiving tainted property | 05.08.2020 | Seven days imprisonment |
| (28) | Possessing dangerous drugs | 09.08.2020 | Seven days imprisonment |
| (29) | Possess property suspected of having been used in connection with the commission of a drug offence | 09.08.2020 | Seven days imprisonment |
| (30) | Possess tainted property | 09.08.2020 | Seven days imprisonment |

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| (31) | Stealing | 13.08.2020 | Seven days imprisonment |
| (32) | Stealing | 13.08.2020 | Seven days imprisonment |
| (33) | Stealing | 13.08.2020 | Seven days imprisonment |
| (34) | Stealing | 13.08.2020 | Seven days imprisonment |
| (35) | Possess utensils or pipes etc that had been used | 13.08.2020 | Seven days imprisonment |
| (36) | Possession of a knife in a public place | 12.08.2020 | Convicted and no further penalty was imposed |
| (37) | Not being endorsed to possess restriced drug | 13.08.2020 | Seven days imprisonment |
| (38) | Not being endorsed to possess restriced drug | 13.08.2020 | Seven days imprisonment |
| (39) | Not being endorsed to possess restricted drug | 13.08.2020 | Seven days imprisonment |
| (40) | Not being endorsed to possess restricted drug | 13.08.2020 | Seven days imprisonment |
| (41) | Not being endorsed to possess restricted drug | 13.08.2020 | Seven days imprisonment |
| (42) | Receiving tainted property | 13.08.2020 | Seven days imprisonment |
| (43) | Offence of driving etc while relevant drug is present in blood or saliva, holder of learner, probationary or provisional licence | 09.08.2020 | Fined $750 and disqualified from holding or obtaining a driver licence for five months |

[9] The sentences on charges 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 and 42 were ordered to be served concurrently. However the sentence on charge 24 was ordered to be served cumulatively.

**Proceedings in the Magistrates Court**

[10] The appellant pleaded guilty to all of the charges (aside from Charge 13) in the Magistrates Court. The defendant's criminal history was tendered as Exhibit 2. This disclosed she was born on 26 September 1990 and thus was 29 years old at the time of offending and 30 at the time of sentence. She had previously been convicted of drug offences and indeed had received 18 months' probation in the Mackay District Court on 12 November 2019 for supplying a dangerous drug and six months' probation for possessing a dangerous drug. Accordingly the matters before the Magistrates Court breached this probation order.

[11] The appellant's traffic history was tendered as Exhibit 2. This disclosed she had previous unlicensed driving convictions, numerous speeding convictions, had previously been fined and disqualified. In 2008, she had been convicted of careless driving.

[12] The pre-sentence custody certificate disclosed the appellant had been remanded since 13 August 2020 until 1 October 2020, a total of 50 days which was declarable.

[13] The schedule of the facts of the charges was tendered as Exhibit 1.

[14] Charge 1 – unlawful use of a motor vehicle, related to the appellant failing to return a hire car vehicle to Red Spot Car Rentals in Mackay on 13 January 2020. The appellant was apprehended in the vehicle by police on 20 January 2020.

[15] Charge 2 occurred when the vehicle was searched and a glass pipe and digital scales were located. She admitted the scales were used to weigh methamphetamine prior to consumption.

[16] Charge 3 related to the appellant failing to appear in the Mackay Magistrates Court on 17 February 2020. When questioned about this, she told police that she had been taken into custody but she had time to appear that day.

[17] Charge 4 related to events on 1 March 2020. At about 3.15am on 1 March 2020, police were called to a traffic crash at Beaconsfield. Nilly Mooney (born 2004) had been at a party and had returned home at around 3.00am. She left again as she had lost her mobile phone and went to look for it. Whilst looking for her phone, she was in the middle of Nicklin Drive and the black Holden Commodore being driven by the defendant struck her.

[18] After striking Ms Mooney, the appellant pulled the vehicle over to the side of the road but left the scene a short time later and didn't render any assistance to Ms Mooney. Ms Mooney died of her injuries in the crash. An inspection of the scene revealed there were no tyre marks to indicate braking prior to impact and no vehicle debris indicating the pedestrian was standing at the time of impact.

[19] When police arrived the appellant and her vehicle were not able to be located. Police spoke to Aaron Regling who had been in the front seat of the vehicle at the time of the crash. He said the appellant and he had picked up a mate at the Austral Hotel just prior to the incident. He claimed they were driving along Nicklin Drive

when a white dog ran out and the appellant swerved slightly to miss the dog and he saw something on the road (Ms Mooney). The appellant then clipped Ms Mooney, pulled to the side of the road and became hysterical and was told to leave which she did. Another witness called Love who was travelling in his vehicle behind the appellant's vehicle said that when they were driving down Nicklin Drive he was travelling about 30 to 40 metres behind the appellant and he saw an object come out from under her car. They pulled over to the side of the road and realised it was a body and 000 was called. The appellant though left the scene and he did not know where she went.

[20] Police continued trying to locate the appellant. At about 3.30pm on Sunday 1 March 2020 she attended the Northern Beaches Police Station with the vehicle and the vehicle was seized. She underwent a record of interview. She said she had been at the Austral Hotel but claimed she had not been drinking. She claimed that when she was driving down Nicklin Drive she saw a white dog and swerved to the right to avoid hitting the dog and when she did this she said someone was lying in the middle road. She said by the time she saw this person she had already hit them and didn't have time to react. She said she believed she was doing about 40 to 50 kilometres per hour at the time. She pulled over, got out of the car and there was blood everywhere. She immediately started screaming and panicking. She said that Regling told her it would be okay and she should get in the vehicle and leave and he would stay. She was panicked and scared, did not know what to do and drove around the Mt Pleasant area before heading out to Mt Ossa. She stayed there before going back to another address and then handed herself to the police. She said the vehicle had no issues with brakes and she had her headlights on but they were not bright. She said she didn't apply the brakes because she didn't have any time. She said she knew she should have stayed at the scene but panicked and didn't know what to do.

[21] As to Charge 5 – possession of dangerous drugs on 13 May 2020, despite being involved in the above incident at 11.30am the appellant was intercepted in a blue Volkswagen Golf and was located with .108gms of crystal substance which she said was methamphetamine. There were also clip seal bags (Charge 6), a glass pipe and scales (Charge 7) and false registration plates attached to the vehicle (Charges 8 and 9). Charge 10 related to possession of the number plates and Charge 11 was possession of a hunting knife in the vehicle.

[22] Again, despite being on bail, on 1 June 2020, the appellant was driving a VW Golf with a false registration plate. Additionally, a glass pipe with white residue was located in the vehicle (Charges 12, 17 and 18).

[23] On 13 June 2020, an associate of the appellant hired a rental vehicle from Mackay Airport. On 13 June 2020, the vehicle was seen in the appellant's driveway and she gave to the police the keys for the stolen car. She admitted in an interview knowing it had to be returned (Charge 14.)

[24] On 14 June 2020 at about 4.50pm, police were conducting mobile patrols in Mackay and came upon the appellant in a red coloured Mazda 3 sedan. A search of her belongings located three clip seal bags of crystal and digital scales. There was .58 grams of crystal which she admitted was methylamphetamine and the total

weight in other bags was 2.03gms. She admitted she used the scales to weigh drugs (Charges 15 and 16).

[25] On 6 July 2020 at about 6.45pm, police were conducting patrols in Mackay and intercepted a Volkswagen being driven by the appellant. After the vehicle was searched, .935 grams of cannabis was located together with some Diazepam tablets (she didn't have a prescription for these), some digital scales and a glass pipe. She admitted the vehicle had been stolen and this was why there were no registration plates and the windows were smashed (Charges 19, 20, 21, 22 and 23).

[26] On 5 August 2020 at about 12pm, police were conducting patrols in East Mackay and observed the appellant at a carpark. Her vehicle was searched and 1.491 grams of white crystal substance were located with a glass pipe. A set of scales was also located together with a stolen dress (Charges 24, 25, 26 and 27). The defendant said after using the substance she realised it was not "meth".

[27] On 9 August 2020 at 3.35pm, police intercepted a vehicle being driven by the appellant. She made admissions to using methylamphetamine. The vehicle was searched. A clip seal bag with white crystal substance weighing .75 grams (the substance was .3 grams) was located. There were also four empty clip seal bags with crystal residue located together with a mobile phone. The appellant made admissions. A message on the phone showed the appellant offered to swap a "HB" for a stolen motorised scooter. "HB" is a common street term for "half ball" (Charges 28 and 29).

[28] On 9 August 2020 at about 4.30pm, the appellant was being processed through the watch house and a Medicare card in the name of Rebecca Kelly was located and this was listed as being stolen from a burglary on 1 August 2020. When questioned she claimed she located it on the floor of a friend's car (Charge 30).

[29] On 12 August 2020 at about 12.20am, police intercepted a vehicle in which the appellant was travelling. The appellant declared a small flick knife in her backpack (Charge 31).

[30] On 13 August 2020, police received a stealing complaint from Canelands Shopping Centre in Mackay. The complaint was that two females had stolen numerous items of clothing. Police reviewed CCTV footage and identified as the appellant as being one of the offenders. At 3.30pm on 13 August 2020, the appellant and her co-offender were apprehended leaving Coles at Canelands with a trolley of items. They were detained for a search. Also their trolley was searched and both of them maintained they had paid for the items but did not have a receipt. Enquiries with Coles showed that only three items were paid for and $156.90 worth of groceries were stolen. Further, a backpack with two items of stationery was stolen from Target, and two gold sleeper earrings and a sealed bag of small clip seal bags were stolen from Good Price Pharmacy. Finally, a glass pipe was located with brown residue in the appellant's handbag which she admitted using to smoke meth (Charges 32, 33, 34, 35 and 36).

[31] On 13 August 2020, police executed a search warrant at a room in West Mackay, the residence of the appellant and her co-offender. Prescription medication in the name of Baynton and another was located (Charges 37, 38, 39, 40 and 41).

[32] As to Charge 42, a perfume bottle clearly labelled tester was located. These bottles are not for sale at any chemist.

[33] The prosecutor read the facts of the incident on 1 March 2020 into the record. It was pointed out that the appellant did not render any form of assistance to Ms Mooney who later passed away from her injuries.[5]

[34] Victim impact statements were tendered as Exhibit 4. Ms Rudall, the mother of Ms Mooney, gave a reference pointing out that the Ms Mooney was very optimistic about her future and had just been selected in the representative football team and 2020 she said was going to be her year. The statement clearly shows the death had a significant effect upon the family. Ms Mooney's sister Ziggy also provided a letter showing there was an effect on her, as did Mr Simmonds Ms Mooney's cousin. Mr Lauga was Ms Mooney's coach said as a result of the incident was unable to keep the team together to compete in the 2020 season. Ms Joanne Rudall who was Ms Mooney's aunty also talked about Ms Mooney and how it affected the family. Rebecca Malayta provided a similar letter as did Irene Brown, Tamika Skinner, Nate, and Gwen Rudall.

[35] The prosecutor pointed out that there were numerous offences before the court from January 2020 until August 2020 when the appellant was finally remanded in custody. Many of them occurred whilst she was subject to bail conditions and all of them occurred in breach of the probation order mentioned previously. All of the offences after charge 4 occurred while she was at large wanted on a warrant for failing to appear. It was pointed that the maximum penalty for Charge 4 was three years imprisonment with a mandatory minimum disqualification of six months.

[36] It was submitted that this was the most serious kind offending as she failed to remain at the scene to provide any assistance and it resulted in the death of a young woman. It was submitted the penalty could go as high as two years imprisonment and deterrence and denunciation were relevant.[6] It was pointed out there were 16 further offences against the *Drugs Misuse Act* together with dishonesty and traffic offences. It was submitted that a parole release date should be set at one third.

[37] The defence lawyer accepted the prosecution facts and pointed out that with respect to the fail to remain charge she wasn't as criminally culpable as she would be for dangerous operation. It was submitted that the offending was sporadic. As a result of the incident she received treatment from a psychologist and had some symptoms of post-traumatic stress disorder.

[38] The defence submitted that the head sentence would be around 18 months' imprisonment with release after six months. It was conceded that imprisonment was appropriate for the fail to remain charge.[7] It was submitted that the penalties for the drug charges should be made concurrent with the fail to remain penalty so the sentence would not be "crushing".[8] The Magistrate also noted, that prior to the sentence being passed the appellant also pleaded guilty to driving whilst relevant

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5 Transcript day 1 page 12.35.
6 Transcript day 1 page 14.30.
7 Transcript day 1 page 18.20.
8 Transcript day 1 page 19.10.

drug was present in her salvia on 9 August 2020. This showed that she had methylamphetamine in her system (Charge 43).

**Sentencing remarks**

[39] The Magistrate in his remarks pointed out that the appellant had been placed on probation in the District Court at Mackay on 12 November 2019 for supplying dangerous drugs. He pointed out this had been breached. He referred briefly to the facts of the case. He pointed out that the most serious charge was the fail to remain charge.[9] He found the appellant had a serious issue with drugs. He took into account the pleas of guilty and reduced the penalty as a result. He also took into account the appellant's cooperation with police with respect to the drug offences.

[40] He also had regard to s 9 of the *Penalties and Sentences Act*. He found that the only appropriate penalty was one of imprisonment as the offences were serious and ongoing until she was finally remanded. He referred to the facts of the other matters at page 4 of the reasons. As to the failing to remain at the scene, he noted the accident occurred at 3.15am and she didn't go to the police station until 12 hours later at 3.30pm. He said "you left the scene because you panicked. Now there may be other reasons why you failed to remain at the scene I don't know. I am not allowed to speculate or guess as to what those reasons might have been… I am bound to have regard to that and act on the basis that you consumed no alcohol."

[41] Whilst he found the offence was not the most serious, it was going towards the upper level and determined upon a penalty of two years' imprisonment, with disqualification for three years.[10] As regards whether the remainder of the sentences should be served concurrently or compulsively, he took into account there was a series of drug offences. Taking into account the behaviour occurred over a fairly short space of time whilst she was on probation. He determined that the two prison terms should be served cumulatively.[11] In the end he ordered a parole release date after one third.

**Appellant's submissions**

[42] It is submitted by the appellant that a sentence of two years' imprisonment for failing to remain was beyond the permissible range of sentence which could have been imposed. It is further submitted that a cumulative outcome of three years is manifestly excessive. It is submitted that the appellant should be sentenced to 18 months to two years' imprisonment. It is submitted that the court should have regard to the fact that the reason for the offending was that the appellant panicked in this case.

[43] In oral submissions the appellant submitted that the court should find that the appellant was aware that Mr Love had called 000 which she submitted was a mitigating factor. It was also submitted that it was relevant two people were left at

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9 Reasons page 3.17.
10 Reasons page 5.30.
11 Reasons page 6.5.

the scene. It was stressed that this was not charged as callous disregard. It was submitted her co-operation should be taken into account and it was relevant that the reason she left the scene was she panicked.

**Respondent's submissions**

[44] The respondent submits that the Magistrate erred by failing to refer to the totality principle and this infected the sentencing discretion and the appellant should be resentenced to 18 months imprisonment on the failing to remain charge, but the other sentence should not be disturbed.

[45] It is submitted the appellant pleaded guilty on the basis Ms Mooney was injured by the appellant and later died. It is also submitted there was no evidence the appellant was aware that Mr Love called 000.

[46] In oral submissions the crown stressed that the fact two people were left behind did not absolve the appellant. She never told the police she was aware that love had called 000. There evidence was clear she had struck the child who was alive and the child died after this.

[47] The crown submitted that there were significant aggravating features in this case.

**Discussion**

[48] I firstly turn to the penalty imposed for the failing to remain charge.

[49] Section 92 of the *Transport Operations (Road Use Management) Act* 1995 (Queensland) provides:

> "**92 Duties and liabilities of drivers involved in road incidents**
>
> (1) The driver of any vehicle, tram or animal involved on any road, or of any motor vehicle involved elsewhere than on a road, in an incident resulting in injury to or death of any person shall—
>
> (a) immediately stop the vehicle, tram or animal; and
>
> (b) if any person is injured—
>
> (i) remain at or near the scene of the incident and immediately render such assistance as the driver can to the injured person; and
>
> (ii) make reasonable endeavours to obtain such medical and other aid as may reasonably be required for the injured person; and
>
> (c) if any person is dead or apparently dead—

(i) remain at or near the scene of the incident; and

(ii) exhibit proper respect for the person's body and take whatever steps are reasonably practicable to have the body removed to an appropriate place.

Maximum penalty—

(a) if the incident results in the death of or grievous bodily harm to a person—120 penalty units or 3 years imprisonment; or

(b) otherwise—20 penalty units or 1 year's imprisonment.

(2) If the court convicts a person of an offence against subsection (1) in the circumstances mentioned in paragraph (a) of the penalty, the court, whether or not any other sentence is imposed, must disqualify the person from holding or obtaining a Queensland driver licence for a period of at least 6 months.

(3) Despite subsection (1)(b)(i) and (c)(i), the driver may leave the scene of the incident solely for the purpose of—

(a) if a person is injured—obtaining medical or other aid for the person; or

(b) if a person is dead or apparently dead—arranging for the removal of the person's body to an appropriate place.

(4) If in determining a complaint for an offence against subsection (1) the court is satisfied that the defendant showed a callous disregard for the needs of a person injured in the incident, the court shall impose, as the whole or part of the sentence, a period of imprisonment.

(5) A person who reports the happening of an incident mentioned in subsection (1) to the Queensland Police Service knowing the report to be false commits an offence.

Maximum penalty—40 penalty units or 6 months imprisonment.

(6) In a proceeding for an offence against this section, the incident may be specified by reference to the approximate time and place thereof or to the person or persons involved or otherwise so as to sufficiently identify it.

> (7) Nothing in this section shall prejudice or affect the provisions of the Criminal Code or any Act relating to traffic or transport and, notwithstanding an order of disqualification under subsection (2) or for any specified period made under the *Penalties and Sentences Act 1992*, section 187, upon a conviction of any person for an offence against this section resulting from any road incident hereinbefore mentioned in this section, if that person is subsequently convicted upon indictment of any offence in connection with or arising out of the same road incident, the judge of the Supreme Court or District Court before whom that person is so convicted, in addition to any sentence the judge may impose, may order that the offender shall, from the date of the conviction upon indictment, be disqualified absolutely from holding or obtaining a Queensland driver licence."

[50] It can be seen that the maximum penalty is three years' imprisonment. There are no higher court comparable decisions which deal with the section alone. However there are three Court of Appeal decisions which are of some relevance.

[51] In *R v Vance; Ex Parte Attorney-General*[12] the respondent pleaded guilty to dangerous operation of a motor vehicle causing death. He was initially sentenced to two years' imprisonment suspended after serving six months with an operational period of two years. He was 20 years of age and had a previous minor drug conviction. The deceased was riding his bicycle between 5.15am and 5.30am along a main arterial road in Burleigh Waters. He was riding in an emergency stopping lane. The respondent was driving his motor vehicle in the same direction. There was little traffic, the street lights were illuminated and the weather fine. The respondent's vehicle collided with the rear of the bicycle and the deceased was thrown forward. The respondent did not stop at the scene. The deceased was found by other motorists. The following day the respondent's solicitor telephoned the police about the respondent. The caller was unsure whether to give himself up. At 2.45pm, the solicitor informed the police of the respondent's name and address and the police went to the house and took possession of the vehicle and found damage to the vehicle.

[52] On 30 August 2006, the prosecution was notified the respondent would plead guilty. The court was informed his last alcoholic drink had been 7.00pm on 29 April and he had previously drank four or five full strength beers. At 9.30pm, he drove to friends at Surfers Paradise and he only drank water. At 4.30am on 30 April, he drove to a friend's house but decided to drive home because he could not get into the friend's house. The court was informed he had no recollection of the collision. He accepted it was he who had struck and killed the deceased and surmised he must have fallen asleep.

[53] De Jersey CJ noted "the much more powerful countervailing considerations were that the respondent left the scene and realised a little later he had been involved in a

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12 [2007] QCA 269; 48 MVR 375.

major incident – not simply glancing off the guard rails; in that he did not investigate the fate of any victim, and he should have surmised there may have been one; and in that he did not assist the authorities by coming forward for more than two and a half days or so after the incident. …. Whatever the overall combination of circumstances actually explain the delay, it remains a feature telling against claims of true remorse or full cooperation as well as being morally reprehensible."

[54] Ultimately it was held that the sentence was manifestly inadequate. The range appropriate was said to be three to four years' imprisonment. The appeal was allowed and the respondent was imprisoned for three years suspended after 12 months.

[55] It must firstly be observed that the maximum penalty at that time for dangerous operation causing death was 10 years imprisonment. Also it must be borne in mind the respondent was younger than the appellant in this case and has less previous convictions. The case is most relevant in terms of principle.

[56] Another case of relevance is *R v Hardes.*[13] The applicant was 42. He pleaded guilty to dangerous operation causing death; failing to remain at the scene showing callous disregard and disqualified diving. He cut a corner, went onto the wrong side of the road and hit and killed a cyclist. He drove off without rendering assistance. He had a bad traffic history and criminal history- worse than the present appellant's.

[57] For the dangerous operation was sentenced to three years' imprisonment. He was sentenced to 12 months' imprisonment for a breach of s 92 of TORUM[14] and a further six months for disqualified driving. The overall term then was four and a half years imprisonment. It was held that the sentences were not manifestly excessive.

[58] The final case to be considered is *R v McCoy.*[15] In that case the appellant pleaded guilty to serious assault of a police officer, dangerous operation with the circumstance she was adversely affected, unlicensed driving and leaving the scene. She was 50 years old with a criminal and traffic history. She had not been to jail before. The applicant struck a police officer with her vehicle to avoid arrest and left the scene knowing she had struck him. The alcohol level in her blood level was .133%. The officer suffered a dislocated and broken right shoulder. Most of the injuries had healed. The sentencing judge noted the maximum penalty was seven years imprisonment. A total of two and half years' imprisonment was imposed with release after 13 months. Six months imprisonment was imposed for leaving the scene.

[59] Having regard to those authorities it seems to me that the range of head sentence in this case was between 12 months to two years imprisonment.

[60] I have concluded this in light of the penalties imposed in *Hardes* and *McCoy.* I consider the facts of the failing to remain charge in *McCoy* to be less serious in light of the fact a death occurred in this case. The comments made in *Vance* as to the

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13 [2003] QCA 47.
14 This was the maximum penalty at the time.
15 [2015] QCA 48.

offender's conduct after the collision in many respects are like that in the present case.

[61] I did not consider the case of *Crack v Post; ex parte Crack*[16] to be of assistance bearing in mind the maximum penalty was far less than in the instant case.

[62] To my mind a head sentence of two years is towards the upper end of the range and could be described as severe, but not outside it.

[63] There were serious aspects of the appellants offending as follows:

- It was in breach of the probation order.
- She deliberately drove away leaving a seriously injured young person on the roadway. The victim in fact died at the scene.[17] This tends to indicate a lack of remorse.
- She did not hand herself in for 12 hours. Whilst it cannot be determined she was affected by drugs or alcohol this meant the police were deprived of a means of checking this.
- She was on bail for offences from earlier in the year.
- She was subject to a warrant issued for failing to appear.
- Despite her release on bail for Charge 4 she continued to commit many further offences including Charge 43 on 9 August 2020- driving with a relevant drug in her saliva. One would have thought she would have slowed down her criminal behaviour having run over and killing Ms Mooney.
- Deterrence and denunciation were crucial factors to be considered.
- I also find that she did not know that Love had called 000 indeed she never told the police that.

[64] One must also bear in mind the Magistrate ordered that there be concurrent terms of imprisonment for many other offences which she had committed in breach of bail, including imposing six months imprisonment on Charges 15 and 20 and one month on Charge 5. In the ordinary case this entitled him to sentence towards the upper end of the range.[18]

[65] As Chesterman JA said in *R v Jackson*[19] even if it be thought that an appellant has been punished severely, that does not dispose of an appeal. The applicant must demonstrate the sentence imposed was beyond the permissible range not that a lesser punishment would have been imposed.

[66] The question of manifest excess in sentence has been considered on a number of occasions by the High Court of Australia. McHugh J in *Markarian v R*[20] said:

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16 [1984] 2 Qd R 311.
17 The defence withdrew a submission that Ms Mooney was already dead when struck by the appellant.
18 *R v Nagy* [2003] QCA 175; [2004] 1 Qd R 63 at [39] and [66].
19 [2011] QCA 103.
20 [2005] HCA 25; (2005) 228 CLR 352 at [65].

> "Unfortunately, discretionary sentencing is not capable of mathematical precision or, for that matter, approximation. At best, experienced judges will agree on a range of sentences that reasonably fit all the circumstances of the case. There is no magic number for any particular crime when a discretionary sentence has to be imposed."

[67] Further, in *Hili v R*[21] it was said:

> "Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.… And, in the present matters, the Court of Criminal Appeal, having described the circumstances of the offending and the personal circumstances of the offenders, said that "the sentence imposed in these matters is so far outside the range of sentences available that there must have been error".

[68] In *Wong v R*[22] it was said :

> "Reference is made in *House* to two kinds of error. First, there are cases of specific error of principle. Secondly, there is the residuary category of error which, in the field of sentencing appeals, is usually described as manifest excess or manifest inadequacy. In this second kind of case appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons."

[69] For the reasons given, I do not consider there was an error here concerning the sentence on charge 4.

[70] The next issue is whether the 12 month penalty for Charge 24 imposed cumulatively was manifestly excessive. The Magistrate in this case imposed 12 months imprisonment for one offence of possessing dangerous drugs on 5 August 2020.

[71] As I have previously indicated, the facts of that case were that the appellant had 1.491grams of white crystal substance in her hand bag which she had purchased believing it was "meth". Importantly, she said that after using some she realised it was not "meth". There was no certificate tendered to show how much of the powder was methylamphetamine or indeed a dangerous drug. It may well have been a very small amount. The Magistrate proceeded on the basis all of it was methylamphetamine.[23] This was an error.

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21 [2010] HCA 45; (2010) 242 CLR 520 at [59].
22 [2001] HCA 64; (2001) 207 CLR 584 at [58].
23 Transcript day 1 page 19.20 and Reasons page 3.5.

[72] The fact is the "powder" was for her own use and there was no commerciality alleged for Charge 24

[73] In those circumstances, it seems to me that a penalty of 12 months' imprisonment was excessive for that matter particularly when one bears in mind the other penalties imposed on the drug charges.[24] I consider that the 12 months' imprisonment cumulatively was outside of the range.

[74] Also I accept the crown concession that this sentence should have been mitigated by reason of the totality principle.[25]

[75] In my opinion, having considered all matters, that penalty should be reduced to one of four months' imprisonment but in light of it being separate offending and after so many earlier offences, it should be served cumulatively.

**Breach of probation**

[76] I find the appellant breached the probation order imposed in the District Court on 12 November 2019.

[77] Mr Byrne informed me that the appellant was 27 years old at the time of those offences and has struggled with a drug addiction. He also stressed the importance of the admissions she made to police.

[78] She did see a psychologist from Lives Lived Well after the probation order was imposed but this did not work.

[79] Exhibit 7 was evidence of a course she has done in prison.

[80] Ultimately both parties conceded I should set aside the probation orders and resentence the appellant to a term of about six months' imprisonment with the same parole release date.[26]

[81] I agree with that submission. The fact is the appellant was given the benefit of probation but did not take up the opportunity offered to her. There is little point in light of the other sentences to impose a different penalty.

**Orders**

[82] In those circumstances, my orders are as follows:

1. The appeal is allowed to the extent that I set aside the term of 12 months' imprisonment imposed on charge 24 and in lieu thereof I impose four months' imprisonment.
2. I order the date the appellant be released on parole be fixed as at 25 May 2021.

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[24] I note for example six months imprisonment was imposed on charge 15 which involved powder of 2.03 grams and 7 days imprisonment was imposed of charges 28 and 29 which involved .75 grams of substance, empty clip seal bags and messages about supplying a "half ball"- 1.75 grams.

[25] *Mill v R* [1988] HCA 70; (1988) 166 CLR 59. Also see section 9(2) (l) and (m) of the *Penalties and Sentences Act 1992 (Qld).*

[26] Section 126 of the *Penalties and Sentences Act 1992 (Qld).*

3. The appeal is otherwise dismissed.

4. I find the breach of probation proved.

5. I set aside the probation orders imposed on 12 November 2019.

6. I resentence the appellant.

7. On each count a conviction is recorded.

8. On the count of supplying a dangerous drug I sentence her to six months imprisonment and on the count of possessing a dangerous drug I sentence her to three months imprisonment. Those terms of imprisonment are to be served concurrently with each other and concurrently with the other terms of imprisonment.

9. I order the date the appellant be released on parole be fixed as at 25 May 2021.