SUPREME COURT OF QUEENSLAND

CITATION:	*R v Samuel (a pseudonym)* [2024] QSC 11
PARTIES:	**THE KING** **v** **SAMUEL (A PSEUDONYM)** (defendant)
FILE NO:	Indictment No 1166 of 2023
DIVISION:	Trial Division
PROCEEDING:	Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Ex tempore on 24 January 2024
DELIVERED AT:	Brisbane
HEARING DATE:	21 December 2023
JUDGE:	Davis J
ORDERS:	**1. The defendant is sentenced to a term of detention of three years.** **2. The defendant be released after serving 50% of that period of detention.** **3. The defendant be disqualified from holding or obtaining a driver's licence for a period of 18 months.** **4. Conviction recorded.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING OF JUVENILES – RELEVANT FACTORS – OTHER CASES – where the defendant pleaded guilty to one count of manslaughter – where the offence occurred when the defendant was 17 years old – where the defendant was subject to an online scam and attempted to commit suicide – where the defendant unlawfully killed another when attempting to commit suicide – where the defendants risk of reoffending is low – where there are good prospects of rehabilitation – whether a detention order ought to be imposed – whether special circumstances allow for early release from detention *Youth Justice Act* 1992, s 150, s 152(e), s 162, s 176, s 183, s 184, s 221, s 222, s 223, s 227(1), s 227(2), Youth Justice Sentencing Principle 18 *R v AS; Ex parte Attorney-General (Qld)* [2004] QCA 259,

considered
R v BXY [2023] QSC 42, cited
R v DBU (2021) 7 QR 453; [2021] QCA 51, followed
R v GBL [2023] QCA 104, cited
R v Goodwin; Ex parte Attorney-General (2014) 247 A Crim R 582; [2014] QCA 345, followed
R v Kelly [1999] QCA 296, cited
R v LAL [2018] QCA 179, cited
R v Maygar; ex parte A-G; R v WT; ex parte A-G [2007] QCA 310, followed
R v Patrick (a pseudonym); Ex parte Attorney-General (2020) 3 Qd R 578; [2020] QCA 51, followed
R v YTZ; Ex parte Attorney-General Qld [2023] QCA 87, cited
Secretary for Justice v CMT [2021] 1 HKLRD 1; [2020] HCKA 939, cited

COUNSEL: R J Marks for the Crown
C F Wilson for the defendant
I Evans appeared for the Chief Executive of the Department of Children, Youth Justice and Multicultural Affairs

SOLICITORS: Office of the Director of Public Prosecutions for the Crown
Hannay Lawyers for the defendant

[1] Samuel, on 3 November 2023, you pleaded guilty to one count of manslaughter. You were 17 years and eight months of age at the time of the commission of the offence, and you are presently 19.

[2] The circumstances of the offending are as follows.

[3] On 9 August 2022, you were driving a Toyota Landcruiser Prado, fitted with a bull bar, northbound along Bells Creek Arterial Road, Corbould Park. Two collisions occurred involving the vehicle driven by you. One caused the death of another citizen.

[4] Bells Creek Arterial Road is single lane each way, with a speed limit of 100 kilometres per hour, with no street lighting.

[5] The first collision occurred three and a-half kilometres away from your home, when you deliberately crossed onto the southbound lane and attempted to collide head-on with a vehicle travelling south. The driver of that vehicle avoided a head-on collision by swerving at the last minute. Your vehicle struck the back bumper of that car.

[6] You then continued to drive northbound for approximately 900 metres, where the second collision occurred. It is the second collision and its tragic consequences which are the subject of the charge.

[7] Analysis of the car you were driving demonstrated that, at the time of the second collision, you were travelling at a speed between 100 and 115 kilometres an hour.

You again deliberately crossed over the centre lane into the southbound lane, and you collided head-on with another vehicle. The deceased, Ms Karen Anne Malcolm, the driver of the vehicle, steered to the left and applied her brakes. Despite this, your vehicle and Ms Malcolm's vehicle collided more or less head-on. Ms Malcolm's vehicle was travelling at about 90 kilometres an hour, giving an impact speed of about 200 kilometres per hour.

[8] The force of the impact tipped your vehicle onto the driver's side, causing it to slide back across into the northbound lane, and Ms Malcolm's car veered off the road, onto a shallow embankment. Ms Malcolm was killed instantly as a direct result of the injuries sustained from the collision.

[9] Prior to emergency services attending, another driver stopped to assist. This driver asked if you were on the phone, and you replied:

> "I wasn't on the phone. I've just had a really bad night and needed to go out for drive."

[10] You were removed from the vehicle and transported to Sunshine Coast University Hospital where you were treated for a lower leg fracture.

[11] Forensic examination revealed no mechanical faults in either your vehicle or Ms Malcolm's vehicle that would have contributed to the collision. You accept that you deliberately drove your vehicle into Ms Malcolm's.

[12] Photographs tendered before me show that the bull bar on your vehicle absorbed much of the impact, but enormous damage was sustained to the front-end driver's side of Ms Malcolm's vehicle.

[13] It is perhaps unnecessary to say that your actions, in deliberately driving into oncoming traffic, inevitably put the drivers of those cars in extreme danger of serious injury or death.

[14] While there is no excuse for your actions, there is, as I will detail shortly, an explanation. You were threatened with humiliation by online exposure of explicit photographs. In response to that threat, you chose to end your life in a motor vehicle collision by driving head-on into another vehicle.

[15] Questions then arise as to your understanding, before the fatal collision, of the likelihood that your plan to kill yourself may injure or kill others, in particular, of course, the driver of any other car involved in the planned collision.

[16] You are to be sentenced as a child, pursuant to the provisions of the *Youth Justice Act* 1992, and I will explain the impact of that legislation shortly.

[17] In *R v Patrick (a pseudonym); ex parte Attorney-General*[1], Sofronoff P observed:

> "When sentencing adult offenders, the plainly foreseeable consequences of offending are often treated as equivalent to intended consequence whether the offender foresaw them or not. However, when dealing with child offenders that simple equivalence is not

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1 *R v Patrick (a pseudonym); Ex parte Attorney-General* (2020) 3 Qd R 578 at [45].

> available. Immaturity in thinking that hampers a child's judgment, as well as a child's lack of experience, means that children often commit offences without being conscious of the potential consequences. For this reason, the moral blameworthiness of a child for the consequences of offending cannot always be the same as that of an adult."

[18] I accept that your extreme reaction to the threat which you faced reflects immaturity and an inability, at least at that time, to work towards more appropriate solutions to the problem. However, I cannot accept, even taking into account your distressed state and the evidence of the psychologist Ms Fercher-Barrett which I will address later, that you did not appreciate the potential for serious injury or death to the driver of the vehicle you intended to deliberately collide with. You specifically intended to cause a life-threatening collision, one in which you intended to die.

[19] You were not a young child. You were 17. You had some driving experience and must have known the potential of serious injury being sustained to any person involved in a motor vehicle accident. While you did not obviously intend to cause death or serious injury or any injury to Ms Malcolm, you were aware that the collision, which you planned and carried out, could at least seriously injury the driver of any car with which you collided, and you proceeded with your plan, nevertheless.

[20] I now turn to the events which led you to deliberately collide with Ms Malcolm's vehicle. You were involved in exchanging sexually explicit messages on Snapchat with a person calling herself or himself, as the case may be, "Amanda Rose", a person you had not met, and was not otherwise known to you. You sent nude photographs of yourself to Amanda Rose, and immediately thereafter, Amanda Rose threatened to distribute the nude photographs if you did not pay her $900. You proceeded to transfer $500, however the demands and threats continued. You warned that you would probably kill yourself if the images were distributed. Nevertheless, additional demands and threats were made.

[21] You then proceeded to transfer an additional $200, and that $200 was borrowed from a friend. However, further demands for money were made, and Amanda Rose sent one of the photographs to one of your online followers. You told her that you were not sending any more money because you would be dead in 15 minutes. Shortly after, you left your home in the Prado car with an intention to commit suicide, and left a final message for the online scammer:

> "Hope you sleep better knowing you killed me".

[22] As I have already explained, you then proceeded to, twice, deliberately cross into the path of oncoming traffic with a view to cause a head-on collision and take your own life. As a consequence, you unlawfully killed Ms Malcolm but you survived the collision.

[23] I accept that the explanation for your offending is that you panicked when threatened by Amanda Rose, and the threat of public disclosure of the photograph so impacted you that you attempted to suicide by causing a motor vehicle accident in which you hoped to die. That takes me to the psychological evidence.

[24] I received into evidence on the sentence, a report of a psychologist Ms Fercher-Barrett. She is your treating psychologist, you having been referred to her in August of 2022. Ms Fercher-Barrett found no evidence of primary mental illness, personality disorder, behavioural disorder or cognitive deficit. She opined that you have insight into the offending, and you represent a very low risk of reoffending. That is all accepted.

[25] Ms Fercher-Barrett opines that you are "incredibly remorseful". That is accepted, and your remorse is also evidenced by your plea of guilty. I have taken the plea of guilty, which is an early one, into consideration.

[26] Ms Fercher-Barrett expressed various opinions as to your mental state at the time of the offending. She recorded that what you informed her, namely, at paragraph 4.6 of her report:

> "4.6 Samuel has some vague recollection of seeing oncoming headlights but overall *'it's a blur, a blur getting in the car, a blur about the messages. As soon as they said they had my pictures my brain just exploded'*. He recalls that he woke up on the ground, that he screamed for help, '*but at that point I didn't know anyone had passed away'*."

[27] At paragraph 4.7, she says this:

> "4.7 Whilst Samuel does not remember feeling suicidal at the time of the offence or sending multiple suicidal messages he accepts that in the height of his acute distress it is possible he did want to end his life. However when he first told 'Amanda Rose' of his suicidality it was in the hope they would '*stop what they were doing'*. He stated, *'I obviously wanted to stop the moment'*."

[28] At paragraph 4.8, she observes:

> "4.8 Samuel explained that when he chose to drive in his distressed state, *'I wasn't thinking, I wasn't going out of my way to do it. I was just driving. I wasn't thinking about where I was'*. He disclosed experiencing a sense of shock and disbelief when the evidence of his suicidal messages were presented to him. He cannot recall purposefully driving into oncoming traffic."

[29] The psychologist then opined this, at 12.3:

> "12.3 However, at the time of the offending he was experiencing an acute stress reaction in response to the realisation he had fallen victim to a sextortion scam. His intense distress caused him to dissociate, a process during which mental functioning is interrupted because the ordinary integration of memory, consciousness, identity, emotion, and self-regulation is disrupted."

[30] At 12.4:

> "12.4 Individual experiences of dissociation vary with regard to symptoms and severity but can include sudden and unexpected shifts in mood, problems with cognition, prominent memory impairment, behavioural compulsions, and identity disruption including behaving in a manner which the person would ordinarily find abhorrent or offensive. It is an altered state of consciousness and results in an intensified disconnect from one's body. Dissociation is an involuntary and temporary response to extreme stress or trauma which has been consistently linked to suicidality."

[31] Later she observed at 12.7:

> "12.7 Samuel's offending is best understood in the context of a severe dissociative experience which occurred in response to acute stress. It is the writer's clinical opinion that the offence is directly related to this acute mental health episode. He has no previous offending of any type, no history of serious mental illness, and no other history of at-risk ideation or behaviours with regard to harming himself or others. The behaviour appears to be extremely out of character."

[32] At 12.8:

> "12.8 In the writer's opinion Samuel's moral culpability is reduced due to his dissociated mental state at the time of the offending which impaired his normal ability to exercise good judgment."

[33] Later, at 12.14, she said this:

> "12.14Samuel is not able to remember feeling suicidal or purposefully driving into oncoming traffic and this is most likely due to the effects of dissociative amnesia. At no time has he expressed ideation to harm himself or others and the offence is at odds with his core values. He presents with a realistic and positive future focus and a commitment to remaining on a positive life trajectory."

[34] Ms Fercher-Barrett assessed your risk of reoffending as very low. I generally accept Ms Fercher-Barrett's unchallenged opinions; however, I do not accept – although I do not think she is actually suggesting this – that the dissociated mental state deprived you of an understanding that you intended to cause a life-threatening situation.

[35] The only rational explanation for your extraordinary actions is that you reacted to the threat by deciding to suicide by driving your vehicle head-on into another vehicle, causing an impact which would take a life, namely, yours. As I have previously explained, you must have appreciated the potential of at least severe injury, if not death, to the driver of any car with which you collided.

[36] Ms Malcolm was a school bus driver, an occupation she had pursued for 15 years. She had driven other buses for 12 years before becoming a school bus driver.

[37] Ms Malcolm lost her life when you deliberately rammed into her car while she was driving home from work. She leaves a sister, children, grandchildren and friends. Ms Malcolm's daughter provided a victim impact statement. That statement carefully and fairly described the understandable grief caused to the family by Ms Malcolm's death. The family have indicated that they are not willing to engage in a restorative justice process, and that is, in my view, perfect understandable.

[38] As earlier observed, you were 17 years and eight months old at the time of the offending, and 19 now. You have no traffic or criminal history. You have undertaken psychological treatment as I have explained, and you have completed the Queensland Traffic Offenders Program.

[39] Since school, you have completed a painting apprenticeship and worked in your father's business as a painter. Your father unfortunately died last year. You presently have employment at Ras-Vertex, which is a company that provides rope access services. Your childhood was unremarkable and you had and continue to enjoy family support. Of some significance, as a developing adolescent, you experienced low self-esteem caused by body image. You had in fact joined a gym a few months prior to the offending. To my mind, this in part explains your volatile reaction to Amanda Rose's threats to publish the photographs of you.

[40] I now turn to analyse the relevant sentencing principles prescribed by the *Youth Justice Act* but there are two preliminary issues.

[41] The first arises by section 162, which requires me to consider referring the case to the Chief Executive for a restorative justice process, instead of sentencing you. Ms Malcolm's family, as earlier observed, is not inclined to engage in a restorative justice process. Neither barrister submitted that such a process was appropriate in this case. In all the circumstances, I will not refer the case for a restorative justice process.

[42] The second issue arises by section 176 of the *Youth Justice Act*. By the provisions of the Criminal Code, manslaughter attracts a maximum of life imprisonment. By section 176 of the *Youth Justice Act*, the maximum for a child convicted of a life offence is 10 years unless the offence is "particularly heinous".

[43] As demonstrated by *R v Maygar; ex parte Attorney-General; R v WT; ex parte Attorney-General*[2] offending which might, of itself, be 'particularly heinous' may fall below that bar when all relevant circumstances are considered.

[44] Here, the circumstances explain but do not justify the offending. The primary objective was to harm yourself, not others. The offending was fairly spontaneous and triggered by stress. The Crown rightly concedes that in all the circumstances the offending is not particularly heinous, and the maximum sentence is therefore 10 years' detention. As you are now 19, any detention will be served in an adult prison.

[45] Section 150 prescribes the sentencing principles. Of significance:

> "**150 Sentencing Principles**

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2 *R v Maygar; ex parte A-G; R v WT; ex parte A-G* [2007] QCA 310.

(a) Section 150(1)(a) applies the general sentencing principles applying to all persons to the sentencing of children, but subject to the provisions of the *Youth Justice Act*.

(b) Section 150(1)(b) applies the *Youth Justice Principles*.

(c) Section 150(1)(c) applies the special considerations in s 150(2).

(d) The relevant special considerations include:

(i) A non-custodial sentence is better than detention in promoting rehabilitation.

(ii) Detention should be imposed as a last resort and for the shortest appropriate period.

(e) By other subsections of s 150(1), the child's antecedents, the nature and seriousness of the offending and the impact on any victim are all relevant.

(f) Youth Sentencing Principles 9, 13, 17 and 18 are of significance. It is not necessary to read them to you. I have applied them."

[46] It is clear that a policy of the *Youth Justice Act* is that rehabilitation is given priority in the process of sentencing children; see the judgment of Justice of Appeal McMurdo in *R v DBU*[3].

[47] In the course of argument, I was referred to the judgment of GN Williams Justice of Appeal in *R v AS; Ex parte Attorney-Genera*l *(Qld)*[4] where his Honour said, at paragraphs 26 and 27:

[26] In his submissions counsel for the respondent contended that the principle of deterrence plays but a minor role when sentencing a juvenile pursuant to the provisions of the *Juvenile Justice Act* 1992. I reject that submission. Section 150(1)(a) requires the court when sentencing a juvenile to have regard to "the general principles applying to the sentencing of all persons" and when a juvenile kills another human being the conduct is so grave that the ordinary principles of sentencing are called in to play and largely outweigh the juvenile justice principles which are more appropriate to less serious crimes committed by juveniles. It is significant for present purposes to also note that s 150 requires the court to have regard to the "nature and seriousness of the offence" and the "impact of the offence on a victim". Further, in Schedule 1, the Charter of Juvenile Justice Principles, the first principle stated is that the "community should be protected from offences".

[48] His Honour went on at paragraph 27:

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3 *R v DBU* (2021) 7 QR 453 at [3].

4 *R v AS; Ex parte Attorney-General (Qld)* [2004] QCA 259 at [26]-[27].

> "[27] Society cannot allow the unjustified killing of a human being to go unpunished. If appropriate punishment for such a crime is not imposed then the very fabric of society is undermined and reasonable people in the community lose faith in the criminal justice system."

[49] To the extent that the Crown submitted that his Honour was stating a legal principle that an offence involving a death fell into some special category of case where the youth justice sentencing principles did not apply or applied differently, that submission ought to be rejected. There is a distinction between a judicial statement of legal principle and an observation about sentencing patterns. His Honour's comments are an example of the latter, not the former.

[50] The *Youth Justice Act* prescribes many considerations which must be taken into account during the sentencing of a child. Those things include rehabilitation, but also include the nature and seriousness of the offending. Where the offending involves the death of a citizen, the offending is, by definition, of a most serious type, and the balancing process will, as Justice Williams observed, "largely outweigh" the other considerations such that detention will be appropriate. There will naturally be cases where it will not. His Honour did not purport to lay down a principle of law that detention must be imposed where the offending results in a death. In my respectful view, the correctness of his Honour's observations is beyond question.

[51] Section 227(1) provides that a child will be released from detention after serving 70 per cent of the period of detention. Section 227(2) provides that the Court may reduce that period down to as little as 50 per cent where there are special circumstances.

[52] I was referred to a number of sentences which were submitted to be comparative; *R v BXY*[5], *R v YTZ; Ex parte Attorney-General Qld*[6], *R v Patrick (a pseudonym); Ex parte Attorney-General*[7]; *R v AS; Ex parte Attorney-General*[8] and *R v Kelly*[9].

[53] None of these cases are particularly helpful. Neither barrister seriously submitted that they were, both conceding that the circumstances of the present cases are "unique".

[54] As observed by Mullins J (as her Honour then was) in *R v Goodwin; Ex parte Attorney-General*[10], the absence of comparative sentences may make the sentencing process more difficult, but where there are no comparatives the relevant sentencing principles must be applied, and in that way a just sentence according to law is achieved.

[55] The Crown submitted that the appropriate range of sentence was seven to eight years' detention, but that I might consider that special circumstances exist so that, pursuant to section 227(2) of the *Youth Justice Act*, time to be served on the

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5 [2023] QSC 42.
6 [2023] QCA 87.
7 (2020) 3 Qd R 578.
8 (2004) QCA 259.
9 [1999] QCA 296.
10 (2014) 247 A Crim R 582.

sentence could be reduced to 50 per cent rather than the statutorily prescribed 70 per cent.

[56] Mr Wilson, who appeared for you, submitted that a sentence of five years' detention was appropriate, but that an order ought to be made under section 221, conditionally releasing you to perform a conditional-release program.

[57] I understand that you are willing to comply with such a program; see section 222. The pre-sentence report concludes that you are suitable for such a program; see section 223. Mr Wilson submits that if I was against him on that submission, then you ought to be released after serving 50 per cent of the period of detention.

[58] There are here special circumstances which enliven the discretion under section 227(2) to reduce the time to be served before release. Those circumstances include:

1. You have no prior criminal or traffic history;
2. The offending is out of character;
3. There is an explanation for the offending, albeit that the explanation is far from an excuse;
4. You have taken steps to address the cause of the offending;
5. The expert opinion is to the effect that your risk of reoffending is very low, an opinion which I accept; and
6. Lastly, you have family support and prospects for a productive life.

[59] Given the steps that you have taken and the expert opinion as to your very low prospects of reoffending, I approach the sentencing on the basis that you have rehabilitated. That is very much to your credit.

[60] Personal deterrence is not an issue here. The offending occurred in circumstances of acute stress and against the background that you had never previously offended against the criminal or traffic laws. Your risk of reoffending is very low, and consequently personal deterrence is not a consideration.

[61] A weighty consideration is the nature and seriousness of the offending. As I have previously explained, I cannot accept that you did not appreciate the danger which you posed to other citizens using the road when you planned to collide head-on with their vehicle. On any sensible assessment, you deliberately drove a quite large vehicle, at about or slightly above the speed limit, into Ms Malcolm's car. Her death has caused understandable grief and misery to her family.

[62] I have already referred to the observations of Justice of Appeal Williams in *R v AS; Ex parte Attorney-General (Qld)*[11]. Notwithstanding the explanation for the offending and notwithstanding your personal circumstances and your rehabilitation, you caused the death of Ms Malcolm by deliberately causing a life-threatening situation. In my view, notwithstanding that a non-custodial sentence is better in promoting rehabilitation, detention is the only appropriate sentence, section 152(e). I decline to make an order under section 221 conditionally releasing you to perform

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[11] [2004] QCA 259.

a conditional release program. The severity of the offending and its tragic consequences, in my view, render such a course inappropriate.

[63] By youth sentencing principle 18, any detention should be for the least time that is justified in the circumstances. This requires a consideration not only of setting a period of detention, but also the exercise of discretion under s 227(2). Taking into account all the circumstances and applying the relevant principles as I have identified them, you should be sentenced to a term of detention of three years and it be directed that you be released after serving 50% of that period of detention.

[64] Questions arise as to whether a conviction ought to be recorded. That discretion arises under section 183, and the relevant considerations to the exercise of that discretion are prescribed by section 184(1) as follows:

> "**184 Considerations whether or not to record conviction**
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> (1) In considering whether or not to record a conviction, a court must have regard to all the circumstances of the case, including—
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> (a) the nature of the offence; and
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> (b) the child's age and any previous convictions; and
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> (c) the impact the recording of a conviction will have on the child's chances of—
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> (i) rehabilitation generally; or
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> (ii) finding or retaining employment."

[65] I have already made comments about the nature and seriousness of the offence. The recording of a conviction in your case is significant because you have no previous convictions. However, you point to no specific prejudice that recording a conviction would inflict. You have employment and there is no suggestion that your employer would take any action against you, based on the conviction. There is no real suggestion that you will enter an industry where the conviction is likely to have an impact on employment prospects.

[66] There are various statements in the cases that offences committed by children may be such as to be so inherently serious that a conviction must be recorded, see *R v LAL*[12] and *R v GBL*[13]. In *R v Patrick (a pseudonym); Ex parte Attorney-General*[14], a case I have already mentioned, President Sofronoff spoke of the principle of denunciation in terms of 'the community's revulsion at the crime and its consequences'. His Honour then observed:

> "That revulsion is partly manifested by the public record that is a conviction. It is true, as counsel for Patrick urged, that the recording of a conviction may affect Patrick's future employment prospects but in a case like the present, that does not outweigh the justification for recording, as a conviction, the community's denunciation of the

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12 [2018] QCA 179.
13 [2023] QCA 104.
14 (2020) 3 Qd R 578.

> offending act, notwithstanding that it was committed by a child in the circumstances in which Patrick found himself."

[67] Those comments were adopted by the Hong Kong Court of Appeal in *Secretary for Justice v CMT*[15].

[68] Given the nature and seriousness of the offending, its tragic consequences, and the lack of specific prejudice attending to the recording of a conviction, a conviction ought to be recorded.

[69] The last question is whether, and for how long, he ought to be disqualified from holding or obtaining a driver's licence. The offending was a most egregious breach of the privilege of being allowed to drive a motor vehicle. You ought to be disqualified for a period of 18 months.

[70] I order that:

1. The defendant is sentenced to a term of detention of three years.
2. The defendant be released after serving 50% of that period of detention.
3. The defendant be disqualified from holding or obtaining a driver's licence for a period of 18 months.
4. Conviction recorded.

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15 [2021] 1 HKLRD 1 at [54].