SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2021 0052

MOHINDER BAJWA SINGH Applicant

v

THE QUEEN Respondent

JUDGES:	EMERTON ACJ, KYROU and T FORREST JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	25 July 2022
DATE OF JUDGMENT:	25 August 2022
MEDIUM NEUTRAL CITATION:	[2022] VSCA 178
JUDGMENT APPEALED FROM:	[2021] VSC 182 (Coghlan JA)

CRIMINAL LAW – Appeal – Sentence – Culpable driving causing death (4 charges) – Trafficking in a drug of dependence (2 charges) – Possession of a drug of dependence – Related summary offences – Total effective sentence 22 years with 18 years and 6 months non-parole – Whether fresh or new evidence ought to lead to the sentencing discretion being reopened – Public policy relating to offenders who cooperate with the authorities – Appeal allowed – Applicant resentenced to 18 years and 6 months' imprisonment with 14 years and 6 months non-parole.

Section 5(2AB) of the *Sentencing Act 1991* referred to.

R v Nguyen [2006] VSCA 184, *Allouch v The Queen* (2018) 276 A Crim R 1, *Cottee v The Queen* [2010] VSCA 285, *Mejia (a pseudonym) v The Queen* [2020] VSCA 141 and *R v O'Connor* [1999] VSCA 55 considered.

Counsel

Applicant:	Mr P Morrissey SC
Respondent:	Mr BF Kissane QC with Ms RL Harper

Solicitors

Applicant:	Pica Criminal Lawyers
Respondent:	Ms A Hogan, Solicitor for Public Prosecutions

EMERTON ACJ
KYROU JA
T FORREST JA:

1 On 22 April 2020, four Victoria Police members from two police vehicles were at the scene of a roadside intercept on the Eastern Freeway at Kew. As the driver of the intercepted Porsche stepped away from his car, a prime mover driven by the applicant collided with the Porsche, the two police vehicles, and the four police members, resulting in the deaths of all four officers.

2 On 11 March 2021, the applicant, now aged 49 years,[1] pleaded guilty to four charges of culpable driving causing death,[2] three charges of trafficking in a drug of dependence,[3] one charge of possession of a drug of dependence,[4] and two related summary offences of dealing with property suspected of being the proceeds of crime,[5] and possession of cartridge ammunition.[6]

3 Following a plea on 11 and 12 March 2021, the applicant was sentenced on 14 April 2021 as follows:

Charge	Offence	Max Penalty	Sentence	Cumulation
Indictment L10997780				
1	Culpable driving causing death	20 years	12 years	Base
2	Culpable driving causing death	20 years	12 years	3 years
3	Culpable driving causing death	20 years	12 years	3 years
4	Culpable driving causing death	20 years	12 years	3 years
5	Trafficking in a drug of dependence (Cannabis L)	15 years	6 months	3 months
6	Trafficking in a drug of dependence (Methylamphetamine)	15 years	12 months	9 months
7	Trafficking in a drug of dependence (1,4-Butanediol)	15 years	14 days	—
8	Possession of a drug of dependence (Diazepam)	1 year	Convicted and discharged	—

1 His date of birth is 10 October 1972.
2 *Crimes Act 1958*, s 318(1).
3 *Drugs, Poisons and Controlled Substances Act 1981*, s 71AC(1).
4 *Drugs, Poisons and Controlled Substances Act*, s 73.
5 *Crimes Act*, s 195.
6 *Firearms Act 1996*, s 124(1).

Related Summary Offences				
9	Dealing with property suspected of being the proceeds of crime	2 years	Convicted and discharged	—
10	Possession of cartridge ammunition	40 penalty units	Convicted and discharged	—
Total Effective Sentence:		22 years' imprisonment		
Non-Parole Period:		18 years, 6 months		
Pre-sentence Detention Declared:		357 days		
Section 6AAA Statement:		Total Effective Sentence 25 years Non-Parole Period 21 years, 6 months		
Other Relevant Orders: 1. Driver's licence cancelled for 10 years.				

4 The applicant seeks leave to appeal against his sentence on the following grounds:

> Ground 1: His Honour erred by failing to give sufficient weight to the plea of guilty.
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> Ground 2: His Honour erred by failing to mitigate the [applicant]'s moral culpability for the relevant decision and driving, sufficiently or at all, by reference to:
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> (a) His psychiatric conditions when he decided to drive;
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> (b) His psychological vulnerability and personal frailty;
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> (c) The unusual constellation of factors undermining his moral compass when he decided to drive;
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> (d) His vulnerability to pressure from his employer to drive; and
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> (e) The acts of his employer at the time.
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> Ground 3: His Honour erred by failing to find that the [applicant] was not the sole cause of his decision to drive, reducing his culpability.
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> Ground 4: The sentence imposed was manifestly excessive, as to:
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> (a) The individual sentence on each of charges 1, 2, 3, 4, 5, 6 and 7;
>
> (b) The total effective sentence of 22 years; and
>
> (c) The non-parole period.
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> Ground 5: His Honour erred by over-accumulating the sentences on charges 2, 3 and 4, and on charges 5 and 6, on charge 1 and on each other.

Ground 6: His Honour erred by fixing an inadequately short period of eligibility for parole, when measured against the head sentence.

Ground 7: There is further evidence, permitting this Court to re-sentence, which is either:

(a) fresh evidence, in the *Nguyen*[7] sense; or

(b) new evidence, in the *Allouch*[8] sense.

Ground 8: His Honour erred by failing to give sufficient weight to the applicant's co-operation and offer of assistance.

5 The circumstances of the offending were summarised in the sentencing judge's careful and comprehensive reasons for sentence. We shall set out the relevant portions.[9]

> On 22 April 2020, you were driving a Volvo Prime Mover and trailer which weighed almost 20 tonne. You were employed by a company called Connect Logistics and had been so employed since 26 February 2020. You had previously worked for that company between June 2017 and April 2018. You had worked as a driver for another company in the time in between. You were still on your six-month probationary period. You were working permanent night shift, your hours were 4 pm to either 3 am or 4 am for five or six days a week. Your work involved delivering products on behalf of Ingham's Pty Ltd. Your work commenced either at the Emergent Cold complex in Dandenong South or the Lyndhurst depot at Lyndhurst. Deliveries were made to Thomastown and Somerville.
>
> When you recommenced your employment with Connect Logistics you were required to undergo induction which involved, among other things, being given a driver's manual which covered fatigue, drugs and alcohol, fitness to drive, self-assessment and overall health and safety requirements. You signed documents acknowledging that you understood the requirements and conditions of your employment. You have never provided a completed medical certificate certifying your fitness to drive a fatigue-related heavy vehicle, even though you were required to do so.
>
> Your behaviour over the days preceding 22 April is important. On 18 April you finished work at 2.10 am. An examination of your phone records show that up until 10.30 am the longest period of outgoing cellular inactivity was two hours and 53 minutes. At 10.30 pm that night you booked into a room at the Dandenong Motel on the Princes Highway. In the early hours of 19 April 2020, you collected Kirsty Richardson and took her to that motel. You spent 12 to 14 hours together, consuming ice (methylamphetamine) and used 1,4-Butanediol. You consumed alcohol and Richardson smoked cannabis. You had about two hours' sleep.
>
> The effect of your combined drug use was such that the two of you struggled to

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7 *R v Nguyen* [2006] VSCA 184, [36] (Redlich JA, Maxwell P and Neave JA agreeing) ('*Nguyen*').

8 *Allouch v The Queen* (2018) 276 A Crim R 1, 9 [47] (Beach and Weinberg JJA); [2018] VSCA 244 ('*Allouch*').

9 *R v Singh* [2021] VSC 182, [5]–[54] (Coghlan JA) ('Sentencing Reasons') (citations omitted). References to 'Matt' in the Sentencing Reasons are to the applicant.

continue your use of drugs. Because of what she observed of you, Richardson thought you were tired and believed you had not slept for two or three days.

Shortly after 10 am, you dropped Richardson off in Springvale. She told you to get some sleep. You went to Dandenong at about 10.42 am and stayed there until approximately 1.30 pm. At about 1.42 pm you met with Rene Dickson at Dandenong South where the two of you discussed gear prices and quality. You swapped four and two points of methylamphetamine.

Sometime later you went to Simon Shaw's house in Hampton Park. Shaw later reported that he thought you were on something and said you could not even speak. Your phone records show that between 1.52 pm and 7.52 pm, the longest single period of outgoing cellular inactivity was one hour and 17 minutes. You sent messages to Dickson asking her to drive to Mornington as you were off your head. You had offered her three points to do so but she did not return your calls. You did go to Mornington, arriving at 9.25 pm, and remained there for a short time, making a sale of methylamphetamine.

An analysis of your outgoing telephone records shows that between 9.30 pm and midnight you had little opportunity for proper rest. From midnight it seems you had the opportunity for 5.5 hours rest. Over the next five hours you made numerous outgoing communications leaving a period at most of one hour and 14 minutes for rest. It was then 20 April.

At about 11.05 am, you met with Dickson and provided her with 3.5 grams of ice and 28 grams of 'bud' (cannabis). Dickson paid you about half of the amount due. You were driving your blue Toyota Camry. From about then until 4.15 pm the longest single period of outgoing cellular inactivity was one hour and 30 minutes.

You arrived at work at 3.37 pm and left Emergent Cold complex at 4.15 and started making deliveries. Just before 10.30 pm, you picked up Glenys Nannup in Narre Warren in your work vehicle. You still had a delivery to make to Thomastown and told her to hide in the truck. You made that delivery about 11.45 pm.

After leaving Thomastown at about 12.10 am, on 21 April, you parked the truck and the two of you injected methylamphetamine. You returned to the Lyndhurst Depot. Nannup had gone with you and you dropped her off at the entrance to the depot at 1.17 am. You finished work at 3.20 am and picked her up in your blue Camry as you were leaving the depot. You drove to various places before dropping her off at Southland. It was then about 8.45 am. You gave her $50 and three points of methylamphetamine.

You drove to Dandenong to meet Jose Ramirez. He later reported he was still going, he had not been to sleep. The two of you smoked some ice. At that time you told Ramirez (referring to a girl):

> 'He said he had to give her money to make her go away. Before we had driven anywhere he was telling me about. He said she said she was a witch and she wouldn't leave the car, leave the passenger seat… She told him she practices witchcraft and he thought she was a witch. It was this chick he said cursed him. He said cursed because of what had been happening to him that night, that she wouldn't leave the car no matter how much he begged.'

You and Ramirez pooled your money and drove to Frankston to buy an ounce of methylamphetamine. You continued to talk about the curse but you were nodding off from time to time while driving as a result of your drug use. Ramirez took over the driving.

The two of you went to the Fountain Gate Bunnings to buy acetone. Ramirez told you that you would kill someone if you did not get some sleep. You drove away to meet Rene Dickson. You met Dickson in Sandringham about 1 pm. She remembers you saying that you were tired and giving her two points of methylamphetamine.

During the afternoon you communicated with a number of other drug associates before leaving the Cranbourne area and going to the Emergent Cold complex. You signed a 'pre-trip check', a 'safety inspection' and the 'fitness for duty' form and began to make deliveries and returning to the depot.

At about 6.30 pm, you met a customer on the side of Abbotts Road and sold him 19 grams of cannabis for $100.

At 11.45 pm, you left Thomastown for the return trip to Lyndhurst.

At 1 am, on 22 April, Stephen Harrison from Connect Logistics was trying to find you but you did not answer your phone. At about 1.35 am, the night supervisor, Kerry Haitana, found you trying to reverse your truck into the wrong loading bay. You told Haitana that you had been having some trouble at home with your wife and family and that you were stressed. Haitana thought you looked over tired and you were initially slow to react. He directed you to the correct dock. He called Harrison about 1.40 am and raised concerns about you. Harrison said that he would talk to you.

At 2.12 am, you told one of your fellow workers you were not feeling well and that as you were coming down the road (referring to Abbotts Road) you had nodded off for a second or two. You borrowed a phone and spoke to Harrison for more than four minutes. You left the Lyndhurst Depot shortly afterwards with a delivery. That delivery was cancelled and you returned to the depot at 3.30 am. Haitana found you again reversing into the wrong dock and reported the matter to Harrison.

A short time later Harrison spoke to you to see if you were okay. Harrison has said:

> 'Matt appeared physically like he had something on his mind. He didn't look tired, he looked not frustrated but confused.'

He recommended to you that 'you see a doctor about counselling for his personal issues.' He advised you to call Simiona (Simon) Tuteru who was the dayshift supervisor for Connect Logistics to tell him of the conversation.

Haitana raised your fitness to drive with Harrison and asked him to inform Tuteru of his concerns. You left work at 3.46 am and at 4.30 am, your son, Gurdeep found you in a disoriented state in the driveway of your Cranbourne home. You went to Gurdeep's car window and asked him to call his mum. He thought that it was strange as his mother was inside the house. You said that you had been sent home from work, they told you to go and see a psychiatrist. You

told Gurdeep that you were going to get the sack.

You told your son 'that a witch was messing with his head' and 'that a witch was following him, that a witch was pulling him towards her'. At one stage you pointed over towards the road indicating that that is where the witch was. Gurdeep left for work. You went into the house and woke your wife, Amarjit, and told her that the company had sent you home and asked you to see a psychiatrist. You said that you had been seeing a witch who changed her clothes.

From 4.30 am till 7.30 am, the longest single period of outgoing cellular inactivity on your phone was one hour and 43 minutes. You left home shortly after 7.30 am, you drove to an address in Dandenong where you sold an associate between 1 gram and 1.7 grams of methylamphetamine. The associate told you to go home to bed and have a sleep. At 8.34 am, you bought a meal at McDonalds.

Between 8.52 am and 9.12 am, you exchanged text messages with your supervisor, Simon Tuteru. In those exchanges, the following appear:

> 8.51 am — SINGH: 'Hi Simon, saw Steve last night about it, I'm going through some hard times at home and other things. I need to come and speak to you about some of them, I don't know who to tell the story to, I'm going to a doctor about it, can I come and see you'.
>
> 8.53 am — TUTERU: 'Talk this arvo, I will be in the office'.
>
> 8.54 am — SINGH: 'Okay, but Steve [said] I'm not fit to drive'.
>
> 9.00 am — TUTERU: 'Steve is not a doctor'.
>
> 9.12 am — SINGH: 'Okay, thanks'.

About 9.15 am you sold an associate 3 grams of cannabis for $50. At about 11 am you went to a house in Cranbourne where you saw Nikita Hawthorne. In describing that meeting she said 'He was off it. He was talking nonsense, he was saying the witches are coming and we have to leave. I've never seen anyone as drug-fucked in my life. He hadn't slept for eight days, he was falling asleep, he was mumbling as he was falling asleep, though he never actually had a sleep'.

At about 1.38 pm, Harrison messaged Tuteru. He said:

> 'Hi Simon, has Matt called you? He came in to see me last night and I'm concerned about his mental state. He told me he's not in a good spot. He was putting trucks on wrong docks and he had a sleep on the way back from Thomastown and slept in. He didn't get back to Lyndhurst till around 2 am. I was trying to ring him but his phone was off. I don't think he should be driving, I told him to go to the doctor straightaway. I will leave it with you to maybe make contact with him if he hasn't rang already'.

Tuteru responded by saying he would speak to you.

You arrived home at about 2.30 pm, your daughter Harpreet thought you looked distressed. Your son Gurdeep woke up. Harpreet recorded your rambling about witches and curses.

You left home at about 2.45 pm and arrived at the Lyndhurst depot about 3.30 pm. You met Simon Tuteru and the two of you went over to your vehicle … where you spoke and prayed for about 44 minutes. You agreed to deliver a single load to Thomastown and then [return] to Lyndhurst. You signed a fitness to drive form and left the [depot] at 4.50 pm.

At 4.52 pm you stopped to get something out of your car. At 4.48 pm you stopped on Abbotts Road to supply an associate with methylamphetamine. He got into the truck to collect the drugs and then got out again. After you had completed that transaction, which is inexplicable in the context, you set out to make your delivery to Thomastown. Three CCTV cameras along the route show you repeatedly drifting into the emergency lane until you crashed into the police officers … and their vehicles on the Eastern Freeway in Kew.

At about 4.51 pm, on 22 April 2020, Leading Senior Constable Lynette Taylor and Constable Glen Humphris of the Road Policing Drug and Alcohol Section, while driving an unmarked white Hyundai, Santa Fe motor vehicle ('the first police vehicle') intercepted Richard Pusey who was driving a black Porsche 911 Turbo S coupe. They had been travelling west and Pusey had been pulled over into the emergency lane a short distance after the Burke Road entrance ramp.

As I have already indicated, you had left the Lyndhurst depot at about 4.58 pm.

Leading Senior Constable Taylor requested the assistance of another police vehicle at 5.15 pm and Senior Constable Kevin King and Constable Joshua Prestney arrived at the scene in their blue marked highway patrol vehicle ('the second police vehicle') at 5.22 pm. They parked behind the other police vehicle in the emergency lane.

CCTV from Eastlink shows you veering out of your lane between Police Road and Springvale Road. You were observed by other motorists when travelling on the Eastern Freeway from the Melba Tunnel in Ringwood to repeatedly drift from the first running lane into the emergency lane. You were travelling at between 85 and 90 kilometres an hour. On the section of the freeway between the Doncaster Road exit and the Bulleen Road exit you drifted into the emergency lane on three or four occasions. On at least one occasion you drifted completely into the emergency lane before veering back into the running lanes.

After the Bulleen Road exit you were observed to move from the third lane of the freeway to the second lane, then into the first lane, without indicating your intention to make any of these changes. One witness who saw that driving somewhat prophetically observed to his mother, 'This dude's going to fucking kill someone'. No brake lights were observed from that point.

As you were coming down the freeway, Senior Constable King was standing at the front passenger side of the first police vehicle and Leading Senior Constable Taylor and Constable Prestney were talking whilst standing between the open passenger side doors. Constable Humphris was standing approximately between the first police vehicle and the Porsche. He was supervising Pusey, who was urinating on the other side of the guardrail. All of the police officers were standing in the emergency lane on the inside of the vehicle.

The truck which you were driving was fitted with reasonably sophisticated

safety equipment, which was to prove of no avail. At 5.36 pm you swerved into the emergency lane. The front mounted radar sensor of your truck detected a 'forward collision warning event' and the 'collision warning with emergency brake' was activated. A red light signal was projected on to the inside of the windscreen that changed into a flashing light and an acoustic signal sounded. Over the next two seconds your truck travelled 50 metres at 87 kilometres an hour. At 5:36:24 pm you crashed into the back of the first police vehicle. An 'airbag event' was recorded and a 'braking event' was triggered. That is, the brake pedal was pressed in a panic situation. It appears you did not react and brake until after the collision.

The events were captured on dashcam footage from other drivers. The footage shows that at 5.36 pm the truck which you were driving veered completely into the emergency lane and struck the police vehicles, the Porsche, and the four police members. Very many passersby rendered assistance, but Leading Senior Constable Lynette Taylor, Constable Glen Humphris, Senior Constable Kevin King, and Constable Joshua Prestney died at the scene as a result of the multiple injuries they had received.

I have viewed the footage on a number of occasions. It is chilling. The police officers had no hope. It shows the inherent danger police officers face while going about relatively routine duties. Their deaths are entirely unnecessary and should have been avoided. Their deaths were caused by you. The circumstances and the essential background I have described constitute the four charges of culpable driving.

An expert examination of the crash scene carried out by Detective Sergeant Robert Hay confirmed the matters set out above. He calculated your speed at the point of impact to be between 62 and 80 kilometres per hour. He found no mechanical matters which might have contributed to the collision.

You were arrested at the scene and taken to hospital. You were then unfit for interview. You were interviewed on 26 April 2020. The prosecutor placed emphasis on the following replies:

(i) 'The whole thing, I was — I was sleeping at the time, I was tired.' (Q334)

(ii) 'He should have let me stay home. I wanted to stay home. I didn't want to work that day like that. I didn't want to work because I was sleepy and tired.' (Q359)

(iii) 'I can still see them in the front of my truck and I tried to slam the brakes on and I couldn't stop it, I couldn't stop it'. (Q364)

A blood sample taken from you after the collision contained 0.58 mg/L of methylamphetamine and 0.06 mg/L of amphetamine and 0.06 mg/L of Midazolam and 34 ng/mL of Droperidol.

Toxicologist Dr Sanjeev Gaya concluded: 'I am of the opinion that at the time of the collision methylamphetamine would have impaired his driving ability to such an extent as to be incapable of having proper control of the motor vehicle'.

An analysis of your mobile phone data, output and work records show that in

the 72 hours preceding the collision, you had five hours of potential rest. Professor Matthew Naughton states: 'This degree of sleep deprivation would severely impair his capacity to drive safely, similar to someone with a blood alcohol greater than 0.1… closer to BAC of 0.3. Sleep loss accumulated acutely (within days) upon a background of chronic sleep loss (over weeks) in the setting of shift work (over weeks) contributed to this collision; and the combination of sleep loss and illicit drugs would have had a multiplicative effect on his ability to control his white Volvo prime mover and thereby contributed to the collision'.

The findings of the experts indicate that the collision occurred when you drove negligently and while under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle.

I am also obliged to sentence you for the drug offences and the summary offences to which you have also pleaded guilty. The circumstances of those offences are as follows.

At the Royal Melbourne Hospital police seized $95 from your wallet. The search of your blue Camry left at the Lyndhurst Depot also revealed $1,140. And that is the uplifted summary charge of dealing with property suspected of being proceeds of crime, in total $1,235. Three bags of cannabis weighing a total of 83.1 grams and two bags of methylamphetamine weighing 3.1 grams were located in the truck.

Searches of your mobile phone together with the evidence of witnesses show that between 1 January 2020 and 22 April 2020 you had trafficked in various ways a total of 3,923 grams of cannabis over 19 transactions. These included the transactions referred to earlier in this sentence and the cultivation of three cannabis plants at your residence. The value of the trafficking was at least $1,380.49. That is Charge 5, trafficking in a drug of dependence (cannabis).

Between 1 January 2020 and 22 April 2020 in various ways you trafficked a total of 14.34 grams of methylamphetamine over 35 transactions. They included the transactions referred to earlier in this sentence. The total value of the trafficking was at least $2,840.50. That is Charge 6, trafficking in a drug of dependence (methylamphetamine).

Between 4 April 2020 and 22 April 2020, in various ways you trafficked a total of 1,000 millilitres of 1,4-butanediol for $250 and another total 9.7 grams of 1,4-butanediol over two separate transactions. That is Charge 7, trafficking in a drug of dependence (1,4-butanediol).

A search of your home revealed 3.61 kilograms of cannabis, 9.7 grams of 1,4-butanediol, 0.64 grams methylamphetamine, nine tablets of diazepam and a further 14 tablets of diazepam in the Toyota Camry. That is Charge 8, possession of a drug of dependence, namely diazepam. And a single round of ammunition with 'H' engraved on the base, which is the uplifted summary charge of possessing ammunition.

Reasons for sentence

6 After setting out the factual basis of the offending conduct, the sentencing judge reviewed other factors relevant to the exercise of his sentencing discretion. We shall summarise these factors below.

7 The victims were all serving police officers of varying seniority. All were much loved and have left behind grieving families and friends. Their grief is 'profound and life changing'.

8 The judge took into account the victim impact material.

9 The applicant has recorded several minor prior offences and two prior convictions for driving with middle range concentration of alcohol.

10 At the time of sentence, the applicant was 48 years old. He was born in a small village in Punjab, India and came to Australia in 1978. He became an Australian citizen in 1980. His early family life was difficult as his parents often quarrelled. That life became more complicated when his parents divorced and his father married his mother's sister. The applicant's mother at one stage in about 1987 attacked his newly married father with a knife.

11 The applicant reported to his psychiatrist that he began seeing ghosts at about the age of five.

12 The applicant left school after Year 11 and then left home. He returned to live with his mother in 1994. He reported to his psychiatrist that, at about that time, he resumed seeing ghosts and other supernatural phenomena.

13 The applicant married in India and returned to Australia in 1997. His son was born in 1997 and his daughter in 1999.

14 The applicant used cannabis from his teenage years and commenced using ice (methylamphetamine) in about 2002. He also abused alcohol for about 13 years while his use of ice ceased.

15 He commenced a car-carrying business in about 2004 and then worked for Toll from 2007. He continued intermittently to experience supernatural hallucinations.

16 The applicant has a good work record and commenced work as a truck driver at Connect Logistics in 2015. He worked there for two or three years and recommenced ice use in 2016. The judge accepted that one reason the applicant recommenced using ice was because it helped him stay awake. He also developed a gambling addiction at about this time.

17 The applicant's family reported to Consultant Forensic Psychiatrist Associate Professor Andrew Carroll that the applicant's mental health had appeared to deteriorate in recent years, with further reports of seeing ghosts and increased aggression. He commenced dealing drugs to pay his drug and gambling debts. He also took out loans and misused his wife's credit card.

18 In about 2018, the applicant left Connect Logistics and went to work for Eastern Liquids. There he experienced bullying and racism. During this period, he reported to a friend that he saw visions, such as old soldiers, 'dead Aborigines' and lights following him.

19 The applicant did not complain to his GP about any psychiatric issues. He resumed work at Connect Logistics in early 2020. At about that time, he told his brother of unusual experiences on a daily basis, including visions of old soldiers. He told his brother that the figures he saw were harmless.

20 The applicant reported to A/Prof Carroll that, in the months leading up to the collision, he had been taking ice morning and afternoon (two or three points a day). He claimed to have only used ice once on the day of the collision.

21 In the early hours of 21 April, he injected ice with a female friend. The sentencing judge summarised this interaction: 'She told you she was a good witch and not to mess with her as she would mess with your head. You told the police she put a spell on you and would not get out of the car, that she changed her appearance and made you see stick figures.'[10]

22 The sentencing judge stated that the applicant believed that his ice use made him more able to see supernatural things.

23 The sentencing judge reviewed A/Prof Carroll's report and evidence. The sentencing judge then concluded that there was no causal connexion between the applicant's mental state and the offending. His Honour went on to state:

> Having considered both Associate Professor Carroll's report and his evidence before me, I do not accept that the causal connection contended for by [defence counsel] has been made out. I must say in relation to it that, even if it had been made out, I do not believe that it would have had a substantial effect on any sentence to be imposed on you, in particular, because of the nature of the offence of culpable driving which in your case included the particulars of negligence, being fatigued, and being under the influence of drugs.
>
> Further reliance was placed upon your psychosis, in particular because Associate Professor Carroll had said that you did not understand that methylamphetamine could cause mental illness. Were that not so, your taking of methamphetamine might have been a matter in aggravation. It is clear, however, that you knew you should not have been driving when under the influence.
>
> Separate reliance was placed upon your personality disorder but, largely because of the other features of the case set out above, the prosecution submitted that was not open. I accept that submission.
>
> The importance of the matters I have just set out was that, if accepted, it was submitted they would reduce your moral culpability and the need for general deterrence. In his oral submission, [defence counsel] submitted that because of your condition these features in sentence would be sensibly moderated. It

[10] Sentencing Reasons, [85].

follows from what I have said earlier that I do not accept that submission.

A further submission was linked to the above submission in that it was put that, having regard to the state you were in generally would reduce your moral culpability. I do not accept that submission.[11]

24 His Honour then considered the external influences on the applicant's offending. He stated:

> I do not have evidence from your supervisor because he has been charged with manslaughter arising out of these events. Nothing I say here is intended to have any influence on his case one way or another. We might begin from the proposition, which appears to be trite, that is if he had told you not to drive you would not have done so. You have said that you did not want to drive. It appears though from what you have said that you thought that Simon had got rid of the stick figures and therefore asked you to drive the one shift. It also seems from what you have said that he had your good welfare in mind.
>
> I accept that what he did and said was a significant influence on you. It has been put that the threat to you was that you might lose your job. In the circumstances, that proposition is somewhat illusory. You were simply unfit to do the job and had little, if any, legitimate claim to keep your position as a truck driver. In the sense that you drove to keep your job that decision was selfish. I accept that it was not an analysis which you carried out. The decision to drive was nonetheless yours. I have taken into account that you were reluctant to drive.[12]

25 The sentencing judge allowed that the drug trafficking offences were persistent, but 'not at the serious end of offending of that kind'.[13]

26 The sentencing judge accepted the following factors in mitigation:[14]

- The applicant instantly repented his act.
- He pleaded guilty at an appropriately early stage.
- His plea was valuable.
- He was remorseful.
- He cooperated fully with the investigation.
- He offered to testify to the events.
- He had some prospects of rehabilitation.

27 The sentencing judge continued:

> [A]lthough I have not given special weight in accordance with *R v Verdins* (principles one to four), to the matters arising out of Associate [Professor] Carroll's report, I have given weight to the matters arising out of Associate Professor Carroll's report, including your background and mental health. And I have taken them into account in determining the appropriate sentence. I have

11 Ibid [104]–[108].
12 Ibid [110]–[111].
13 Ibid [112].
14 Ibid [113].

> had regard to the possibility that, because of your mental health, the sentence I impose on you will be more onerous than on a person without your mental health issues (*R v Verdins*, principle five).[15]

28 The judge took into account the more onerous custodial conditions caused 'thus far' by the Covid-19 pandemic.

29 His Honour stated that he had regard to just punishment, retribution, denunciation, general and specific deterrence, and current sentencing practices. He noted that the standard sentence for culpable driving was eight years.

Ground 7: 'Fresh' or 'new' evidence

30 It is convenient to consider ground 7 first. In substance, ground 7 complains that, after the judge sentenced the applicant, further 'fresh' or 'new' evidence became available, which was highly relevant to his sentence and ought be admitted on this application. It was submitted that this further evidence ought to lead to the sentencing discretion being reopened.

31 We shall set out the undisputed factual background to this ground:

(1) The applicant was charged with various offences arising from the 22 April 2020 collision on or about 26 April 2020.

(2) On 27 April 2020, the applicant's filing hearing took place at the Melbourne Magistrates' Court.

(3) The applicant's barrister, Peter Morrissey SC, was engaged at about this time.

(4) Within one to two weeks of the applicant being charged, Detective Acting Senior Sergeant ('DASS') Paul Lineham, a senior police officer involved in the investigation of the collision, spoke to Mr Morrissey concerning the possibility that the applicant be requested to give evidence against his immediate workplace supervisor, Simiona Tuteru.

(5) Stephen Pica, the applicant's solicitor, sought and received instructions from the applicant that he would be prepared to make a statement and give evidence if required.

(6) On 13 May 2020, at 11:41 am, Mr Pica by email advised Detective Sergeant ('DS') Roslyn Wilson and DASS Lineham that 'I have canvassed the matters raised … and when matters settle down [the applicant] will be in a position to assist police with their enquiries.'

(7) That same day at 11:47 am, DASS Lineham replied, 'At this stage there will be no formal request for further information from Mr SINGH.'

(8) The applicant maintained his instructions to Mr Pica that he would be prepared to make a statement and assist police.

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[15] Sentencing Reasons, [115] (citations omitted).

(9) On or about 29 October 2020, a plea offer was made by Mr Pica to Jason Ong, the Office of Public Prosecutions ('OPP') solicitor who had carriage of the prosecution of the applicant. In a subsequent discussion on that day, Mr Pica advised Mr Ong that the applicant was still willing to give evidence and assist the police.

(10) On 3 December 2020, the applicant pleaded guilty at the Melbourne Magistrates' Court to four counts of culpable driving and other criminal charges. The plea was set down for 11 and 12 March 2021. The plea hearing subsequently proceeded on those dates.

(11) On 14 April 2021, the applicant was sentenced. While the applicant's offer to assist remained open, there was no request from either Victoria Police or the OPP for the applicant to provide assistance of any sort in the prosecution of Mr Tuteru.

(12) On 23 April 2021, nine days after sentence, Mr Pica received an email from DS Wilson. Relevantly, it reads:

> I am not sure if you will be having continued involvement with Mohinder SINGH throughout the next matter which involves his Supervisor TUTERU, but we thought it best we reach out and let you know of our intentions next week.
>
> The informant for the TUTERU matter, DASgt Cameron Merrett, will be making application today to the prison requesting access to Mohinder SINGH possibly Thursday next week (29/4) seeking a formalised statement about the events that occurred leading up to the collision.
>
> As I am not involved in that particular case please feel free to speak with Cam if you have any questions about this process …

(13) Later on 23 April 2021, Mr Pica replied as follows:

> As you know we have indicated early in the proceedings that Mr Singh was willing to assist. I will need to organise a video link so that I can let him know what's happening and explain the statement making process to him as well as his commitment to the committal and trial process in the matter of Tuteru. I will ask for a video conference today and should get one by Tuesday or Wednesday. I hope to have this all organised with your Thursday deadline in mind so that the statement can be taken that day.

(14) On 27 April 2021, Mr Pica further replied to Detectives Wilson and Merrett:

> I have just completed a jabber link with Mr Singh. He confirms that he will make a statement and understands that he will be called on behalf of the prosecution at a committal proceeding and any subsequent trial to give evidence. He has been advised that he may be attended upon as early as this Thursday.

(15) On 4 May 2021, Detective Senior Constable Aaron Price attended at Ravenhall Correctional Centre and took a signed statement from the applicant.

(16) As at 4 May 2021, the applicant was being held in the general prison population at Ravenhall Correctional Centre.

(17) On an unrecorded date, the applicant advised Mr Pica that threats had been made to him from within the prison population. On 19 May 2021, the applicant was transferred from Ravenhall Correctional Centre to the general prison population at the Metropolitan Remand Centre ('MRC').

(18) On 23 June 2021, the applicant was transferred from the general prison population at the MRC and placed in protection.

(19) On 14 July 2021, the applicant gave evidence in accordance with his statement at Mr Tuteru's committal proceeding and was cross-examined. Mr Tuteru was committed to stand trial on 15 indictable charges including four charges of manslaughter.

(20) Mr Tuteru's trial is scheduled to take place on 3 October 2022 in the Supreme Court. The applicant will be called to give evidence at his trial.

32 It is a matter of singular regret that the police did not accept the applicant's offer before he was sentenced.

Legal principles relating to cooperation with authorities

33 It is in the public interest that those who commit offences be encouraged by the courts to inform on their co-offenders.[16] An offender who assists the authorities is entitled to have that assistance considered in mitigation of their sentence. This principle is recognised in statute. Section 5(2AB) of the *Sentencing Act 1991* states:

> If, in sentencing an offender, a court imposes a less severe sentence than it would otherwise have imposed because of an undertaking given by the offender to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence, the court must announce that it is doing so and cause to be noted in the records of the court the fact that the undertaking was given and its details.

34 The 'discount' or sentencing benefit to be applied in any particular case will depend on the nature of the assistance provided and the consequences for the offender in providing that assistance. The highest level of discount is reserved for what are known as 'true informers': offenders who assist authorities from within a criminal enterprise, acting to provide information, often while the offending is still on foot, and at great personal risk. Lower down the 'discount' scale are offenders who cooperate with authorities after participating in offending and being charged. If the cooperation extends to giving evidence against a co-offender or related offender, the discount to be applied will likely be significant.

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16 *Cottee v The Queen* [2010] VSCA 285, [25] (Weinberg JA, Ashley JA agreeing).

35 The 'cooperation discount' must not frustrate the principle of adequate punishment for offending. In *Mejia (a pseudonym) v The Queen*,[17] the Court discussed the challenge presented by a 'cooperation discount' in the sentencing process:[18]

> It has long been accepted that an offender who provides assistance to law enforcement authorities is entitled to seek a reduced sentence on that account. The availability of a 'cooperation discount' is of vital importance to the administration of criminal justice. It serves the public policy objective of encouraging offenders to provide information which will help bring other offenders to justice.[19]
>
> Determining the extent of the discount to which an offender is entitled is, however, a task of particular difficulty for the sentencing court. On the one hand, the discount must reflect the benefit flowing, or likely to flow, from the assistance provided, and the risk to which the offender is exposed by reason of having given the assistance. On the other hand, the discounted sentence must be — and be seen to be — an adequate punishment for the offending, having regard to its objective gravity, the offender's moral culpability and the need for deterrence of the crime in question.[20]

Legal principles relating to 'fresh' or 'new' evidence

36 In an application for leave to appeal against sentence, the Court may, in certain circumstances, permit evidence to be led of matters that have occurred after the imposition of sentence. In *Nguyen*,[21] Redlich JA summarised the principles that apply to the admission of this type of evidence. We shall reproduce those relevant to this application:[22]

> (i) the new evidence must relate to events which have occurred since the sentence was imposed;[23]
>
> (ii) the evidence must demonstrate the true significance of facts in existence at the time of the sentence;[24]

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17 [2020] VSCA 141 ('*Mejia*').

18 Ibid [1]–[2] (citations as in original).

19 *R v Su* [1997] 1 VR 1, 77 (Winneke P, Hayne JA and Southwell AJA); *R v Cartwright* (1989) 17 NSWLR 243, 252 (Hunt and Badgery-Parker JJ); *Collins (a pseudonym) v The Queen* [2018] VSCA 131, [25] (Osborn JA).

20 *R v Gallagher* (1991) 23 NSWLR 220, 232 (Gleeson CJ); *R v Johnston* (2008) 186 A Crim R 345, 350 [18] (Nettle JA); [2008] VSCA 133.

21 [2006] VSCA 184.

22 Ibid [36].

23 *R v Eliasen* (1991) 53 A Crim R 391, 394 (Crockett J, McGarvie and Phillips JJ agreeing) ('*Eliasen*'); *R v Rostom* [1996] 2 VR 97, 101 (Charles JA, Callaway JA and Vincent AJA agreeing) ('*Rostom*'); *R v WEF* [1998] 2 VR 385, 388 (Winneke P, Charles JA and Hampel AJA agreeing) ('*WEF*'); *R v Wooden* [2006] VSCA 97, [7] (Callaway JA, Chernov and Vincent JJA agreeing).

24 *R v Smith* (1987) 27 A Crim R 315; *Eliasen* (1991) 53 A Crim R 391, 394 (Crockett J, McGarvie and Phillips JJ agreeing); *Rostom* [1996] 2 VR 97, 99 (Charles JA, Callaway JA and Vincent AJA agreeing); *WEF* [1998] 2 VR 385, 389 (Winneke P, Charles JA and Hampel AJA agreeing); *R v Holland* (2002) 134 A Crim R 451, 452 [2] (Batt JA), 457 [35] (O'Bryan AJA, Eames JA agreeing); [2002] VSCA 118;

(iii) the evidence will not be admitted if it relates only to events which have occurred after sentence and which show that the sentence has turned out to be excessive;[25]

(iv) the new evidence may be admissible even though the applicant did not refer to the pre-existing state of affairs in the course of the plea;[26]

(v) upon the admission of the new evidence, it is unnecessary to determine whether the original sentence was vitiated by error,[27] or whether it was manifestly excessive; and

(vi) the question is whether, on all of the material now before the Court, any different sentence should be substituted to avoid a miscarriage of justice.[28]

37 Even where additional evidence does not qualify as fresh evidence, courts have traditionally permitted additional evidence to be led where the interests of justice have so dictated.[29] This remains a discretionary decision. As Beach and Weinberg JJA explained in *Allouch*, '[t]he Court will examine the circumstances of, and an explanation for, the non-production of that evidence, and will strive to ensure that justice is done.'[30]

The parties' contentions on ground 7

38 The applicant contends that it is clear he was prepared to testify at Mr Tuteru's trial and this fact was well known at the time of the plea. What was not known, and could not have been known at that time, was that the respondent's rejection of that offer either had been revised or was imminently to be revised. As a result, the applicant received some very modest sentencing benefit, if any at all, for his offer to give evidence; further, at the sentencing hearing, senior counsel for the applicant was constrained from submitting that the applicant ought be accorded a specific discount. In these circumstances, it was said that the perception of the value of the applicant's cooperation

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R v McLachlan (2004) 8 VR 403, 406–7 [10] (Chernov JA, Winneke P and Vincent JA agreeing); [2004] VSCA 87 ('*McLachlan*'); *R v SH* [2006] VSCA 83, [9] (Warren CJ, Charles and Chernov JJA agreeing) ('*SH*').

25 *R v Babic* [1998] 2 VR 79, 80, 82 (Brooking JA, Winneke P and Ashley AJA agreeing); *McLachlan* (2004) 8 VR 403, 406–7 [10] (Chernov JA, Winneke P and Vincent JA agreeing); [2004] VSCA 87; *WEF* [1998] 2 VR 385, 388 (Winneke P, Charles JA and Hampel AJA agreeing).

26 *Knights v The Queen* (1993) 70 A Crim R 105, 109–10 (Crockett J, Marks and Hampel JJ agreeing); *R v Maniadis* [1997] 1 Qd R 593, 597 (Davies JA and Hellman J, Fitzgerald P agreeing); [1996] QCA 242; *R v Ahmed* [2005] VSCA 279, [11] (Charles JA) ('*Ahmed*').

27 *Ahmed* [2005] VSCA 279, [18] (Charles JA); *SH* [2006] VSCA 83, [25]–[26] (Warren CJ, Charles and Chernov JJA agreeing).

28 *Eliasen* (1991) 53 A Crim R 391, 396 (Crockett J, McGarvie and Phillips JJ agreeing); *Rostom* [1996] 2 VR 97, 103 (Charles JA, Callaway JA and Vincent AJA agreeing); *SH* [2006] VSCA 83, [25] (Warren CJ, Charles and Chernov JJA agreeing). The reference to 'miscarriage of justice' is found in such cases as *McLachlan* (2004) 8 VR 403, 406 [10] (Chernov JA, Winneke P and Vincent JA agreeing); [2004] VSCA 87 and *Ahmed* [2005] VSCA 279, [11].

29 *Allouch* (2018) 276 A Crim R 1; [2018] VSCA 244.

30 Ibid 9 [47] (Beach and Weinberg JJA).

was unfairly diminished on the plea, and as a consequence received scant attention in his Honour's reasons for sentence.

39 The respondent contended that the further evidence ought not be received on this application as it is neither 'new' nor 'fresh'.[31] The respondent went on to contend that the judge took account of the applicant's cooperation with investigators and his offer to give evidence 'when called' despite not seeking 'any specific' discount for this. The respondent also submitted that Mr Tuteru 'is not a co-accused of the applicant' and that the applicant was simply 'a compellable witness in a separate proceeding'. Further, the respondent submitted that the applicant has not provided information to police which placed him in a situation of risk. The statement, the respondent contends, is of 'minimal benefit and proved to be of limited utility [to the prosecution] at the committal' and provided no more than evidence of a 'bare statement to Tuteru that he was tired'.

40 The respondent further contends that the applicant, armed with the knowledge that Mr Tuteru was being prosecuted, could have volunteered a statement to the prosecution at any stage prior to his plea, and he did not. The respondent also contended that any undertaking the applicant may give to this Court about his preparedness to testify at trial was a 'procedural impossibility' as there is no provision under the *Criminal Procedure Act 2009* ('CPA') for undertakings to be given 'anywhere but in an originating court'.

Consideration of ground 7

41 We consider that the applicant has established ground 7. As we have observed at [32] of these reasons, it is regrettable that the police did not accept the applicant's offer to assist before he was sentenced. The police did not prepare a formal statement of the evidence he was prepared to give at Mr Tuteru's committal and trial and thus no such statement was placed before the sentencing judge. As a consequence, in our view, his Honour and the applicant were deprived of the opportunity to appreciate fully a significant factor in the mix of factors that were relevant to the exercise of the sentencing discretion. We have reached these conclusions for the following reasons.

42 First, we do not accept that events after the applicant's plea were neither 'fresh' nor 'new' evidence as contended by the respondent. The relevant event after sentence was the communication by police to the applicant's solicitors of their intention to call the applicant at Mr Tuteru's committal and trial, and their wish to take a statement from him. Up until that moment, nine days after sentence, neither the applicant nor his legal team could possibly have been aware of the police's intention. As at the date of sentence, the most recently expressed police attitude to the applicant's offer was '[a]t this stage there will be no formal request for further information from Mr SINGH'. This relevant event bore directly on a fact in existence at the time of the plea hearing and sentence. The fact in existence was the offer by the applicant to cooperate with authorities by providing a statement and giving evidence against Mr Tuteru. The offer was made on 13 May 2020 and rejected six minutes later by DASS Lineham. The offer was repeated to Mr Ong on 29 October 2020. The post-sentence event constituted an

[31] In either the *Allouch* (2018) 276 A Crim R 1; [2018] VSCA 244 (new evidence) or *Nguyen* [2006] VSCA 184 (fresh evidence) sense.

effective acceptance of the applicant's pre-sentence offer to give evidence at Mr Tuteru's committal and trial.

43 Second, as a consequence of this sequence of events, the applicant was, in our view, denied the opportunity to place before the sentencing judge a complete picture of his cooperation. The applicant's counsel was reduced to contending that his client's preparedness to cooperate was a generally favourable factor in the sentencing calculus, and was precluded from contending that the applicant was entitled to a specific discount for his cooperation:

> [MR MORRISSEY:] The fifth point that he cooperated fully with the investigation is an important matter on this plea. It is not appropriate that he seek any specific discount for being prepared to, if called upon, to give evidence in the future.
>
> He would be a most — a witness of uncertain value. We say that here from the court without binding the hands of those in the future. But it may well be that there be a requirement of fairness to call him. He is prepared to cooperate. He offers himself as prepared to tell the truth when called and how that [a]ffects his future life is - - -
>
> HIS HONOUR: As it turns out, as I understand what he said is he's in a position to say more about the matters preceding the driving, than he is capable of saying about the driving itself, ironically in one sense, but - - -
>
> MR MORRISSEY: I think that's probably right.
>
> HIS HONOUR: - - - that seems to have been the way it's been put.
>
> MR MORRISSEY: Well I think — yes, Your Honour. But we — if I may say what was — Your Honour can infer here that the Crown take no issue with that this is appropriately seen as an aspect of cooperation rather than as some freestanding matter on the plea. But all that the defence can say is he does cooperate. He stands willing to do it. It's relevant to remorse. It's relevant to his rehabilitation. We don't have a restorative justice component, but he's — it's just part of doing what he can, Your Honour.
>
> So it is a matter of significance for Your Honour to weigh, *but we're not suggesting it's a specific discount and Your Honour shouldn't deal with it in that manner*.[32]

44 We shall admit the fresh evidence on this application. As we have observed, a 'cooperation discount' is a significant matter to be considered in any relevant sentencing exercise, and in our view it would have been a significant matter for the sentencing judge to consider in this unfortunate case.

45 Third, we reject the respondent's contention that, because Mr Tuteru is not a co-accused of the applicant, this fact somehow defeats the application of a cooperation discount. We have no doubt Mr Tuteru could have been tried in the same criminal proceeding, had the applicant pleaded not guilty; it is unnecessary to say more than, on the

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[32] Emphasis added.

prosecution case against Mr Tuteru, he is involved in the applicant's criminality. Further, there is nothing in s 5(2AB) or any other provision in pt 2 (Governing Principles) of the *Sentencing Act* that confines the sentencing benefit derived from an undertaking to cooperate, to co-offenders. Frequently, this Court is asked to consider sentencing benefits accorded to 'informers' who are not strictly co-accused with those upon whom they inform, but are, by dint of criminal association, in possession of confidential 'inside' criminal intelligence.

46 Fourth, we reject the respondent's submission that the applicant's cooperation is of 'minimal benefit', 'limited utility' and amounts to no more than a 'bare statement to Tuteru that he was tired'. The applicant is a witness on Mr Tuteru's indictment. We have read the Summary of Prosecution Opening, the applicant's police statement and the transcript of his cross-examination at the committal. We consider that the applicant's evidence at Mr Tuteru's trial will be relevant and meaningful. He is a central witness to relevant events.

47 Fifth, we disagree with the respondent that the applicant 'has not provided information to police in a situation which places him at risk and does not find himself in a different position to any other compellable witness'. The applicant has provided police with a statement, has already given evidence at Mr Tuteru's committal and has committed himself to giving evidence at his trial. He is currently held in protection at the MRC. The applicant was moved into a protective unit after his cell mate started calling him a 'dog', chastised him for giving evidence and physically assaulted him. In our view, the respondent's submissions on this aspect are untenable. Experience over many years informs the Court, and we suspect also the respondent, that prisoners who cooperate with prosecution authorities are generally at a significantly greater risk of harm than the ordinary prison population. We doubt that prisoners bent upon harming those they regard as 'dogs' comb through the depositions analysing the extent and quality of the evidence a prisoner witness may give, before proceeding.

48 Sixth, the respondent submitted that the applicant could have volunteered a statement and undertaking at his plea. Theoretically this is correct, but it ignores the impact of the fresh evidence, that the police/prosecution determined a few days after sentence that they *would* call the applicant, after all. This fresh evidence placed the original offer into a different light, and it would have put a volunteered undertaking and statement into a different light as well. Absent any police request for a statement or undertaking, had the applicant volunteered these matters on the plea, it would likely have been perceived by the judge as a shallow gesture, devoid of any proper basis upon which its value could be measured. The applicant put it this way in his written submissions:

> The absence of a statement and undertaking at the time of the plea (and sentence) are entirely attributable to the police and/or prosecutors of Mr Tuteru, who declined to reverse their decision until the sentence was duly passed. It cannot fairly be used to undermine the 'fresh' nature of his action in making his statement and testifying as he has (and will).

49 Seventh, the respondent submitted that in the event that this Court, upon a resentencing exercise, obtained an undertaking of preparedness to testify at trial, this would constitute a procedural impossibility as s 291 of the CPA provides the Director of Public Prosecutions with a right to appeal to this Court from a breach of an undertaking given

to the originating court. The CPA is silent on a breach of an undertaking to this Court. This does not mean, however, that this Court cannot receive such an undertaking and sanction an applicant who fails to honour that undertaking. This Court has wide powers to deal with contempts of court that interfere with the proper administration of justice, including the breach of an undertaking given to the Court. Those powers include the power to imprison a contemnor.[33] The applicant has given an undertaking to assist in the prosecution of Mr Tuteru by giving evidence at the forthcoming trial along the lines of his statement and evidence previously given at Mr Tuteru's committal.

50 Leave to appeal will be granted in respect of ground 7 and the appeal against sentence will be allowed. As a consequence, it will be necessary to resentence the appellant. It follows that it is unnecessary to consider the other grounds of appeal. It is sufficient for us to state that we regarded his Honour's comprehensive reasons for sentence as impeccable, and that none of the grounds that alleged specific error were meritorious.

Resentence

51 We agree with the sentencing judge that these are serious examples of the serious offence of culpable driving causing death, itself a species of the offence of manslaughter.[34]

52 This Court, as his Honour did, has viewed the CCTV footage of the appellant's driving in the kilometres leading up to its tragic culmination. We endorse his Honour's observation that '[i]t is chilling.' The driving is different to other serious examples of this offence where speed, or recklessness, or intoxication of some sort, or some combination of these factors, produce truly dreadful offending. We consider that, whilst different to many other examples that can be readily brought to mind, the appellant's offending in this case can also be appropriately described as truly dreadful offending. He had not slept for days; he had used ice repeatedly; he was hallucinating and knew that he was and he knew that the driving required of him involved navigating a twenty-tonne prime mover and trailer through greater metropolitan Melbourne over a round trip of about 150 kilometres. The appellant's driving recorded from Eastlink onwards was simply egregious. He veered between lanes; he drifted into the emergency lane repeatedly; he caused another motorist to accurately predict that he would kill. And he did.

53 In resentencing the appellant, we take into account all factors that were before the sentencing judge, including the principle of totality. We agree with the sentencing judge, essentially for the same reasons, that there was no causal connexion between the appellant's mental state and the offending. Further, even if such a connexion were made out, it would make little, if any, difference to the ultimate sentence, because of the nature of the offence, which involved both gross negligence and driving under the influence of drugs. We agree that *Verdins*[35] principles one to four are not engaged, but that principle five is engaged as we consider the sentence we impose will weigh more heavily on the appellant than it would on a prisoner without his mental health issues.

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33 *Supreme Court (General Civil Procedure) Rules 2015*, r 75.11.

34 *R v O'Connor* [1999] VSCA 55, [19] (Winneke P, Brooking and Phillips JJA agreeing).

35 (2007) 16 VR 269, 276 [32] (Maxwell P, Buchanan and Vincent JJA); [2007] VSCA 102.

54 We accept the factors in mitigation that were accepted by his Honour — instant repentance, early plea of guilty indicative of remorse and carrying a high utilitarian value, cooperation with the investigation, and some guarded rehabilitation prospects.

55 It will be recalled that the sentencing judge accepted as a mitigating factor, albeit one of limited practical value, that the appellant offered to give evidence as to relevant events. As we have explained, the belated acceptance of that offer has placed it into a different mitigatory category carrying with it significantly more practical value and thus weight, than at the time of sentence.

56 In evaluating this factor, as we have said, the appellant has given an undertaking to this Court that he will give evidence in the forthcoming trial of Mr Tuteru, along the lines set out in his statement to police and the evidence he previously gave at Mr Tuteru's committal. Assuming the appellant adheres to the undertaking, we repeat that we consider the assistance he has provided as relevant and meaningful — it cannot be dismissed as trivial. So much is apparent from the Summary of Prosecution Opening filed in Mr Tuteru's trial, the appellant's statement itself and the committal transcript of the appellant's cross-examination.

57 We must also take account of the risk to which the appellant has exposed himself by taking this course. For reasons we have explained, we are of the view that it is not insignificant.

58 We also take into account that the appellant remains the principal offender and that he is proposing to give evidence against an alleged accomplice. We must bear steadily in mind that any 'cooperation discount' must not frustrate the principle of adequate punishment for the offender.[36]

59 Adequate punishment for the driving offending requires us also to keep steadily in mind the moral culpability of the appellant, the appalling consequences of that offending to the victims and their loved ones, the need for deterrence, both specific and general, and the need for denunciation. We also must consider the maximum penalties for the offending conduct,[37] and the standard sentence of eight years for the culpable driving charges.[38]

60 Insofar as the drug-related offending is concerned, we agree with his Honour's sentencing remarks that the appellant's conduct in that regard 'was relatively persistent but not at the serious end of offending of that kind.'[39] The summary offences (dealing with property suspected of being the proceeds of crime and possession of ammunition) are consumed by the gravity and consequences of the more serious offending.

61 Balancing these competing factors, we shall resentence the appellant as follows:

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36 *Mejia* [2020] VSCA 141.
37 Set out in the table at [3] of these reasons.
38 *Sentencing Act*, s 5(2)(ab).
39 Sentencing Reasons, [112].

Charge	Offence	Sentence	Cumulation
Indictment L10997780			
1	Culpable driving causing death	10 years	Base
2	Culpable driving causing death	10 years	2 years, 6 months
3	Culpable driving causing death	10 years	2 years, 6 months
4	Culpable driving causing death	10 years	2 years, 6 months
5	Trafficking in a drug of dependence (Cannabis L)	6 months	3 months
6	Trafficking in a drug of dependence (Methylamphetamine)	12 months	9 months
7	Trafficking in a drug of dependence (1,4-Butanediol)	14 days	—
8	Possession of a drug of dependence (Diazepam)	Convicted and discharged	—
Related Summary Offences			
9	Dealing with property suspected of being the proceeds of crime	Convicted and discharged	—
10	Possession of cartridge ammunition	Convicted and discharged	—
Total Effective Sentence:		18 years, 6 months' imprisonment	
Non-Parole Period:		14 years, 6 months	

62 The sentence that we have imposed is less severe than it otherwise would have been as a consequence of the undertaking to cooperate given by the appellant to this Court. The fact and details of this undertaking will be noted in the records of the Court.[40]

63 We will declare that, but for the appellant's pleas of guilty, he would have been sentenced to a total effective sentence of 22 years' imprisonment with a non-parole period of 18 years and 6 months.[41]

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[40] *Sentencing Act*, s 5(2AB).
[41] *Sentencing Act*, s 6AAA.