SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2022 0021

DIRECTOR OF PUBLIC PROSECUTIONS Appellant

v

JOSHUA LOMBARDO Respondent

JUDGES:	McLEISH, NIALL and KENNEDY JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	9 September 2022
DATE OF JUDGMENT:	21 September 2022
MEDIUM NEUTRAL CITATION:	[2022] VSCA 204
JUDGMENT APPEALED FROM:	[2022] VCC 93 (Judge Cahill)

CRIMINAL LAW – Appeal – Sentence – Crown appeal – Category 2 offence subject to s 5(2H) of *Sentencing Act 1991* – Dangerous driving causing death – Momentary lapse in judgment – Respondent turned onto highway while side window fogged and light of oncoming vehicle visible – Respondent youthful and remorseful with no prior convictions and excellent prospects of rehabilitation – Respondent suffering symptoms of anxiety and post-traumatic stress – Respondent reminded of offending by memorial at collision site – Judge found exceptions to s 5(2H) existed, allowing non-custodial sentence – Community correction order with unpaid community work condition – Whether open to find respondent had 'impaired mental functioning' within s 5(2H)(c)(ii) – Symptoms falling short of diagnosed illness at time of sentence inadequate, even if likely to deteriorate in custody – Whether open to find 'substantial and compelling circumstances that are exceptional and rare' within s 5(2H)(e) – Circumstances must be both powerful and wholly outside 'run of the mill' factors typical of relevant offending – Evaluative assessment for sentencing judge – Respondent's circumstances, including memorial at collision site, not 'exceptional and rare' for driving offending – Findings not open.

CRIMINAL LAW – Appeal – Sentence – Crown appeal – Residual discretion – Whether Court should decline to interfere with sentence despite sentencing error – Reasons articulate principles for governance and guidance in future cases – Respondent completed seven months of community correction order, and most of prescribed work hours – Appeal filed on last day of appeal period – Rehabilitative progress would be undone by imposing term of imprisonment – Appeal dismissed.

WORDS AND PHRASES – 'impaired mental functioning' – 'substantial and compelling' – 'exceptional and rare'.

Sentencing Act 1991 ss 5(2H), 5(2HC), 5(2I), 10A; *Mental Health Act 2014* s 4(1).

Georgiou v The Queen [2022] VSCA 172, *Fariah v The Queen* [2021] VSCA 213, *Farmer v The Queen* [2020] VSCA 140, *Director of Public Prosecutions v Hudgson* [2016] VSCA 254, *Director of Public Prosecutions v Karazisis* (2010) 31 VR 634, applied; *Buckley v The Queen* [2022] VSCA 138, *Director of Public Prosecutions v Bowen* (2021) 65 VR 385, explained.

Counsel

Appellant:	Mr CB Boyce KC, with Ms B Goding
Respondent:	Mr TR Marsh

Solicitors

Appellant:	Ms A Hogan, Solicitor for Public Prosecutions
Respondent:	Farrelly Legal

McLEISH JA
NIALL JA
KENNEDY JA:

1 This appeal raises difficult questions about sentencing for the offence of dangerous driving causing death. In particular, it concerns the meaning and application of provisions of the *Sentencing Act 1991* ('the Act') governing sentencing for 'category 2 offences', of which dangerous driving causing death is one.[1] Section 5(2H) of the Act provides that a custodial sentence (other than a custodial sentence imposed in addition to a community correction order) must be imposed for a category 2 offence unless an exception applies.

Factual background

2 At the time of the offending, the respondent, an agricultural contractor and tractor driver, was 22 years old. He held a probationary driver's licence.

3 Just after 7:00 am on 30 March 2020, the respondent set off in his utility vehicle from his partner's family's rural property in Bushfield to travel to his place of work in Cobden. The sun had not yet risen, and it was dark. The windows were fogged and visibility was very poor. The respondent applied the demisters and windscreen wipers, as he proceeded along the driveway (or track) towards where it met the Hopkins Highway. This improved visibility through the windscreen, but not the side windows.

4 The respondent continued along the driveway, and slowed as he approached the end. While he was still about 10 metres from the entrance to the property, he looked to his right and to his left. He saw an oncoming light to his right. He thought about winding down the driver's side window to see the oncoming vehicle better, but did not do so. He thought, incorrectly, that it was far enough away that he could safely turn right.

5 The oncoming vehicle was a motorcycle. The rider was Aaron Flack, a 46 year old father of three. He was fully licensed and travelling within the speed limit of 100 kilometres per hour.

6 The respondent did not stop at the intersection, and turned right into Mr Flack's path. Mr Flack braked, and was thrown from the motorcycle. Both the motorcycle and Mr Flack slid along the road before colliding with the driver's side of the respondent's vehicle.

7 The respondent brought his vehicle to a stop on the shoulder of the highway. At 7:09 am, he rang emergency services. He said:

> I pulled out and my windows were fogged up and a motorbike has – had its lights on real dim and it's just come and hit my tray … No, no. It's all my fault.

[1] The Act s 3(1) (definition (eb) of 'category 2 offence').

8 The respondent attempted to administer CPR to Mr Flack. Paramedics then arrived on the scene. They also failed to revive Mr Flack, and pronounced him dead at the scene. The respondent was taken to the Warrnambool police station. A blood sample was taken and was found not to contain ethanol, common drugs or poisons.

9 Police interviewed the respondent a little later that morning. He told them that he had seen the oncoming light and 'just made the decision to go', because the light 'looked like it was so far away … it looked far enough away that it was safe'.

10 On 21 January 2022, the respondent pleaded guilty before a judge of the County Court to a charge of dangerous driving causing death.

11 On 9 February 2022, the judge sentenced the respondent on the basis that two of the exceptions in s 5(2H) applied. He held that:

(a) there were 'substantial and compelling circumstances that are exceptional and rare and that justify not imposing a sentence of imprisonment';[2] and

(b) the respondent had proved that he had 'impaired mental functioning' that would result in him being subject to 'substantially and materially greater than the ordinary burden or risks of imprisonment'.[3]

12 The judge sentenced the respondent to a community correction order for three years, with a condition requiring 250 hours of unpaid community work, and ordered that his driver's licence be cancelled and he be disqualified from driving for 18 months.[4]

13 The Director of Public Prosecutions appeals the sentence on three grounds.[5] By the first and second grounds, the Director contends that the judge erred in finding that the above exceptions applied on the facts of the case. By the third ground, the Director contends that, even if she fails to establish either of the first two grounds, the sentence imposed was manifestly inadequate.

14 For the reasons that follow, although the Director succeeds on the first two grounds, the appeal will be dismissed.

Statutory framework

15 Section 5(2H) of the Act relevantly provides:

> In sentencing an offender for a category 2 offence, a court must make an order under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a community correction order in accordance with section 44) unless—
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> …

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2 Ibid s 5(2H)(e).
3 Ibid s 5(2H)(c)(ii).
4 *DPP v Lombardo* [2022] VCC 93 ('Sentencing Remarks').
5 *Criminal Procedure Act 2009* s 287.

(c) the offender proves on the balance of probabilities that—

…

(ii) the offender has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment; or

…

(e) there are substantial and compelling circumstances that are exceptional and rare and that justify not making an order under Division 2 of Part 3 (that is not a sentence of imprisonment imposed in addition to making a community correction order in accordance with section 44).

16 Division 2 of pt 3 concerns custodial orders, which relevantly for present purposes means terms of imprisonment.

17 For the purposes of the exception in s 5(2H)(c)(ii), the Act defines impaired mental functioning to mean any of five types of conditions.[6] The type of condition that is presently relevant is 'mental illness within the meaning of the *Mental Health Act 2014*',[7] which is a 'medical condition that is characterised by a significant disturbance of thought, mood, perception or memory'.[8]

18 For the purposes of the exception in s 5(2H)(e), s 5(2HC) of the Act provides:

> In determining whether there are substantial and compelling circumstances under subsection (2H)(e), the court—
>
> (a) must regard general deterrence and denunciation of the offender's conduct as having greater importance than the other purposes set out in section 5(1); and
>
> (b) must give less weight to the personal circumstances of the offender than to other matters such as the nature and gravity of the offence; and
>
> (c) must not have regard to—
>
> (i) the offender's previous good character (other than an absence of previous convictions or findings of guilt); or
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> (ii) an early guilty plea; or
>
> (iii) prospects of rehabilitation; or
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> (iv) parity with other sentences.

19 Section 5(2I) also provides that:

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6 Ibid s 5(2HB), 10A(1).

7 Ibid s 10A(1) (definition (a) of 'impaired mental functioning').

8 Ibid; *Mental Health Act 2014* s 4(1).

> In determining whether there are substantial and compelling circumstances under subsection (2H)(e), the court must have regard to—
>
> (a) the Parliament's intention that in sentencing an offender for a category 2 offence only an order under Division 2 of Part 3 (that is not a sentence of imprisonment imposed in addition to making a community correction order in accordance with section 44) should ordinarily be made; and
>
> (b) whether the cumulative impact of the circumstances of the case would justify a departure from such a sentence.

20 These provisions qualify the sentencing principles of proportionality and parsimony, which ordinarily require that a court not impose a sentence more severe than is necessary to achieve the purposes for which the sentence is imposed, and not impose a sentence of confinement unless those purposes cannot be achieved without doing so.[9]

Sentencing remarks

21 The judge set out the circumstances of the offending. He confirmed that the offence was serious[10] but assessed the respondent's moral culpability as at 'the low end of the range' for the offence.[11] He characterised the offending as involving a 'momentary lapse in judgment' — that is, commencing the right hand turn without first winding down the driver's side window to check the distance to the oncoming vehicle.

22 The judge referred to the victim impact statements of Mr Flack's widow, children and parents, which described the terrible consequences of the offending.[12]

23 The judge then described the respondent's personal circumstances. He noted his relative youth, good work record, and his lack of any criminal record.[13] The judge referred to laudatory character references from the respondent's family, friends and employer, ultimately characterising his family and work life as 'exemplary'.[14]

24 The judge accepted that the respondent was immediately and genuinely remorseful.[15] He had stopped to administer aid to Mr Flack, and immediately admitted and accepted responsibility for his offending.[16] He was deeply anguished by the accident and was constantly reminded of the accident and its consequences by a memorial at the accident scene.[17]

25 The judge considered that the respondent was very unlikely to reoffend and characterised his prospects of rehabilitation as excellent.[18]

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9 The Act s 5(3)–(4). See further, however, [97] below.
10 Sentencing Remarks [55], [79].
11 Ibid [61]–[63].
12 Ibid [21]–[22], [64].
13 Ibid [23]–[26], [65].
14 Ibid [26]–[28], [65].
15 Ibid [66].
16 Ibid [66].
17 Ibid [28], [66].
18 Ibid [69].

26 He attributed substantial utilitarian and practical value to the respondent's guilty plea, particularly given the ongoing pandemic-related backlog in the criminal justice system.[19]

27 Next, the judge referred to a report prepared by Ms Carla Ferrari, a forensic psychologist who assessed the respondent. Ms Ferrari said that the respondent reported a history of anxiety that had been significantly exacerbated by the offence; he lay awake at night ruminating about what had happened. He reported infrequent and minimal social consumption of alcohol and no past use of illicit drugs. In Ms Ferrari's view, the respondent had no clinical depressive symptoms or any personality disorder but was experiencing:

(a) some moderate but not debilitating symptoms of anxiety, falling short of a diagnosis of generalised anxiety disorder, and

(b) a mild elevation of post-traumatic stress, falling short of a diagnosis of post-traumatic stress disorder.

28 Ms Ferrari considered that the respondent's symptoms would be worse if not for the maintenance of his usual routine, and his strong social, vocational, and familial supports. In a custodial setting, without these protective factors, there was a high probability that his 'symptom profile' would be 'fully realized'. She stated:

> In individuals with symptoms of anxiety, there is potential for significant mood fluctuation and the volatile nature of the prison environment can further exacerbate his symptom profile and risk of decompensation. There is no doubt that the unpredictable, volatile and tense prison environment is going to cause exacerbation of Mr Lombardo's hyperarousal and anxiety symptoms.

29 On the basis of Ms Ferrari's report, the judge found that the respondent's symptoms were likely to 'deteriorate severely' in prison and also make imprisonment more burdensome for him than it would otherwise be, enlivening the fifth and sixth principles in *R v Verdins.*[20]

30 Finally, the judge addressed s 5(2H) of the Act. He set out the statutory framework described above,[21] and concluded that both the 'substantial and compelling circumstances' exception[22] and the 'impaired mental functioning' exception[23] were engaged. It will be necessary to return to the judge's findings in this respect.

31 Accordingly, the judge considered that it was open to him to impose a non-custodial sentence. The judge considered that a community correction order could achieve all the applicable sentencing purposes in the respondent's case and so imposed the sentence set out above.

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19 Ibid [67].
20 (2007) 16 VR 269, 276 [32] (Maxwell P, Buchanan and Vincent JJA) ('*Verdins*'); ibid [68], [77].
21 Sentencing Remarks [58]–[60], [70]–[73].
22 The Act s 5(2H)(e).
23 Ibid s 5(2H)(c)(ii).

Dangerous driving causing death

32 In order to understand the issues that arise in this appeal, it is first necessary to identify the features of the offence of dangerous driving causing death, as recently confirmed by this Court in *Georgiou v The Queen*.[24]

33 Section 319(1) of the *Crimes Act 1958* provides that a person is guilty of dangerous driving causing death if the person drives a motor vehicle at a speed or in a manner that is dangerous to the public having regard to all the circumstances of the case and the dangerous driving causes the death of a person.

34 The test is objective and involves a serious breach of the proper conduct of a motor vehicle upon the road, that is 'so serious as to be in reality and not speculatively, potentially dangerous to others'.[25] The objective question is whether the manner of driving has the necessary quality of being dangerous to the public.[26]

35 As the Court in *Georgiou* pointed out, driving is not free from hazard and the fact that an ordinary risk of driving comes to pass does not mean that the driving must have been dangerous.[27] For driving to be dangerous, 'there must be some feature which is identified not as a want of care but which subjects the public to some risk over and above that ordinarily associated with the driving of a motor vehicle, including driving by persons who may, on occasions, drive with less than due care and attention.'[28]

36 After making these points, the Court in *Georgiou* went on to explain:

> Although dangerous driving may, and often will, be associated with a want of care, negligence is not an element of the offence.[29] As was said in *King*, particular driving may be undertaken with care and skill but remain dangerous for the purpose of s 319.[30] It follows that the fact that the driving was associated with a degree of carelessness on the part of the driver or that the collision could have been avoided by the exercise of greater care does not suffice to make out a charge of dangerous driving.
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> A further illustration of the distinction between negligence and dangerous driving can be seen in the judgment of McLure JA in *McPherson*. In that case, McLure JA described as a 'fundamental misunderstanding of the law', a prosecution submission that a driver who contravened the give way road rule resulting in a collision with a vehicle that had right of way, must be driving in a manner that was dangerous to the public.[31] Her Honour was not suggesting that failing to give way could not constitute dangerous driving, self-evidently it may. Rather, it is necessary to ask how the driving affected the risk of harm to

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24 [2022] VSCA 172 ('*Georgiou*').

25 *McBride v The Queen* (1966) 115 CLR 44, 50 (Barwick CJ).

26 *McPherson v Lucas* (2008) 181 A Crim R 587, 594 [31] (McLure JA, Wheeler JA agreeing at 588 [1], Miller JA agreeing at 595 [37]); [2008] WASCA 56 ('*McPherson*').

27 *Georgiou* [2022] VSCA 172 [16] (Priest, Kyrou and Niall JJA).

28 *Jiminez v The Queen* (1992) 173 CLR 572, 579 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ) (citations omitted); *King v The Queen* (2012) 245 CLR 588, 607–8 [46] (French CJ, Crennan and Kiefel JJ) ('*King*').

29 *King* (2012) 245 CLR 588, 615–6 [68] (Heydon J).

30 Ibid 605 [38] (French CJ, Crennan and Kiefel JJ).

31 (2008) 181 A Crim R 587, 592 [20]–[21].

> road users and members of the public when compared with the proper conduct of a motor vehicle.[32]

37 The respondent by his plea of guilty accepted that he had not merely been careless in entering the highway after seeing the light approaching from his right, but that he had by his driving subjected the public to some risk over and above that ordinarily associated with the driving of a motor vehicle, including by persons who sometimes drive with less than due care and attention.

Ground 1 — impaired mental functioning

38 The judge held that the impaired mental functioning exception was engaged because the respondent's mild symptoms of anxiety and post-traumatic stress would 'likely be severely exacerbated' if he was imprisoned.[33]

Submissions

39 The Director submitted that it was not reasonably open for the judge to have found that the impaired mental functioning exception was engaged.

40 First, the judge was said to have erred in finding that the respondent suffered from impaired mental functioning at all. As mentioned, the Act relevantly defines 'impaired mental functioning' as mental illness, being a medical condition 'characterised by a significant disturbance of thought, mood, perception or memory'.[34] This was said to be narrower than the concept of impaired mental functioning which engages the *Verdins* principles, in that it required a diagnosed illness or condition. Further, the use of the present tense 'has' in s 5(2H)(c)(ii) showed that the mental illness in question had to exist at the time of sentence. Ms Ferrari's evidence did not satisfy the narrower statutory definition because she only identified mild to moderate symptoms that, at the time of sentence, fell short of a diagnosed mental illness. It was irrelevant that Ms Ferrari's evidence suggested that a mental illness might develop later, should the respondent be imprisoned.

41 Secondly, the judge was also said to have erred by finding that impaired mental functioning would result in the respondent being subject to 'substantially and materially greater than the ordinary burden or risks of imprisonment'. This was said to set a higher hurdle than the fifth and sixth *Verdins* principles.[35] The judge erred in finding this hurdle was met because his finding that the respondent's symptoms would likely be 'severely exacerbated' if he were imprisoned was unsupported. Ms Ferrari's evidence suggested that the respondent's symptoms would be exacerbated, but not severely so.

42 In written submissions, the respondent contended that the judge's finding that the impaired mental functioning exception was engaged was essentially *obiter*. It was submitted that the primary relevance of the respondent's mental condition was as one

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32 *Georgiou* [2022] VSCA 172 [19]–[20] (Priest, Kyrou and Niall JJA).
33 Sentencing Remarks [77]–[78].
34 See [17] above.
35 *Peers v The Queen* (2021) 97 MVR 379, 389–90 [52] (Niall and Sifris JJA); [2021] VSCA 264.

of the circumstances which, in combination, engaged the substantial and compelling circumstances exception.

43 In oral submissions, however, counsel for the respondent accepted that the judge's finding that the impaired mental functioning exception applied also operated independently to justify a non-custodial sentence. Counsel submitted that this finding was reasonably open to the judge. He submitted that the judge recognised that the exception operates prospectively, focussing on the offender's mental functioning in custody rather than at the time of sentence. It was therefore irrelevant that the respondent's anxiety and post-traumatic stress symptoms fell short of a diagnostic level at the time of sentence. What was relevant was the judge's recognition that these symptoms would worsen in custody.

Analysis

44 In our view, this ground must be upheld.

45 The judge expressly found that the mental impairment exception was satisfied. We can see no reason why he would have said so other than to confirm, as an independent ground, that the requirement to impose a term of imprisonment under s 5(2H) did not apply.

46 Section 5(2H)(c)(ii) by its terms requires the offender to prove that he or she 'has impaired mental functioning'. By virtue of the relevant part of the definition of impaired mental functioning, that requires proof that the offender has a mental illness.[36] We accept that the statutory exception looks to the future, in so far as it requires proof of the likely effect of imprisonment on the offender. However, in our view, it is not possible to construe the provision as applying where there is no extant mental illness established at the time of sentence, and only the prospect (however likely) that the offender will develop a diagnosable mental illness once imprisoned. That is because of the use of the word 'has' in sub-para (ii), which can be compared with sub-para (i) which expressly looks at the time of the offence.

47 In the present case, the evidence was that the respondent's symptoms did not reach clinical significance, but he had moderate elevations on the generalised anxiety scale and mild elevations on the post-traumatic stress scale. Ms Ferrari explicitly stated that the respondent 'has developed symptoms of worsening anxiety which are currently below the diagnostic threshold' for generalised anxiety disorder, and that he 'does not meet diagnostic criteria' for post-traumatic stress disorder.

48 In light of those findings, in our view it was not open to be satisfied, on the balance of probabilities, that the respondent had a mental illness at the time of sentencing. The mental impairment exception was therefore incapable of being established.

49 In the circumstances it is not necessary, and would be artificial, to consider the Director's second argument, concerning whether the respondent's putative mental

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[36] See [17] above.

illness would result in him being subject to 'substantially and materially greater' than the ordinary burden or risks of imprisonment.

50 The Director therefore succeeds, under ground 1, in denying the applicability of this exception to the requirement of imprisonment in s 5(2H).

Ground 2 — substantial and compelling circumstances

51 The judge accepted that the substantial and compelling circumstances exception required that a 'stringent' standard be met.[37] He considered that it was met by a combination of factors, none of which were individually unusual but which were collectively 'exceptional and rare'.[38] These factors were:

(a) the respondent's impaired mental functioning;

(b) the short duration of the respondent's dangerous conduct;

(c) the absence of any aggravating features in the respondent's offending;

(d) the respondent's immediate acceptance of responsibility;

(e) the respondent's lack of any prior convictions;

(f) the respondent's stable work and family supports;

(g) the respondent's lack of any alcohol or substance abuse; and

(h) the presence of ongoing reminders of the fatality, in the form of the memorial at the site of the collision.

Submissions

52 The Director submitted that it was not reasonably open for the judge to have found that the substantial and compelling circumstances exception applied.

53 It was said that the combination of factors identified, even taken at their highest, fell short of the threshold required. They were not 'substantial and compelling', let alone 'exceptional and rare'. To the contrary, they were all factors often present in driving offences of this kind. Such offending routinely consists of brief lapses unaccompanied by aggravating factors, and offenders are often young, highly remorseful and lacking in prior convictions. Young offenders like the respondent who suffer from symptoms of anxiety and will be vulnerable in custody are 'often seen'.[39]

54 Further, the Director submitted that at least one of the constituent factors was impermissibly taken into account. It was said the respondent's 'stable work and family

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37 Sentencing Remarks [70], citing *Farmer v The Queen* [2020] VSCA 140 [52] (Maxwell P, Kaye and Niall JJA) ('*Farmer*').

38 Sentencing Remarks [74]–[75].

39 Reference was made to *Farmer* [2020] VSCA 140 [54] (Maxwell P, Kaye and Niall JJA).

support' could only be relevant to his prospects of rehabilitation, which the judge was not entitled to consider.[40]

55 The respondent accepted that none of the factors identified were individually capable of meeting the threshold, and that most of the features were common in offending of this kind. But, it was said that the offending was at the very lowest end of the range for the offence of dangerous driving causing death, and at least one of the factors was uncommon — the presence of a memorial to the deceased at the end of the respondent's partner's driveway. This (along with the location itself) was an 'indelible reminder of the ongoing impact of the offending', which the respondent could not avoid and which profoundly burdened every visit to his partner's home. This, in combination with the other factors identified, was said to constitute a set of circumstances which it was well open to the primary judge to consider to be substantial and compelling, and exceptional and rare.

56 The respondent contended that the judge did not have regard to factors he was not entitled to consider. The relevance of the respondent's 'stable work and family support' was not confined to rehabilitation. It was also relevant to specific deterrence, protection of the community, and more generally to the individual consideration of the offender's circumstances. As a result, it was not impermissible for the judge to consider that circumstance, at least for sentencing purposes other than rehabilitation.

Section 5(2H)(e) — Legislative history

57 A 'substantial and compelling circumstances' exception to a mandatory sentencing provision first entered the Act on 1 July 2013 when the *Crimes Amendment (Gross Violence Offences) Act 2013* introduced ss 10 and 10A. These provisions required that a custodial sentence be imposed for certain offences,[41] unless a court found that a special reason existed, including because there were 'substantial and compelling circumstances' justifying such a finding.[42] In the relevant second reading speech, it was explained that this 'substantial and compelling circumstances' exception was intended to accommodate cases involving '*rare and unforeseen* circumstances where it would be clearly outside the intention of the Parliament' that a custodial sentence be imposed.[43]

58 In part by reference to this second reading speech, this Court in *Director of Public Prosecutions v Hudgson* concluded that the 'substantial and compelling circumstances' exception in s 10A required that the circumstances identified be atypical.[44] The exception, the Court stated, requires 'powerful circumstances of a kind wholly outside … "run of the mill" factors typically present' in offending of the relevant kind.[45]

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40 The Act s 5(2HC)(c)(iii).

41 Causing serious injury intentionally in circumstances of gross violence, and causing serious injury intentionally in circumstances of gross violence.

42 The Act s 10A(2)(e).

43 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, 27–8 (Robert Clark, Attorney-General) (emphasis added).

44 [2016] VSCA 254 [112] (Weinberg, Whelan and Priest JJA) ('*Hudgson*'); see also *Farmer* [2020] VSCA 140 [47]–[48].

45 *Hudgson* [2016] VSCA 254 [112] (Weinberg, Whelan and Priest JJA).

59 On 20 March 2017, mandatory sentencing provisions in respect of category 2 offences were introduced into the Act. The *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* defined a set of 'category 2 offences', which did not at first include dangerous driving causing death. It also introduced s 5(2H). In its original form, the s 5(2H)(e) exception was substantially the same as the s 10A exception: it required 'substantial and compelling circumstances that justify' not imposing a term of imprisonment.

60 On 28 October 2018, dangerous driving causing death was made a category 2 offence. The *Justice Legislation Miscellaneous Amendment Act 2018* also amended the 'substantial and compelling circumstances' exceptions in 5(2H)(e) and s 10A(2)(e). The words 'that are exceptional and rare' were introduced after the words 'substantial and compelling circumstances'.

61 The narrowing phrase 'that are exceptional and rare' was introduced because of a perception, articulated in the relevant second reading speech, that the courts were finding that 'substantial and compelling' circumstances existed not merely in rare or atypical circumstances, but in 'conditions or situations that afflict a large number of Victorians'.[46] The introduction of the 'exceptional and rare' requirement can therefore be seen to reflect parliamentary dissatisfaction with the stringency of the existing judicial application of the provision.

62 However, even before the enactment of the 'exceptional and rare' requirement,[47] the courts already regarded the imposition of a non-custodial sentence for the offence of dangerous driving causing death as 'exceptional'.[48] To that extent, therefore, when the 'exceptional and rare' requirement was introduced for category 2 offences generally, Parliament was adopting language already used in the case law in relation to dangerous driving causing death.[49]

63 More generally, the introduction of the 'exceptional and rare' requirement made explicit this Court's approach to the existing 'substantial and compelling circumstances' requirement — namely, that the circumstances must not only be powerful, but also 'wholly outside' the 'run of the mill' factors seen in offending of the relevant kind.[50]

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46 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 June 2018, 2145 (Martin Pakula, Attorney-General).

47 The 'exceptional and rare' requirement was introduced by the *Justice Legislation Miscellaneous Amendment Act* 2018 ss 76(6), 79(5).

48 *DPP v Neethling* (2009) 22 VR 466, 472 [29] (Maxwell P, Vincent JA and Hargrave AJA) ('*Neethling*'); *R v Lu* (2022) 100 MVR 144, 152 [33] (Fox J) ('*Lu*'); [2022] VSC 258.

49 We note, however, that sentencing statistics suggest that between 2016 and 2021 a community correction order was imposed in some 40 per cent of cases of dangerous driving causing death, suggesting that a significant proportion of cases was considered 'exceptional': Sentencing Advisory Council, 'Dangerous Driving Causing Death: *Crimes Act 1958* (Vic) s 319(1), Higher Courts, 1 July 2016 to 30 June 2021', *SACStat: Higher Courts* (Online Database) <https://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/HC_6231_319_1.html >.

50 *Farmer* [2020] VSCA 140 [47]–[48] (Maxwell P, Kaye and Niall JJA).

Section 5(2H)(e) — meaning

64 The Director emphasised authority in this Court to the effect that the 'substantial and compelling circumstances which are exceptional and rare' formulation is 'almost impossible to satisfy'.[51] Observations of that kind, however, must not be treated as a substitute for the statutory language.[52] At best they describe the apparent operation of the provision, but without supplying a guide as to its meaning. That is especially so, given that the subsection applies to multiple offences and the degree of difficulty in satisfying the exception may vary according to which offence is under consideration. For example, both culpable driving causing death and dangerous driving causing death are category 2 offences, but the former offence is, by definition, more serious than the latter.[53]

65 When we turn to the statutory language, it is apparent that the inquiry under s 5(2H)(e) has two key steps.

66 First, the court must identify whether there are 'substantial and compelling circumstances'. In that context, 'substantial and compelling' means that the circumstances are weighty and forceful or powerful.[54] The issue is whether the circumstances are substantial and compelling so as to justify not imposing a custodial sentence. That is the criterion by which the substance and compulsive force of the circumstances are to be assessed.

67 The second critical step, if the circumstances are substantial and compelling in the sense described above, asks whether they are also 'exceptional and rare'. In our view, this is to be regarded as a composite phrase imposing a single test, rather than as two discrete tests. That is because the meanings of the two words overlap; in particular, 'exceptional' means 'out of the ordinary course, unusual, special', which includes that which is 'rare'.[55] In that situation, a separate test asking whether something that is 'exceptional' is also 'rare' would be redundant. Instead, the two words operate together and each influences the meaning of the overall phrase.[56]

68 The 'exceptional and rare' language is not merely a description of the empirical outcome of applying the law of sentencing to a collection of offences. It is a threshold which must be met before it is open to impose a non-custodial sentence. The question then is the meaning of the language used.

69 In construing the phrase 'exceptional and rare', it is relevant that, in the context of deciding whether circumstances are 'substantial and compelling', Parliament has stated

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51 *DPP v Bowen* (2021) 65 VR 385, 388 [11] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA); see also *Buckley* [2022] VSCA 138 [3]–[4] (Maxwell P and T Forrest JA) ('*Buckley*').

52 See also *Farmer* [2020] VSCA 140 [51] (Maxwell P, Kaye and Niall JJA): 'a very high hurdle that will not often be surmounted'.

53 The Act s 3(1) (definitions (ea) and (eb) of 'category 2 offence').

54 *Farmer* [2020] VSCA 140 [47]–[50] (Maxwell P, Kaye and Niall JJA); *Hudgson* [2016] VSCA 254 [112] (Weinberg, Whelan and Priest JJA).

55 *DPP v Tong* (2000) 117 A Crim R 169, 174 [19] (McDonald J); [2000] VSC 451. Similarly, 'rare' may mean something 'unusual, uncommon, exceptional': *Oxford English Dictionary* (online at 15 September 2022) 'rare' (adj1, def 4a).

56 *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645, 660 (Dixon J).

its intention that imprisonment should 'ordinarily' be imposed for a category 2 offence: s 5(2I)(a). This statement of intention is expressed in moderate terms, suggesting that the 'exceptional and rare' requirement has a meaning closer to 'out of the ordinary'.

70 On the other hand, the expression 'out of the ordinary', while capable of describing something that is 'exceptional', as well as something that is 'rare', does not fully capture the force of the phrase 'exceptional and rare'. Both the expression 'exceptional and rare' and the legislative object that imprisonment should 'ordinarily' be imposed are, however, consistent with earlier case law, such as *Hudgson,* which described provisions such as the present as requiring circumstances of a kind 'wholly outside "run of the mill" factors typical of' the relevant kind of offending.

71 Accordingly, in our view that language properly captures the meaning of the phrase 'exceptional and rare' in this context.[57] It refers to circumstances that are wholly outside the ordinary factors typical of the relevant offence, in this case dangerous driving causing death.

72 Applying the two steps of the mandated analysis calls for the sentencing judge to make an 'evaluative judgment' once the underlying facts have been established, and unaffected by notions of burden of proof.[58] It is possible that a set of circumstances may engage the exception in combination, even where the constituent circumstances are mainly, or even wholly, 'relatively common'.[59]

73 For example:

(a) In *Fariah,* this Court considered that in combination, the applicant's 'appalling childhood experiences' of 'war and conflict' in Somalia, along with his youth, remorse, lack of criminal history, and risk of deportation, enlivened the exception.

(b) In *Farmer*, this Court considered that the applicant's youth, remorse and co-operation with authorities, lack of criminal history, and vulnerability in custody, together with the wide-ranging effects of a medical condition (alopecia) which had given rise to diagnosed mental disorders, and contributed to the offending itself, enlivened the exception and it had not been open to find otherwise.[60]

74 By contrast:

(a) In *Al-Anwiya,*[61] this Court considered it was open to find that the exception was not enlivened by a combination of factors including the low objective gravity of the offending, the applicant's low moral culpability, youth, early guilty plea, remorse, lack of past criminal history, and a debilitating mental illness with its origins in the applicant's upbringing in a war-torn country.[62]

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57 *Hudgson* [2016] VSCA 254 [112] (Weinberg, Whelan and Priest JJA).
58 *Fariah v The Queen* [2021] VSCA 213 [24]–[25] (Priest and Beach JJA) ('*Fariah*').
59 Ibid; see also *Farmer* [2020] VSCA 140 [55]–[56], [65]–[66] (Maxwell P, Kaye and Niall JJA).
60 *Farmer* [2020] VSCA 140 [13], [28], [32], [56], [59].
61 *Al-Anwiya v The Queen* [2022] VSCA 181.
62 Ibid [34]–[35] (Priest and Beach JJA).

(b) In *Makieng*,[63] this Court considered it was open to find that the exception was not enlivened by a combination of factors including the applicant's youth, childhood of trauma and disadvantage overseas, his assistance to police in relation to a separate investigation (for which he suffered retribution), and his emergence as a positive role model for other offenders.[64]

(c) In *Buckley*, this Court considered that the same exception to s 10A could not have been enlivened by the applicant's youth, significant immaturity, difficulties during adolescence, and likely vulnerability in prison. The Court concluded that while that combination of circumstances may well be 'substantial and compelling', it could not also be described as 'exceptional and rare'.[65]

Application — substantial and compelling circumstances

75 In making the assessment as to substantial and compelling circumstances, the Act imposes a number of further conditions. First, the judge must regard general deterrence and denunciation of the offender's conduct as more important than other sentencing purposes in s 5(1) of the Act (which include just punishment, specific deterrence, rehabilitation and protection of the community from the offender): s 5(2HC)(a).

76 Next, the judge must also give less weight to the offender's personal circumstances than to the nature and gravity of the offence: s 5(2HC)(b).[66]

77 Thirdly, the judge must not have regard to the matters in s 5(2HC)(c), which include the offender's previous good character (other than an absence of convictions), any early guilty plea and prospects of rehabilitation.

78 Fourthly, the judge must have regard to Parliament's intention that in sentencing an offender for a category 2 offence, only an order for a custodial sentence 'should ordinarily be made': s 5(2I)(a). We have already referred to this requirement in the context of the 'exceptional and rare' criterion.

79 Finally, the judge must have regard to whether the cumulative impact of the circumstances of the case would justify a departure from a custodial sentence: s 5(2I)(b). This last requirement appears to do no more than restate the task under s 5(2HC)(e) itself. It confirms, however, that it is the cumulative effect of the relevant circumstances which is significant.[67]

80 The first question for this Court is whether it was reasonably open for the sentencing judge to find that the circumstances of the present case were substantial and compelling so as to justify (but not require) not imposing a custodial sentence.[68] In our view, it was.

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63 *Makieng v The Queen* [2022] VSCA 52.

64 Ibid [24], [40] (Priest and Kyrou JJA).

65 *Buckley* [2022] VSCA 138 [43] (Maxwell P and T Forrest JA); the Act s 10A(2)(e).

66 The provision refers to 'matters such as the nature and gravity of the offence'. It is not clear what other matters might be embraced by the words 'such as', but they would appear to include the moral culpability of the offender, if that is not already captured by the 'nature and gravity of the offence'.

67 See *Fariah* [2021] VSCA 213 [25] (Priest and Beach JJA).

68 *Farmer* [2020] VSCA 140 [53]–[55] (Maxwell P, Kaye and Niall JJA); *Buckley* [2022] VSCA 138 [40] (Maxwell P and T Forrest JA).

81 The personal circumstances of the respondent are of the most mitigating kind. He is youthful and has no criminal past. He took immediate responsibility for his conduct and its terrible consequences, by which is he naturally haunted. His plea of guilty is evidence of his taking of responsibility and his remorse. He has strong family, social and employment supports. He also has the symptoms of anxiety and post-traumatic stress identified by Ms Ferrari, which are likely to be exacerbated if he is imprisoned and to make prison more difficult than it would otherwise be, as a result.

82 We do not accept the Director's submissions that some of these considerations are foreclosed by s 5(2HC)(c). In particular, most of these matters bear on specific deterrence and the need to protect the community from the offender, which remain relevant sentencing considerations. They may be taken into account without treating them as bearing on the respondent's prospects of rehabilitation. His guilty plea is also relevant, without taking into account its early character.

83 Moreover, the legislative injunction to give less weight to these matters and more to the nature and gravity of the offence does not dictate an answer to the ultimate question where the balance lies. To the contrary, in a case such as the present where the respondent's moral culpability is low and the offending is agreed to be at the lower end of the range for the offence, consideration of the 'nature and gravity of the offence' tends to justify rather than negate the invoking of the exception.

84 In making that observation, we do not accept the respondent's submission that this case was at the very lowest end of the range for the offence of dangerous driving causing death. While it is true that the case involved a 'momentary lapse of judgment', as the judge held, the respondent took a calculated risk by proceeding onto the highway in the face of an oncoming vehicle that he could not properly see due to the very poor visibility through his fogged-up side window. This was not merely careless driving, or a dangerous example of inattention, but the taking of a terrible risk that constituted dangerous driving near, but not at the bottom of, the range of that offending.

85 Finally, we also do not consider that the requirement to regard general deterrence and denunciation of the offender's conduct as more important than other sentencing purposes points to any different conclusion regarding 'substantial and compelling circumstances'. General deterrence and denunciation are always important in these cases, which is why non-custodial sentences are exceptional.[69] But the strength of those considerations, again, is influenced by the nature and gravity of the offending. They are stronger in cases where the offending is more egregious.

86 For these reasons, the Director has not shown that it was not reasonably open to the sentencing judge to regard the circumstances of this case as substantial and compelling so as to justify a non-custodial sentence.

Application — exceptional and rare circumstances

87 We turn then to the 'exceptional and rare' requirement. Here, we must respectfully part company with the sentencing judge. It is true that the subjective evaluation required in this context may well be informed by the sentencing judge's experience and observation

69 *Neethling* (2009) 22 VR 466, 477 [54] (Maxwell P, Vincent JA and Hargrave AJA).

of the panoply of cases which come before the courts at first instance. It is also true, as the respondent submitted, that this Court sees only a 'skewed sample' of those cases, and should be cautious as a result not simply to substitute its own assessment of what is exceptional and rare.[70]

88 But in the context of dangerous driving causing death, at least, it has long been recognised that the offence is often committed by young people of previously impeccable character, who are racked with remorse and grief for what they have done and have the best prospects for rehabilitation. Both in New South Wales and in this State, these features have been described as 'frequently recurring'.[71] Such offenders can often be expected to suffer from symptoms of anxiety and post-traumatic stress, which a term of imprisonment may tend to exacerbate.

89 Counsel for the respondent sought to distinguish the present case from others like it by drawing attention to the existence of the memorial created at the scene of the collision by the family and loved ones of Mr Flack. The respondent is confronted by the sight of the memorial, and mourners sometimes gathered at it, when he visits has partner. Such visits are irrevocably poisoned with a reminder of what happened at that place. While doubtless painful and confronting, however, we do not consider this aspect of the case to be especially unusual, given that similar memorials are frequently seen and it is inevitable that cases of dangerous driving causing death will occur in places which offenders are regularly required to pass in their daily lives. Even if we are wrong about that, however, we do not think that this feature of the case is capable of tipping the balance to take it out of the ordinary tragic case of this offence.

90 In these circumstances, we find it impossible to conclude that it was open to the sentencing judge to find the circumstances of this case 'exceptional and rare'.

91 It follows that ground 2 succeeds.

Ground 3 — manifest inadequacy

92 In the circumstances, the sentence that was imposed did not comply with s 5(2H), and it is not strictly necessary to decide the manifest inadequacy ground. It is convenient, however, to deal briefly with that ground, on the assumption that the Director had failed on each of the first two grounds.

Submissions

93 The Director contended that the sentence imposed fell below the available range, given:

(a) the seriousness of the offending, which involved an inherently dangerous activity (driving with fogged-over windows) and a deliberate decision to turn onto a road after seeing an approaching vehicle, rather than winding down the window for a clearer view;

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70 *Griffiths v The Queen* (1977) 137 CLR 293, 310 (Barwick CJ) ('*Griffiths*').

71 *Neethling* (2009) 22 VR 466, 477 [54], citing *R v Whyte* (2002) 55 NSWLR 252, 284 [204] (Spigelman CJ); see also *Harrison v The Queen* (2015) 49 VR 619, 645 [115] (Maxwell P, Redlich and Tate JJA).

(b) the profound impact of the offending on Mr Flack's family;

(c) the importance of the sentencing principles of general deterrence, denunciation, and just punishment in respect of driving offending; and

(d) current sentencing practices for comparable offending, which suggest that, at a minimum, the Court ought to have imposed a combination sentence.[72]

94 The respondent contended that the sentence was well within the available range. The offending was properly characterised by the judge as a 'momentary oversight', and involving a low level of moral culpability. Further, the respondent had, as the judge identified, powerful mitigating factors in his favour. The imposition of a non-custodial sentence, it was said, was unremarkable in these circumstances.[73]

Analysis

95 To establish manifest inadequacy in a sentence, the Director must show that the sentence was 'wholly outside the range' of sentencing options available to the sentencing judge.[74] It must be shown that something has gone 'obviously, plainly or badly wrong'.[75] The Court must be 'driven to conclude that there must have been some misapplication of principle'.[76]

96 It is necessary for these purposes to assume, as we have observed, that one of the exceptions to s 5(2H) was applicable, so that the sentencing judge was not required to impose a custodial sentence. It would have remained open, in that event, for him to have done so according to ordinary sentencing principles.

97 It should be noted that, whether or not an exception in s 5(2H) applies, nothing in s 5(2H) limits the relevant sentencing considerations or requires particular weight to be accorded to any individual matter. Sections 5(2HC) and 5(2I) are expressly directed to the issue whether substantial and compelling circumstances exist and are silent as to the application of the instinctive sentencing synthesis. Subsections 5(3) and (4) make it plain that, subject to the requirement for a custodial sentence in s 5(2H) (where applicable), ordinary principles of parsimony and proportionality apply. This means that

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72 Reference was made to two cases predating the application of s 5(2H): *DPP v Lack* [2017] VCC 897, a failure to give way case, in which the offender was sentenced to one year's imprisonment and a three-year community correction order; and *DPP v Mitchell* [2019] VCC 624, a momentary inattention case, in which the same sentence was imposed. The Director also referred to two cases raised at the plea hearing where terms of imprisonment for dangerous driving causing death were imposed under the framework in s 5(2H): *DPP v Mahmood* [2021] VCC 997 (an individual sentence of two years and four months in a case where the offender, who was a taxi driver, performed an illegal U-turn in the face of an oncoming truck); and *DPP v Tran* [2020] VCC 1882 (a sentence of eight months in a case where the offender turned in front of a motorcyclist who was travelling at twice the speed limit).

73 Reference was made to *Lu* [2022] VSC 258, and to *Neethling* (2009) 22 VR 466.

74 *DPP v Karazisis* (2010) 31 VR 634, 662–3 [127] (Ashley, Redlich and Weinberg JJA, Warren CJ and Maxwell P relevantly agreeing at 637 [1]) ('*Karazisis*').

75 See, eg, *Ayol v The Queen* [2014] VSCA 151 [30] (Maxwell P), quoting *Clarkson v The Queen* (2011) 32 VR 361, 384 [89] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA).

76 *Pham v The Queen* (2015) 256 CLR 550, 559 [28] (French CJ, Keane and Nettle JJ).

there is no statutory requirement that a sentencing judge, in a case where an exception applies, leans towards a term of imprisonment — quite the opposite.

98 In our view, the Director has failed to establish that the sentence imposed in this case was manifestly inadequate.

99 A community correction order is a punitive sanction.[77] Apart from the burden of complying with its conditions, the person serving the order is under threat of imprisonment for its contravention, together with resentencing for the relevant offence.[78]

100 This Court recognised in *Neethling* that, while non-custodial sentences are 'exceptional' for dangerous driving causing death, the exception applies 'where the offender's level of moral culpability is low'.[79] The typical case of low moral culpability is where there has been momentary inattention or misjudgement.[80]

101 This is a case at the lower end of seriousness, for which the parties accept that the respondent's moral culpability was low. Further, the respondent is able to call on a host of mitigating features, as set out earlier in these reasons.

102 To the extent that comparable cases may be of assistance, we note, as well as the cases to which the Director referred, the decision in *Lu*, where an inattentive driver who killed a child who was crossing the road on a green pedestrian light was sentenced, under the law applying before dangerous driving causing death became a category 2 offence, to a community correction order for three years. That offender had suffered a delay of some four years in reaching sentence, and was liable to deportation. The sentencing judge referred to a list of cases in which community correction orders had been imposed for this offence, both before and after the offence became a category 2 offence.[81]

103 For these reasons, in our opinion the sentence imposed in this case would have been within the range of available dispositions, had either of the exceptions in s 5(2H)(c)(ii) or s 5(2H)(e) been applicable. Ground 3 must therefore fail.

Section 5(2H)(e) and dangerous driving causing death

104 We should not pass from this ground without noting the potentially unintended consequence of treating dangerous driving causing death as a category 2 offence. In circumstances where only instances of that offence involving low moral culpability, typically cases of momentary inattention or misjudgement, have ever been thought suitable for a non-custodial sentence, the effect of the 'exceptional and rare' requirement is to target those very cases as ones calling for imprisonment. That places this offence in the same position as the significantly more serious offence of culpable driving causing death, whereas cases of this kind are in truth closer to cases of mere

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77 *Boulton v The Queen* (2014) 46 VR 308, 331 [91] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

78 Ibid 331 [92], referring to ss 83AD and 83AS(1)(c) of the Act.

79 *Neethling* (2009) 22 VR 466, 472–3 [29]–[32], citing *DPP v Oates* (2007) 47 MVR 483, 486–7 [22] (Neave JA); see also 488 [33] (Warren CJ), 489 [38] (Nettle JA); [2007] VSCA 59 ('*Oates*').

80 *Oates* (2007) 47 MVR 483, 489 [38]–[40] (Nettle JA).

81 *Lu* (2022) 100 MVR 144, 153 [38] n 14 (Fox J). See, in particular, *Bell v The Queen* (2018) 87 MVR 1, 10 [54]–[55] (Ashley JA, Priest JA agreeing at 2 [1]); [2018] VSCA 281.

carelessness. On one view, this introduces an unfortunate anomaly into the law governing sentencing for these offences, and warrants reconsideration.

Residual discretion

105 The Director has succeeded in establishing grounds 1 and 2. Subject to the application of the residual discretion to refuse relief in the case of Director's appeals, it would follow that the respondent should be resentenced to a term of imprisonment.

106 The respondent submitted that this Court should exercise the residual discretion not to intervene. Counsel pointed, in particular, to the progress made by the respondent while serving his community correction order over the past seven months. The evidence shows that:

(a) the respondent has completed 137 of the 250 work hours imposed under the community correction order, with no absences;

(b) as a result of the licence disqualification order, the respondent has been unable to continue in his employment as a tractor driver, but has found alternative employment as a labourer;

(c) the notice of appeal was filed on the last day of the appeal period, and served on the respondent the following day, by which point he reasonably believed that no appeal would be brought;

(d) the appeal has had a significant impact on the respondent and exacerbated his mental health situation.[82]

107 Senior counsel for the Director contended that this was not an appropriate case for the exercise of this Court's residual discretion, at least if grounds 1 and 2 were to be upheld. That is because those grounds raise an important point of principle regarding the exceptions to s 5(2H). Grounds 1 and 2 seek to vindicate a legislative policy that a term of imprisonment be imposed for offending of this sort, which the exercise of the residual discretion would undermine. Senior counsel rightly accepted, however, that it was a large step to imprison a youthful person after serving seven months of a non-custodial sentence.

Analysis

108 In determining a Director's appeal against sentence, this Court retains a residual discretion to decline to interfere with a sentence, even where sentencing error is established.[83] Relevantly, factors that inform the exercise of the discretion include whether:

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82 Counsel for the respondent tendered an affidavit exhibiting correspondence from the respondent's mother and employer deposing to these effects.

83 *Karazisis* (2010) 31 VR 634, 648–9 [52], 652 [73], 657–8 [100] (Ashley, Redlich and Weinberg JJA); see also *Green v The Queen* (2011) 244 CLR 463, 472 [24], 479 [43] (French CJ, Crennan and Kiefel JJ) ('*Green*').

(a) the offender given a non-custodial sentence has complied with its terms for a significant period;[84]

(b) the offender given a 'lenient disposition' has made productive use of that disposition, including by finding 'employment and stability in their personal life';[85]

(c) the offending falls short of 'criminality of the highest order';[86]

(d) there has been a delay between the imposition of sentence and the Crown appeal; and

(e) the sentence first imposed is of a type which enhances the prospects of the offender's rehabilitation, particularly where the offender is young.[87]

109 The onus is on the Crown to 'negate any reason why the residual discretion … should be exercised'.[88]

110 It is also relevant to bear in mind that the primary purpose of Crown sentence appeals is to clarify the law and 'lay down principles for the governance and guidance' of sentencing courts in future cases.[89] That purpose may be served by the Court identifying the sentencing error in its reasons for judgment without disturbing the sentence.[90]

111 In our view, this is a case where the residual discretion ought to be exercised. The appeal has provided the opportunity to articulate principles governing the operation of s 5(2H), and paragraph (e) in particular. Consistent with his prior good character, the respondent has already served seven months of the community correction order and completed more than half the hours of work prescribed. He was justified in thinking that no appeal would be brought when the Director waited until the last day to file the appeal, meaning that he was served after that period had expired (even though that did not affect the validity of the appeal). In the meantime, the respondent has obtained new employment and been able to rely on strong family and other support on the path to restoring a productive life, as the sentencing judge envisaged. This rehabilitative progress of a youthful offender would be undone if he were now to be required to serve a term of imprisonment, which would bear on him more severely than a person without his mental health circumstances. It is also relevant, in this context, that the sentence that was imposed was not manifestly inadequate apart from the misapplication of s 5(2H).

112 There is force in the Director's argument that the policy of s 5(2H) ought to be vindicated by imposing a sentence of imprisonment. On the other hand, if that were to

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84 *Karazisis* (2010) 31 VR 634, 658 [107].

85 Ibid 659 [108].

86 Ibid.

87 Ibid 659 [111]–[112]; see also *Green* (2011) 244 CLR 463, 479 [43] (French CJ, Crennan and Kiefel JJ).

88 *CMB v Attorney-General (NSW)* (2015) 256 CLR 346, 359 [33]–[36] (French CJ and Gageler J).

89 *Cumberland v The Queen* (2020) 94 ALJR 656, 658 [4] (Bell, Gageler and Nettle JJ); [2020] HCA 21; *Green* (2011) 244 CLR 462, 465–6 [1] (French CJ, Crennan and Kiefel JJ); see also *Griffiths* (1977) 137 CLR 293, 310 (Barwick CJ).

90 See, eg, *DPP v Currie* [2021] VSCA 272 [133], [143] (Beach, McLeish and Walker JJA); *DPP v O'Neill* (2015) 47 VR 395, 424 [111] (Warren CJ, Redlich and Kaye JJA)

be done, account would necessarily have to be taken of the serving of the community correction order to this point, resulting in a lesser term of imprisonment than would have been required if the provision had been applied by the sentencing judge. In that sense, the policy of s 5(2H) is no longer able to be met in any event. Overall, we consider that the policy of the provision has been vindicated more generally, without requiring application in the circumstances of this appeal we have described.

113 Taking all these matters into account, this is a case that warrants exercise of the residual discretion not to interfere with the sentence imposed.

114 Accordingly, the appeal will be dismissed.
