IN THE SUPREME COURT OF VICTORIA COURT OF APPEAL (CRIMINAL DIVISION)

S APCR 2017 0230

DIRECTOR OF PUBLIC PROSECUTIONS

v

EBONIE JANE WEYBURY

RESPONDENT'S WRITTEN CASE

Part A and B: Particulars of Conviction and Sentence, Relevant Statutory Provisions and Maximum Penalties.

1. No issue is taken with paragraph 1 of the Appellant's written case.

Part C: Summary of Relevant Facts.

2. No issue is taken with paragraph 2 of the Appellant's written case. The Respondent pleaded guilty and was sentenced on the basis of the Summary of Prosecution Opening (**Opening**). However, in addition to the facts set out in the Opening, the following further facts were accepted by the sentencing Judge:

   2.1 That at the time of the offending, the Respondent was fearful of Mr Walshe.[1]

   2.2 Prior to the Respondent stopping her vehicle at the Boronia Police Station:[2]

   (a) Mr Walshe had kicked the dashboard of the vehicle;

   (b) Mr Walshe grabbed the steering wheel;

   (c) Mr Walshe had grabbed the Respondent's arm;

   (d) While stopped, Mr Walshe had removed the rear vision mirror of the vehicle;

[1] Plea hearing, 2 October 2017, Tp 32 ln 3-21; Reasons for Sentence at [23].

[2] Reasons for Sentence at [48].

(e) While the vehicle was moving, Mr Walshe pulled up the handbrake.

Part D: Grounds of Appeal

3. The principles governing Crown appeals against sentence on the basis of manifest inadequacy were re-stated in *DPP v Zhuang*[3] and recently summarised in *DPP v McInnes*:[4]

> "• first, that the discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice;
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> • secondly, that the members of this Court may not substitute our own opinion for that of the sentencing judge merely because we would have exercised our discretion in a manner different from the manner in which the sentencing judge exercised her discretion;
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> • thirdly, that manifest inadequacy of sentence is a conclusion which does not depend upon attribution of identified specific error in the reasoning of the sentencing judge;
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> • fourthly, that a sentence may be inadequate either because the wrong type of sentence has been imposed – for example, non-custodial rather than custodial – or because the sentence imposed is manifestly too short; and
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> • fifthly, that manifest inadequacy will not be established unless the sentence is wholly outside the range of sentencing options available to the sentencing judge, in the sense that it was not reasonably open to the sentencing judge to arrive at the sentence which she did had proper weight been given to all the relevant circumstances of the offending and of the respondent".

Ground 1: Manifest Inadequacy

4. It is submitted that the learned sentencing Judge's sentencing remarks were comprehensive and carefully reasoned. His Honour did not overlook the features of the offending which bore directly on its objective seriousness[5] or the relevant sentencing principles.[6]

5. Although Ground 1 is particularised with a range of complaints about the weight given to individual factors, the learned sentencing Judge did not purport to give particular weight to each or any factor. The Appellant's complaint is, in truth, about the result of the process of

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[3] [2015] VSCA 96, at [39]-[49].
[4] [2017] VSCA 374 at [75].
[5] Reasons for Sentence at [25]-[31].
[6] Ibid at [35], [61] and [63].

instinctive synthesis. That process is one which admits of no single just sentence. It is the nature of the very task of weighing incommensurate factors that gives sentencing judges a particularly broad area of decisional freedom.[7]

6. On proper analysis, the sentence imposed was not such as to bespeak an error in point of principle.[8]

7. The Appellant places particular weight on the matters listed in *DPP v Neethling*[9] as potentially aggravating. However, in *Stephens v The Queen*[10], the Court held that these factors *'do not constitute some mere checklist nor are they intended to be exhaustive'*.[11]

8. The Court held in that case:[12]

> "Moral culpability in respect of criminal conduct does not fall to be assessed simply by identifying aggravating features that could have been present and then asserting that the case under consideration cannot be regarded as serious or very serious because of the absence of some of those factors. Both the dangerousness and moral culpability fall to be assessed by reference to all of the conduct and circumstances of the specific case, including the circumstances of the offender".

9. His Honour took into account all of the matters relevant to the objective gravity of the offending as set out in the Appellant's written case at [3.3]. His Honour also took into account the Respondent's decision to drive away from Boronia Police Station, having pulled into the police station as a result of Mr Walshe's behaviour in the lead up to the offending driving, the Respondent appreciating *'the inherent risk involved in driving in these circumstances'*.[13] His Honour took into account the interactions between the Respondent and Mr Walshe in the lead up and at the time of the offending *'in a general sense that you were in a pressurised situation given the goings on in the car, and that the exigencies of your situation do contextualise your exceeding the speed limit and loss of control'*.[14]

10. The Respondent was able to call upon a number of factors in mitigation, the following of which were accepted by the sentencing Judge:

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[7] *Elias v The Queen* [2013] HCA 31, at [27].
[8] *DPP v Zhuang*, at [51].
[9] (2009) 22 VR 466.
[10] (2016) 76 MVR 90.
[11] Ibid, at [25].
[12] Ibid at [26].
[13] Reasons for Sentence at [31]. See also *Stepehens v The Queen,* at [27].
[14] Reasons for Sentence at [52].

10.1 No prior convictions, such that His Honour accepted the Respondent was a person of good character prior to the offending;[15]

10.2 That the Respondent's time in custody would be more burdensome due to her presenting symptoms of obsessional ruminative thinking, disturbed sleep, concentration difficulties, flashbacks, and occasional nightmares;[16]

10.3 Her plea of guilty at an early stage;[17]

10.4 Genuine remorse;[18]

10.5 Positive prospects of rehabilitation;[19]

10.6 A delay of just under 2 years from the date of the offence until sentence. His Honour took this into account in relation to the process of rehabilitation and the fact of the matter hanging over the head of the Respondent for this period of time.[20]

11. The Appellant submits that the offending should be regarded as being in the "upper range of seriousness" and complains that the learned sentencing Judge did not deal with this submission and did not say where the Respondent's conduct fell within or above the mid-category of seriousness.

12. This complaint is without substance. It has become commonplace to characterise offending as 'low', 'mid' or 'high' range or 'within the upper range of seriousness'. However, such characterisation is not a necessary part of the process of instinctive synthesis. Indeed, it can distract from the actual task of a sentencing judge by encouraging the use of a blunt proxy for the subtlety of instinctive synthesis.[21]

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[15] Reasons for Sentence, at [36].
[16] Ibid at [56].
[17] Ibid at [63].
[18] Ibid at [63].
[19] Ibid at [63].
[20] Ibid at [64].
[21] As Gaegler and Gordon JJ remarked in *DPP v Dalgliesh* (2017) 349 ALR 37 at [82], while recognising the importance of consistency in the application of sentencing principles, current sentencing practices are no basis to '*sentence within a band'*.

13. This case is a classic example. There were factors relating to the driving and to the choices that the Respondent made which might tend to elevate the objective seriousness of the offending. Equally, the complex relationship that she had with the passenger of the vehicle and her fear of him put those matters into some context. Her positive personal circumstances, remorse, plea of guilty, reduced importance of personal deterrence and the likelihood of prison being particularly hard for her also had to be factored in.[22]

14. Requiring the learned sentencing Judge to affix a label to assessment of culpability is to add a step to the sentencing process that is unnecessary and which can mislead.

15. The real question is whether it was open to the learned sentencing Judge – whose task it was to weigh a range of competing factors that interacted in a complex way – to conclude that this offending warranted a sentence at the level imposed. That is, a sentence reflecting the totality of the offending of 3 ½ years imprisonment – which would have been 4 ½ years but for the guilty pleas.

16. However, if labels are to be used then the question might be: was the learned sentencing Judge obliged to conclude that the offending should be classified as in the "upper range of seriousness"? The answer to that question is "no".

17. In *Sharma v The Queen,*[23] this Court referred to a table of cases decided between 2015-2016 from the County Court and Court of Appeal for the offence of dangerous driving causing death. This decision was referred to his Honour during the course of the plea. Included was the County Court decision in *DPP v Ristovski*[24] as an example where the overall seriousness of the offending was high. In *Ristovski,* the offender was driving erratically, competitively and at extremely high speed over the course of an evening. After dropping a passenger off, the offender continued driving and lost control at a roundabout, colliding into a tree, resulting in the death of the front seat passenger. The offender was also affected by drugs and alcohol at the time of the offending.

[22] See, generally, the discussion on 'instinctive synthesis' in *DPP v Dalgliesh*, at [4]-[10] and *Hi v The Queen* [2017] VSCA 315, where the Court, after referring to *Dalgliesh,* noted, at [49] that the sentencing Judge's assessment of the gravity of the offending and the culpability of the offender are one of a range of factors to be taken into account in determining the appropriate sentence.
[23] [2017] VSCA 63.
[24] [2016] VCC 1226.

18. It cannot be said that this offending *had* to be characterised as being in the "upper range of seriousness". It was open to the learned sentencing Judge to describe the Respondent's offending in the way that he did, that is, as falling "within or above the mid-category of seriousness".

19. The sentence imposed does not fail to reflect the gravity of the offending or fail to give due weight to general deterrence, denunciation, protection of the community and just punishment. Notably, his Honour found – as he was entitled to – that specific deterrence was of *'reduced significance'*.[25]

20. The Appellant also relies on the individual sentences imposed as a percentage of the maximum penalty as supporting an argument of manifest excess. It is trite to say that sentencing is not a mechanical or mathematical exercise[26]. It is well established that the relevance of the maximum penalty for any offence is of general assistance as a 'yardstick'[27], given that the Court is required to balance the factors prescribed in s5(2) of the *Sentencing Act 1991*, including the extent to which each factor bears upon the case.[28]

21. It is respectfully submitted that the learned sentencing Judge properly applied the correct legal principles to the sentencing task and exercised his discretion soundly. The sentence imposed is not manifestly inadequate. This ground of appeal should be dismissed.

Ground 2: Specific error

22. Here, the Appellant argues that the learned sentencing Judge made a specific error in the following reference[29] to this court's decision in *Stephens v R*:[30]

> The Court of Appeal of this State indicated that there is a need for a gradual increase in the sentences to be imposed for cases of dangerous driving causing death which falls within or above the mid-category of seriousness. I am satisfied that your case falls within this range.

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[25] Ibid at [63].
[26] *DPP v Dalgliesh*, at [79], per Gageler and Gordon JJ.
[27] *Stephens v The Queen* at [38]
[28] *DPP v Dalgliesh,* at [7]
[29] Reasons for Sentence, at [62].
[30] (2016) 76 MVR 90.

23. The Appellant submits that the 'process of gradual uplift set out in *Stephens*' cannot survive the reasoning of the High Court in *Dalgliesh*. It follows – so says the Appellant – that to the extent that the learned sentencing Judge applied that *'process of gradual uplift'* his Honour was in error.

24. The Appellant describes the *'process of gradual uplift'* as involving *'allowing a small increase in the sentence so that eventually in a different case a sentence would be imposed that paid full heed to the Court of Appeal's statement that sentences were inadequate and should increase'*.[31]

25. There are two related problems with the Appellant's reasoning. **First**, *Stephens* did not prescribe or endorse a process of the kind described by the Appellant. **Second**, the learned sentencing Judge did not engage in any such process.

26. The Court of Appeal in *Stephens* at [34] to [43] endorsed the approach taken to current sentencing practices for Negligently Causing Serious Injury by the Court of Appeal in *Harrison v The Queen*[32] and held that the same approach should be taken to the offence of dangerous driving causing death.

27. The Court of Appeal's direction to sentencing courts in *Harrison* could not have been clearer. It held that *'[s]entencing courts should no longer consider themselves constrained by existing sentencing practice'*[33] and *'judges should no longer remain fettered by the previous pattern of sentencing'*.[34]

28. The reference in *Stephens* to a "gradual increase" is found at [33]: *'there is a need for a gradual increase in the sentences to be imposed for cases of dangerous driving causing death which fall within or above the mid-category range of seriousness'*.

29. The Court cited in support of that proposition a series of cases including *Ashdown v The Queen*[35] and *Winch v The Queen*.[36] In *Winch* the Court of Appeal held that sentencing judges should not consider themselves constrained by current sentencing practices in respect of glassing offences.[37] There is no suggestion in that case of small increases in future sentences until proper

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[31] Appellant's Written Case at [4.2].
[32] (2015) 49 VR 619.
[33] *Harrison* at [140].
[34] Ibid at [138].
[35] (2011) 37 VR 341.
[36] (2010) 27 VR 658.
[37] *Winch* at [55].

sentences are eventually reached. In *Ashdown* the Court of Appeal held that the circumstances did not warrant any intervention in current sentencing practices for the offence of Recklessly Causing Serious Injury generally. In the course of the judgments a number of the ways in which such intervention could happen were discussed. None of those included the "small increases" approach that the Appellant says is represented by *Stephens*.

30. It follows from the citation of those cases, and from the fact that the Court of Appeal in *Stepehens* endorsed and replicated the approach taken in *Harrison*, that it was not inviting sentencing judges to engage in "small increases" in sentencing practices with a view to eventually reaching an appropriate sentence. Rather, the reference to "gradual increase" is more likely to be a prediction of the effect on current sentencing practices as new higher appropriate sentences are added into to the mix of historical lower sentences.

31. Given that the Court of Appeal in *Stephens* was not advocating a "small increases" approach, there is nothing in its reasoning that is inconsistent with the judgments in *Dalgliesh*. Indeed, by adopting the *Harrison* approach, *Stephens* is entirely consistent with *Dalgliesh*.[38]

32. Further, there is no reason to suppose that the learned sentencing Judge misunderstood the effect of *Stephens*. The sentencing remarks reveal no reference at all to current sentencing practice in the form either of statistics or of the facts of decided cases used for comparison purposes. The obvious conclusion is that the learned sentencing Judge did not – consistent with *Stephens* – consider himself constrained by current sentencing practices.

33. In any event, and for the reasons set out in respect of ground 1 above, there is no basis to conclude that the learned sentencing Judge's approach was in error or has resulted in a sentence that was not reasonably open.

Dated: 2 January 2018

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[38] For the same reasons discussed in *DPP v Barry* [2017] VSCA 344, at [45].