IN THE SUPREME COURT OF VICTORIA S APCR 2017
COURT OF APPEAL
(CRIMINAL DIVISION)

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

EBONIE WEYBURY

Respondent

# APPELLANT'S WRITTEN CASE

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| Date of document: | 3 November 2017 |
| Filed on behalf of: | Appellant |
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## Part A and B: Particulars of Conviction and Sentence, Relevant Statutory Provisions and Maximum Penalties

1. On 14 September 2017, the respondent was arraigned and pleaded guilty at the County Court of Victoria at Melbourne and on 6 October 2017 she was sentenced as follows:

| Charge on Indictment | Offence | Maximum | Sentence | Cumulation |
|---|---|---|---|---|
| 1 | Dangerous driving causing death [s 319(1) *Crimes Act 1958*] | 10 years imprisonment [s 319(1) *Crimes Act 1958*] | 3 years imprisonment | Base |
| 2 | Dangerous driving causing serious injury [s 319(1A) *Crimes Act 1958*] | 5 years imprisonment [s 319(1A) *Crimes Act 1958*] | 18 months imprisonment | 6 months |
| **Total Effective Sentence** | | 3 years and 6 months imprisonment | | |
| **Non-Parole Period:** | | 2 years imprisonment | | |

| | |
|---|---|
| **Pre-Sentence detention declaration pursuant to s 18(1) of the *Sentencing Act 1991*:** | 4 days |
| **6AAA Statement:** 4 years and 6 months imprisonment with a non-parole period of 3 years imprisonment | |
| **Other relevant orders:**<br>- License cancelled and disqualified from driving on Victorian roads for a period of 2 years and 6 months | |

**Part C: Summary of Relevant Facts**

2. The appellant relies on Exhibit 1 (Summary of Prosecution Opening dated 28 April 2017) which was tendered at the Plea Hearing.

**Part D: Grounds of Appeal**

3. **Ground 1 – The sentences imposed on charges 1 and 2 of Indictment [No.G12697774] and the orders for cumulation are manifestly inadequate.**

   **In imposing the sentence of 3 and ½ years imprisonment and a non-parole period of 2 years as set out above in this Notice of Appeal, the Learned Sentencing Judge –**

   **(a) failed to have sufficient regard to the maximum penalties prescribed for the offences;**

   **(b) failed to properly reflect the objective gravity of the offences;**

   **(c) failed to have sufficient regard to the need for general deterrence;**

   **(d) failed to have sufficient regard to the need for specific deterrence;**

   **(e) failed sufficiently to manifest the denunciation by the court of the type of conduct in which the offender engaged;**

   **(f) failed to have sufficient regard to the need for protection of the community;**

   **(g) failed to have sufficient regard to the need for just punishment;**

   **(h) failed to reflect the objective gravity of the offences in the orders for cumulation made upon the base sentence;**

   **(i) failed to have sufficient regard to the impact of the offending upon the victims;**

   **(j) had regard to the statements in *Stephens v R* (2016) 76 MVR 90 that sentences should increase gradually over time;**

**(k) failed to regard current sentencing practices as but one part and not the controlling part of section 5(2) of the *Sentencing Act 1991*.**

3.1 The maximum penalty for dangerous driving causing death is 10 years imprisonment. The sentence imposed in relation to these charges represents 30% of the maximum penalty. The maximum penalty for dangerous driving causing serious injury is 5 years imprisonment. The sentence imposed in relation to this charge also represents 30% of the maximum penalty. Individual sentences that represent only 30% of the maximum penalty do not reflect the serious nature and objective gravity of this offending.

3.2 In assessing the objective gravity of the offending the authorities draw on the analysis from New South Wales in *R v Whyte*[1], which was adopted in this Court in *DPP v Neethling*[2], where the following matters were listed as potentially aggravating:

(i) Extent and nature of the injuries inflicted.
(ii) Number of people put at risk.
(iii) Degree of speed.
(iv) Degree of intoxication or of substance abuse.
(v) Erratic driving.
(vi) Competitive driving or showing off.
(vii) Length of the journey during which others were exposed to risk.
(viii) Ignoring of warnings.
(ix) Escaping police pursuit.
(x) Degree of sleep deprivation.
(xi) Failing to stop.[3]

3.3 A number of these matters presented themselves in this case:

- The respondent was driving at a speed of at least 97 kph in a 60kph zone just prior to the collision;
- Prior to the collision she had been driving erratically for some time as a result of being in an argument with Mr. Walshe;
- Mr. Walshe told her to slow down but she continued to drive at a fast rate of speed;

[1] (2002) 55 NSWLR 252
[2] (2009) 22 VR 466
[3] Ibid at [31]

- As the respondent accelerated up the hill she was driving at such a speed she was unable to control the car:
- The respondent lost control of the car such that it swerved first to the left and then the right crossing on to the wrong side of the road.
- The respondent's car then narrowly missed the car driven by Ms. Clarke;
- The car mounted the curb and struck Mr. Cassidy, who was innocently walking along the footpath, from behind;
- The incident occurred in a built up area at night; and
- The passenger in the respondent's car was also seriously injured.

3.4 As a result of these matters the respondent's objective gravity and the resultant moral culpability was high. Both death and a significant serious injury resulted. A number of the aggravating matters listed in *Whyte,* specifically (i), (ii), (iii), (v) and (viii), were present. This was not a case of momentary inattention or distraction such as is common at the less serious end of the spectrum for this type of offending.

3.5 It was submitted on the plea that the respondent's offending was at the upper range of seriousness. As a result of the matters discussed in paragraphs 3.2 to 3.4 above, that submission is repeated.

3.6 Further it is well established that general deterrence is a significant sentencing factor in offending of this nature. It is one of the most significant reasons for imposing a significant term of imprisonment.

3.7 In *Harrison & Rigogiannis v R*[4] the Court found that current sentencing practices for the offence of negligently cause serious injury in the upper end of seriousness was inadequate and needed to change. The effect of this would be sentences for lower and mid-range offending would necessarily increase.[5] In *Stephens v R*[6] the Court said that there needs to be similar uplifting of current sentencing practices for dangerous driving causing death[7]. These cases were drawn to the learned sentencing judge's attention.

[4] (2015) 49 VR 619
[5] Ibid at [12], [137]
[6] (2016) 76 MVR 90
[7] Ibid at [43]

3.8 However since then the High Court has brought down its decision in *DPP v Dalgliesh (Pseudonym)*[8]. Nothing said by the High Court in *Dalgliesh* affects the analysis by the Court of Appeal in *Stephens* of sentences in relation to dangerous driving causing death. Indeed in *Dalgliesh* the High Court proceeded on the Court of Appeal's statements that an increase in that matter was warranted. The majority judgement of the High Court pointed out that the only expectation an offender can have is to be sentenced according to law[9]. Further this judgement indicated current sentencing practices is but one factor to be taken into account and cannot justify a manifestly inadequate sentence. Thus, to the extent that the Court in *Stephens* referred to the need for a gradual increase in the sentences imposed for dangerous driving causing death[10], a statement which was followed by His Honour[11], such a need for the increase to be gradual no longer applies after *Dalgliesh*. Rather His Honour was required to sentence according to law and this means fixing an appropriate sentence, not one that is heading towards a higher mark. This may be one factor that led His Honour to impose a manifestly inadequate sentence and is dealt with further in ground 2 below.

3.9 Reference was made in *Stephens* to the most common sentence for dangerous driving causing death being 3 years imprisonment after the increase in the maximum from five years to ten years imprisonment[12]. This was based on the report from the Sentencing Advisory Council (SAC) which showed only a small increase in the sentences imposed following the change in maximum penalty. So the SAC in its 2015 Sentencing Advisory Council's report *Major Driving Offences: Current Sentencing Practices*[13] analysed the sentences imposed in respect to charges of dangerous driving causing death, as follows:

Table 11: Sentencing statistics for dangerous driving causing death, by commission before or after 19 March 2008, 2006–07 to 2012–13

| Offence before/after change in maximum penalty | Number of charges | Number of charges sentenced to imprisonment | Minimum (years) | Median (years) | Maximum (years) |
|---|---|---|---|---|---|
| Before | 73 | 28 | 1 y | 2 y 6 m | 3 y 6 m |
| After | 72 | 28 | 1 y 6 m | 3 y | 4 y 4m |

[8] [2017] HCA 41
[9] Ibid at [65]
[10] *Stephens v R* (2016) 76 MVR 90 at [33]
[11] Reasons for Sentence at [62]
[12] (2016) 76 MVR 90 at [38]
[13] June 2015

The recent figures from the SAC in SACStat in relation to dangerous driving causing death indicates that the median sentence for dangerous driving causing death is 3.13 years for all offenders. Further the SAC's SACStat for dangerous driving causing serious injury indicates that the median sentence is two years imprisonment. The decision in *Stephens* adopts this analysis that the increase in maximum has not led to an overall increase in sentences. The Court said:

> The report also shows that the increase in the maximum for dangerous driving causing death has resulted in a 10 month increase in the longest sentence imposed. Since the report which covered sentences until 2013, only three offenders have received a sentence of 4 years, and one a sentence of 5 years. For cases falling into this upper category of seriousness the range was 2 years 4 months to 3 years prior to the increase in the maximum and subsequent to the increase the most common sentence was 3 years with some above and some below that figure. There is considerable force in the submission that the dearth of cases in excess of five years since the increased maximum bespeaks a failure by the courts to give proper effect to the maximum term of imprisonment as a 'yard stick'. The tables of cases produced by the Director also demonstrate, that as a consequence of the low sentences fixed for the upper category of offending, an artificially low ceiling exists for mid category offending.[14]

3.10 If the characterisation of the offending is that this should be regarded as being in the upper range of seriousness[15] then it is submitted a sentence of three years imprisonment does not adequately reflect this range of seriousness. Indeed it is difficult to see how a sentence of three years imprisonment for dangerous driving causing death allows for any increase in sentences over and above the level prior to *Stephens*.

3.11 Further the sentence imposed for dangerous driving causing serious injury is also at the thirty percent mark. The injury inflicted was not at the upper end of seriousness. Nonetheless it was a significant injury. It included fractures to the left cheek, a fracture to the left eye socket, a spinal fracture, bruising and swelling to the eye, blurry vision and multiple lacerations to the head face and elbow with glass fragments lodged in the victim's face. The injuries occurred in circumstances where this was a serious example of dangerous driving. Cumulation of 6 months for this separate offending did not adequately reflect the need to further punish the offender, albeit that the Court was required to consider issues of totality.

[14] (2016) 76 MVR 90 at [38]
[15] Prosecution submissions on sentencing dated 13 September 2017 at [17]

3.12 In terms of mitigating circumstances the respondent was able to call in aid her previous lack of court appearances[16], her plea of guilty[17], the impact of delay on both rehabilitation and uncertainty[18], and facing the prospect of a more burdensome time in custody than other prisoners[19]. However His Honour did not otherwise accept that the applicant's culpability was reduced by application of the principles in *R v Verdins*[20].

3.13 His Honour described the respondent's driving as being well over the speed limit, irresponsible, and dangerous in the face of requests to slow down[21]. Further His Honour was satisfied that the respondent's conduct fell within or above the mid-category of seriousness[22], although His Honour did not say where that was and did not deal with the Director's submission that this was offending in the upper range of seriousness. However once it is accepted that this was not offending at the low end of the range, it is submitted that, allowing for mitigating factors, the sentences imposed and the orders for cumulation do not reflect the seriousness of the offending and are manifestly inadequate.

4. **Ground 2 – The learned sentencing judge erred, following *Stephens v R*, in finding that it was necessary to increase the sentences imposed in relation to this type of offending by increments.**

4.1 His Honour, as he was obliged to do at the time, followed statements made in *Stephens v R* that sentences for this offence in the mid to upper range were inadequate and needed to be uplifted over time[23]. As stated above shortly after the learned sentencing judge sentenced the respondent the High Court brought down its decision in *DPP v Dalgliesh*. This decision means that His Honour was required to fix a sentence according to law and was not entitled to engage in the process of gradual uplift set out in *Stephens*.

4.2 It follows that His Honour erred in engaging in the process of allowing for a small increase in the sentence so that eventually in a different case a sentence would be imposed that paid full head to the Court of Appeal's statement that sentences were inadequate and should increase.

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[16] Reasons for Sentence at [36]
[17] Ibid at [64]
[18] Ibid at [64]
[19] Ibid at [56]
[20] Ibid at [51]
[21] Ibid at [28]
[22] Ibid at [62]
[23] Ibid at [62]

4.3 His Honour's noting of the date of the Court of Appeal decision in *Stephens* and His Honour's reference to the 'need for a gradual increase' indicates that he considered himself part of this process of gradual increase. As a result of the High Court's decision in *Dalgliesh* His Honour has therefore fallen into error. In addition to making this specific error, as stated above, this approach may also in part at least explain the sentence imposed which it is submitted in any event is manifestly inadequate.

4.4 As stated above this does not mean that the analysis of the Court of Appeal in *Stephens* was irrelevant to His Honour's task. The Court of Appeal had highlighted the failure of sentences to increase following the increase in the maximum penalty for this offence. The Court of Appeal also highlighted the compression of sentences for offences such as this one in the middle and upper range of seriousness. The discussions in the Court of Appeal about these matters remained relevant to His Honour's instinctive synthesis as they remain relevant in this Court.

**DATED:** 3 November 2017

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**Brendan Kissane QC**
**Counsel for the Respondent**