SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sheldon* [2014] QCA 328
PARTIES:	**R** **v** **SHELDON, Kyle John** (appellant/applicant)
FILE NO/S:	CA No 129 of 2013 DC No 96 of 2012 DC No 398 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	12 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	25 August 2014
JUDGES:	Holmes and Morrison JJA and Alan Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal against conviction.** **2. Set aside the conviction and order a re-trial.** **3. Grant the application for leave to appeal against sentence.** **4. Allow the appeal and impose a sentence of seven years imprisonment, with a parole eligibility date fixed at 2 May 2016.** **5. Declare that the appellant has served between 2 May 2013 and 12 December 2014 as imprisonment under that sentence, a period of 590 days.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – where the appellant was convicted by a jury of one count of dangerous operation of a vehicle causing the death of two passengers, with the aggravating circumstance that although he ought reasonably to have known that both had been killed, he left the scene of the incident – where the appellant appeals the conviction – where the appellant seeks to adduce as fresh evidence a report from a road safety and traffic engineering consultant – where the appellant contends the report raises reasonable hypotheses consistent with innocence – where there is little or no evidentiary basis for the report's assertions – where the report is new, but not fresh, evidence, since the

appellant could have procured it for the trial - whether the absence of the evidence from the trial produced a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN THE COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the appellant was convicted by a jury of dangerous operation of a vehicle causing the death of two passengers, and leaving the scene when he ought reasonably to have known his passengers had been killed – where the appellant's vehicle collided with a truck parked in the parking lane – where the appellant asserted that he was distracted by a safe falling onto him – where the appellant argues that both limbs of accident under s 23(1) and mistake of fact under s 24(1) of the *Criminal Code* 1899 (Qld) should have been left for the jury's consideration – where there was no evidence which raised any of those excuses – whether the trial judge erred in failing to leave those excuses to the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN THE COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the appellant was convicted by a jury of dangerous operation of a vehicle causing the death of two passengers, and leaving the scene when he ought reasonably to have known his passengers had been killed – where the appellant's vehicle collided with a truck parked in the parking lane – where the appellant asserted that he was distracted by a safe falling onto him – where the appellant submitted that extraordinary emergency under s 25 of the *Criminal Code* should have been left to the jury – where the trial judge did not direct the jury that the prosecution had to exclude the possibility that an ordinary person would have reacted as the appellant did – where no such direction was sought – whether the failure to leave the excuse deprived the appellant of a real chance of acquittal – whether a miscarriage of justice has resulted

CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN THE COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the appellant was convicted by a jury of dangerous operation of a vehicle causing the death of two passengers, and leaving the scene when he ought reasonably to have known his passengers had been killed – where prior to the incident, the appellant had been involved in a break and enter and where after it he had used a vehicle which police witnesses described as suspected of being stolen – where the appellant contends the trial judge failed properly to direct the jury in relation to those activities – whether the trial judge erred in directing the jury on how the evidence of the appellant's involvement in the break-in

could be used – whether the trial judge erred in failing to give a propensity direction in respect of the appellant's use of the vehicle

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted by a jury of one count of dangerous operation of a vehicle causing the death of two passengers in 2011, with the aggravating circumstance that although he ought reasonably to have known that both had been killed, he left the scene of the incident – where the appellant pleaded guilty to a further count of dangerous operation of a vehicle causing death in 2009, with the aggravating circumstances that he was affected by alcohol and, although he ought reasonably to have known that the other driver was killed or injured, left the scene of the incident – where the appellant was sentenced to seven years' imprisonment for the 2009 offence and three years' imprisonment for the 2011 offence, to be served cumulatively – where the appellant was automatically the subject of a serious violent offence declaration – where the appellant seeks leave to appeal against both sentences on the grounds that they were manifestly excessive – where the appeal is allowed on the 2011 conviction – where it is necessary to re-sentence in respect of the 2009 offence – where the appellant had a previous conviction for dangerous operation of a vehicle and several other unrelated drugs and dishonesty offences – where the appellant submits he should be given credit for his early guilty plea and earlier periods in custody – whether sentencing for the 2009 offence should be remitted – whether the 2009 sentence, now viewed alone, is manifestly excessive

Criminal Code 1899 (Qld), s 23(1)(a), s 23(1)(b), s 24(1), s 25
Supreme Court of Queensland Act 1991 (Qld), s 61(3)

Jiminez v The Queen (1992) 173 CLR 572; [1992] HCA 14, cited
Lawless v The Queen (1979) 142 CLR 659; [1979] HCA 49, applied
R v Hallett [2009] QCA 96, cited
R v Hopper [2011] QCA 296, cited
R v Ross [2009] QCA 7, cited
R v Vessey; ex parte Attorney-General (1996) 86 A Crim R 290; [1996] QCA 11, cited
R v Warner [1980] Qd R 207, cited
Ratten v The Queen (1974) 131 CLR 510; [1974] HCA 35, applied
The King v Coventry (1938) 59 CLR 633; [1938] HCA 31, cited

COUNSEL: K M Hillard for the appellant/applicant
D L Meredith for the respondent

SOLICITORS: Fisher Dore for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The appellant was convicted by a jury of one count of dangerous operation of a vehicle causing the death of two passengers on 23 June 2011, with the aggravating circumstance that although he ought reasonably to have known they had been killed, he left the scene of the incident. The Crown case was that the appellant was the driver of a Volkswagen Golf hatchback which collided with the back of a truck trailer parked on the northbound side of Spencer Road at Nerang. Upon being convicted of that count, he pleaded guilty to a further count of dangerous operation of a vehicle causing death on 6 June 2009, in this instance with the aggravating circumstances that he was affected by alcohol and, although he knew or ought reasonably to have known that the other man involved in the collision had been killed or injured, left the scene of the incident.

[2] The appellant was sentenced to seven years imprisonment for the 2009 offence and three years imprisonment for the 2011 offence. Those terms of imprisonment were ordered to be served cumulatively, with the result that he was automatically the subject of a serious violent offender declaration. He appeals against his conviction of the 2011 offence, seeking to adduce fresh evidence to establish that there was a miscarriage of justice, with further grounds that the trial judge erred in failing properly to direct the jury on the excuses of accident, unwilled act, mistake of fact and extraordinary emergency and in relation to other alleged criminal activity on his part. He seeks leave to appeal against the sentences imposed on both counts on the grounds that they were manifestly excessive.

The appellant's version of events

[3] The appellant gave an account of the collision in evidence at the trial. He did not dispute that it occurred as he and his passengers, Zachary de Palma and Jeremy Booth, were driving away from having performed a break-in at an IGA store at Mudgeeraba, in which one of the items taken was a 25 kilogram safe. According to the appellant, as they were travelling down Spencer Road he became aware of an odour, and asked de Palma, who was in the back seat, whether it was emanating from the safe, which was also in the back seat.

[4] Something heavy hit the appellant's shoulder, sliding down his arm onto his lap. He was unaware at the time of what de Palma was doing, but he inferred that he had lifted the safe to look at it, rested it on the top of the driver's seat, and dropped it. The appellant's reaction was to push the safe back into the hands of de Palma, who was leaning over the seat. The appellant's left arm was under the safe; he used both hands and arms, twisting and pushing to his left, to raise it. He had seen the truck parked some distance ahead (he gave an estimate of between 200 and 400 metres away) but he had taken his eyes off the road for a split second to push the safe away. He had not attempted to brake. He felt and heard a bang, and was knocked unconscious for a short period.

[5] When the appellant regained consciousness, he realised that neither of his passengers was breathing. (It was formally admitted that both were dead at this point.) He kicked open his door and ran to the left hand side of the Volkswagen,

where he saw the damage to the vehicle and the condition of the two passengers. In a state of panic, he ran to Booth's nearby house, where he told the occupants to call an ambulance. A female friend went back to the crash site and returned in the early hours of the morning, presumably reporting on what she had seen. The appellant borrowed Booth's car and drove with the friend to a Nerang motel where they checked in. Mid-morning, he saw a police car in the driveway and took a taxi away from the premises. After that he got in touch with his parents and a lawyer and handed himself into police.

[6] In cross-examination, the appellant said that he was relieved and happy that he and his friends were almost home from their excursion. He accepted, however, that on a prior occasion of giving evidence he had put it more strongly, saying that there was "excitement in the car". He similarly accepted that he had previously answered the question "You weren't travelling at 60 kilometres an hour?" in the negative, but maintained that he did not know what speed he was going. He was not travelling at 98 kilometres per hour (the post-collision reading on the Volkswagen's speedometer).

[7] The appellant agreed that although the safe (on his version) had fallen into his lap, he could nevertheless have held the steering wheel with his right hand and applied the brakes, since nothing was impeding the use of his feet, but he had done neither. Instead, he had instinctively reacted by trying to remove the safe. The safe in falling onto his lap had not turned the steering wheel; the vehicle was still travelling straight forward. He took his eyes off the road for a split second. He did not notice if Booth, who was seated in the front passenger seat, had done anything to assist.

The Crown case

[8] The truck involved in the collision was a B-double; that is to say, a prime mover with two trailers attached behind it. The truck driver gave evidence that on the night of 22 June he parked the prime mover and trailers on the side of Spencer Road, within the marked parking lane. He had unloaded two vehicles which he had been carrying on the rear trailer and left a prime mover on the front trailer for unloading in the morning. He went to sleep in a bunk in the truck and was woken by a crash. After dressing, he emerged from his vehicle to see the wreck of the Volkswagen, with the driver's door open and no-one in the driver's seat. He rang the emergency number.

[9] Queensland Ambulance Service officers arrived at the accident scene before police. A paramedic gave evidence that he looked into the Volkswagen and saw a man in the back of the vehicle. In order to gain access to him, he leaned in through the rear door on the right, took hold of two large black objects in the centre of the back seat (one of which was the IGA safe), and threw them onto the ground.

[10] A police officer specialising in traffic accident investigation, Senior Constable Clarke, explained that Spencer Road was a service road to the M1 motorway, consisting of north-bound and south-bound lanes with a bitumen surface. The north-bound lane was 3.3 metres wide, while its parking lane was 2.4 metres. His methodology at a collision scene was to mark the road, showing the tyres of all the vehicles involved, and then to look for road scarring, which could be in the form of skid marks, tyre marks, gouges or scratches in the road surface. All the marks he found on the road appeared to be made post-impact. He made measurements and drew by hand a sketch, not to scale, recording the width of the various lanes, the

location of the vehicles and debris and the position of power poles to the side of the road. Later, he produced a computer drawing which was to scale and recorded on it all the marks which had been painted on the road. It showed scrape marks, gouges on the road and fluid spills as well the location of vehicles, debris and power poles.

[11] Constable Clarke said that the prime mover and trailers occupied the whole of the north-bound parking lane but did not protrude beyond it. Visibility at the scene was good. There was ambient light from motorway lights and commercial premises, as well as the street lighting. The trailers could be seen from some distance away. The speed limit in the area was 60 kilometres per hour. The left-hand side of the Volkswagen had collided with the right-hand rear corner of the back trailer, the impact involving an area of about 12 to 18 inches. There was no marking on the road indicative of any braking or swerving. The whole of the left-hand front wheel assembly was torn off the Volkswagen and its bonnet was left wedged into the rear of the trailer. Its battery was found about 40 metres north of the point of impact. The Volkswagen itself had rotated anticlockwise and come to rest on the other side of the road.

[12] Constable Clarke found no evidence that the trailers and prime mover had moved in the collision. The wheels were locked; if they had moved forward he would have expected to see some scarring on the road surface, but there was none. His recollection was that the truck weighed over 30 tonnes and the car something like 700 kilograms. He had arranged for photographs to be taken of the vehicles. In one of them, taken from behind the prime mover and trailers, the rear trailer can be seen with its rear right wheels just inside the lane marking. Another photograph taken from the front of the prime mover shows its left-hand front wheels up on the angled kerb and its right-hand wheels within the lane marking, apparently further in than the rear trailer wheels.

[13] A Queensland Police Service vehicle inspection officer, Mr Ritchie, examined the Volkswagen. It had an automatic transmission, and the gear lever was in drive mode. Its accelerator was in working order. There was impact damage to the brakes, but it appeared they were working. The steering components were in a satisfactory condition. The car was new, a 2011 model. Nothing about it would have contributed to the collision. The tachometer's reading was 3,400 rpm, which indicated mid-range acceleration. The speedometer had stopped at a reading of between 98 and 100 kilometres per hour, which might indicate the speed at the time of collision but might be explained by some other factor; for example if the car had become airborne, with its wheels spinning, an artificially high reading might result. Even in ordinary circumstances, there was a tolerance level for speedometers of ten per cent plus four kilometres an hour by which the reading could exceed actual speed.

The application to adduce further evidence

[14] The appellant sought leave to adduce evidence on the appeal in the form of a report from Mr Allan Joy, described as a road safety and traffic engineering consultant. In an affidavit, Ms Amber Atkinson, a solicitor having carriage of the appellant's appeal, deposed that the appellant had not previously sought a report from Mr Joy because he accepted the advice of his trial counsel. Counsel had informed him that she had put questions to Mr Joy, but the answers were not useful; the case came down to what had happened in the car, his version of the events and whether he believed his response was dangerous. Accordingly, the appellant did not pursue the possibility of obtaining a report from Mr Joy.

[15] According to Ms Atkinson, she spoke to Mr Joy, who said that he had attended a conference with the appellant's then lawyers, at which they discussed the position of the Volkswagen and the safe. He was not given a full brief of evidence or the scale drawing of the accident scene, which showed a power pole against the side of the rear trailer. Oddly, Mr Joy did not himself depose to these matters.

The further evidence

[16] Mr Joy did depose, however, to some research he had undertaken, and annexed to his affidavit a report of his investigation. He had not inspected the location of the collision, nor the Volkswagen, but he had seen photographs of it. He had ascertained from a website that the weight of the Volkswagen was 1400 kilograms. The trailer would have been between 2.0 and 2.5 metres in width. It could be reasonably assumed that the prime mover probably weighed approximately ten tonnes; the front and back trailers, each between seven and eight tonnes unladen; and the prime mover on the front trailer about ten tonnes; giving a total weight of about 35 tonnes.

[17] Mr Joy noted in his report that the police photographs showed the prime mover's right side rear wheels slightly west of the line of the parking lane (i.e. to the left of it) and the right side wheels of each trailer on the edge line. Constable Clarke's scale drawing of the accident scene showed the rear trailer positioned hard against the power pole, although it was not possible to tell from the photographs whether that was so. Given that it appeared from the photographs that the three units – the prime mover and trailers – were in an almost straight line and that the road curved slightly towards the right, the position of the rear trailer against the power pole would probably have entailed both trailers having rubbed against it before the prime mover stopped. This would, Mr Joy said, be a highly unusual thing for the driver to do, although the possibility could not be ruled out, given that no attention had been paid to the point at trial. He acknowledged that in the photographs the truck and trailers appeared to be in a straight line, which was at odds with the notion that the trailer had been moved; however, he said, he did not know whether the prime mover and trailers had been driven in a straight line into the parking position in the first place.

[18] In Mr Joy's view, the Volkswagen would have applied a westward component of force to the rear of the last trailer. Although there were no marks on the road consistent with that having occurred, the possibility could not, in his opinion, be excluded. The force of the impact when the left front part of the car struck the rear tyre of the trailer might have lifted the right side wheels momentarily, not marking the road surface, and pushed the trailer leftward, leaving it with its left side against the power pole. He did not think there was any evidence of an examination of the road pavement beneath the left side wheels of the rear trailer, which would have confirmed whether or not it had been pushed sidewards by the collision. If the trailer had been pushed sideways, it would follow that it was not parked wholly within the parking lane before the impact.

[19] Mr Joy was asked by the instructing solicitors to comment on the speedometer reading of 98 kilometres per hour. He responded by saying it was not reliable; it was likely to be the result of impact forces or an electrical spike. On his calculations, the speed of 98 kilometres per hour did not correspond to an engine speed of 3,400 rpm in any gear. He adopted the solicitors' speculation that the appellant might inadvertently have applied pressure to the accelerator in the process of exerting effort to push the safe back to the rear seat. (The appellant gave no evidence to that effect.) If he had

done so, it was possible that the vehicle's transmission would have changed down gears, resulting in an increase in engine speed. Mr Joy had used a collision analysis software package into which he entered what he could ascertain from the photographs as to the damage to the Volkswagen. He had arrived at an impact speed of between 60 and 75 kilometres per hour.

[20] Mr Joy raised another possibility. In 2013, there had been a product recall because of gear box problems in Volkswagen Golfs. Mr Joy was unable to say whether the appellant's vehicle was within the compass of the product recall. However, because of the recall, he was, he said, "unable to exclude the possibility" that the vehicle's gear box and engine were not operating properly. This was another reason to suppose that there was no reliable relationship between the engine speed recorded by the tachometer and the vehicle speed as shown on the speedometer.

[21] Mr Joy had reviewed the appellant's evidence about the falling safe. In order for the safe to be passed from the rear of the car to the front, it would have to be held up and if it fell onto the console it would probably topple. If it toppled to the right, it would be likely to hit the driver's left elbow and fall onto his left thigh. If it hit the driver's elbow, it would most probably cause some deviation of the vehicle's steering. If it fell onto the driver's left thigh, it would likely come in contact with the steering wheel.

[22] Remarkably, the appellant's solicitors asked Mr Joy this question:

> "Assuming the safe scenario is accepted, is it reasonable that [the appellant] believed the car was travelling generally straight and in the lane he was driving, when in fact it may have gone out of the lane slightly when it ran into the back of the truck while he was distracted by the safe?".

Even more remarkably, he answered it, saying that a safe falling on the driver would inevitably cause "a level of distraction", both initially and as he attempted to remove it. It was, in Mr Joy's view, more probable than not that the driver would have travelled off path and, it was quite possible, without being aware of it. In his opinion, if the appellant was dealing with the safe a few seconds before the impact, braking would not have prevented the collision. He conceded however, that if the incident had taken longer than a couple of seconds to occur – if, for example, the vehicle had drifted out of its lane over a longer period and the truck had been seen from some 200 metres away - there was ample time to bring the Volkswagen to a stop. It would have been difficult for the appellant to determine whether the trailer's back corner was in the parking lane or protruding into the traffic lane.

[23] Even if there had been no falling safe, the area of impact was relatively small, under half a metre. At 60 to 70 kilometres per hour, the Volkswagen could have moved a metre and a half laterally within a second or two. Consequently, it was possible the crash could have occurred without the appellant being inattentive for more than that period.

Miscarriage of justice

[24] The appellant argued that that there had been a miscarriage of justice because the opinions in Mr Joy's report were not placed before the jury. Had it been, a properly instructed jury could not have convicted, because it raised reasonable hypotheses consistent with innocence, which could not be excluded.

[25] It is plain that the opinion of Mr Joy constitutes new evidence, but not fresh evidence. It was available to the appellant and his failure to adduce it cannot render the trial unfair. A conviction will not be set aside if new evidence "reveals no more than a likelihood that the jury would have returned a verdict of not guilty".[1] However, if the new evidence is enough to satisfy the court of the appellant's innocence or make it entertain a reasonable doubt as to his guilt, there will have been a miscarriage of justice.[2]

[26] Mr Joy's theory as to the likelihood of the truck's having protruded from the parking lane depends entirely on the premise that the scale drawing is literally correct when it shows the back trailer against the circle which represents the power pole. But there is every reason to doubt that it is correct. It does not correspond with the hand drawing which Constable Clarke made on the night of the collision, which shows the trailer away from the pole. And even if the scale drawing were correct and the back trailer was against the pole, it did not follow that it was moved there in the collision. The driver (who was not asked any question about his parking method) might not have been meticulous about avoiding scraping to his trailers, or he may have considered that if it were necessary for the trailer to touch the pole in order to be entirely within the parking lane, that was where he would bring it to rest.

[27] Mr Joy's assertion that it was not known whether the left side tyres had moved disregards Constable Clarke's evidence that he marked all the points on the road represented by the tyres and found no evidence of any movement, apart from that involving the Volkswagen. That evidence militates against the theory of the shift of the back trailer. And of course, the truck driver's evidence was that the prime mover and trailers were parked within the right hand line of the parking lane. It does not follow that if the truck were protruding slightly over the lane marking the jury could not have found the appellant's driving dangerous; but in any event, I do not consider Mr Joy's hypothesis of protrusion, lacking any evidentiary basis as it does, to amount to a reasonable possibility.

[28] It is unnecessary to consider what was advanced as to speed, including the dubious propositions that a product recall not shown to involve the Volkswagen might be relevant, and that the appellant might have inadvertently depressed the accelerator, notwithstanding the absence of any evidence from him on the point. It was accepted on the Crown case that the speedometer reading of 98 kilometres per hour might not be reliable; that was the evidence of Mr Ritchie. It was not necessary that the jury, or indeed this Court, be satisfied that the appellant was speeding in order to conclude that he was guilty of dangerous operation of a motor vehicle. Permitting a vehicle to move out of a driving lane and into the back of a parked truck could properly be found to amount to dangerous operation; the possibility that it involved only a momentary lapse in attention would not preclude that conclusion.[3]

[29] And even on the appellant's own account, the taking of both hands off the wheel and the failure to brake, although he had known over some distance that the truck was parked ahead of him, were ample bases on which to convict. It is entirely questionable whether Mr Joy's opinions as to how the safe might have fallen into the front of the vehicle reflected any expertise at all, but more importantly, they do not accord with the appellant's evidence. He did not say that the fall of the safe had

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1 *Lawless v The Queen* (1979) 142 CLR 659 at 675.

2 *Ratten v The Queen* (1974) 131 CLR 510 at 518 - 519.

3 *The King v Coventry* (1938) 59 CLR 633 at 638; *Jiminez v The Queen* (1992) 173 CLR 572 at 579.

any impact in causing the steering to deviate; simply that he was unable to steer with his left hand, although he conceded that he could continue to do so with the right. And, of course, Mr Joy's theories in this regard depend on acceptance of the appellant's evidence as to the safe incident; something which in my view, the jury was by no means bound to find credible.

[30] Mr Joy's evidence does not persuade me of a likelihood that the jury would have returned a verdict of not guilty, let alone cause me to entertain a reasonable doubt as to guilt. Its absence from the trial did not produce any miscarriage of justice.

Mistake of fact and accident

[31] The appellant argued that mistake of fact under s 24(1) of the *Criminal Code* should have been left for the jury's consideration: he had acted under the honest and reasonable, but mistaken, belief, when he removed his hand from the wheel, that the car was travelling safely in its lane in a straight line. But there was no evidence that he believed anything of the sort, let alone that such a belief would have been reasonable. He said that he was not aware of the car's having veered, but he had taken his eye off the road for a split second.

[32] Next, the appellant submitted that accident under s 23(1)(a) of the *Code* – an act or omission occurring independently of the exercise of his will - ought also to have been left to the jury, because of the possibility that the safe had knocked the steering wheel or the appellant had inadvertently depressed the accelerator. There was no evidence of either event; to the contrary, the appellant said that the safe had not deflected the steering wheel. There was no basis, accordingly, for leaving accident under that provision to the jury. It was also submitted that accident under s 23(1)(b) should have been left: the appellant could have failed to foresee the collision and an ordinary person would not reasonably have foreseen it, because the truck might have been parked beyond the parking lane line. Again, there was no evidence of that, and again, no basis for leaving the defence.

Extraordinary emergency

[33] Finally as to Chapter 5 excuses, the appellant submitted that extraordinary emergency under s 25 of the *Criminal Code* should have been left to the jury. That provision reads:

> "25 Extraordinary emergencies
>
> Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise.

[34] The trial judge directed the jury on the elements of the offence, informing them there was no dispute that the appellant had been operating the vehicle, that the collision had caused the death of the two passengers and that the appellant had left the scene, knowing that they had been killed. He continued,

> "So the only element really for your consideration is whether his operation of the motor vehicle was dangerous. The term "operates a motor vehicle" means operating a vehicle at a speed or in a way

> that is dangerous to the public. Having regard to all of the circumstances, the public always includes passengers in the vehicle. Including the nature, condition and use of the place; the nature and condition of the vehicle; the number of persons, vehicles or other objects that are or might reasonably be expected to be in the place; and the presence of any alcohol substance. There's no suggestion of that in this case in the driver's body. So the operation of a motor vehicle includes the speed at which the vehicle is driven and all other matters connected with the management and control of the vehicle by the driver such as getting a look at, turning, slowing down, stopping or steering or accelerating the vehicle.
>
> The expression "operates a vehicle dangerously" in general does not require any given state of mind on the part of the driver as an essential element of the offence. A motorist may believe he or she is driving carefully yet be guilty of operating a vehicle dangerously. Dangerously is to be given its ordinary meaning of something that presents a real risk of injury or damage. The prosecution must prove that there was a situation which, viewed objectively, was dangerous. For the driving to be dangerous, there must be some feature which is identified not as mere 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 a person who may, on occasion, drive with less that due care and attention.
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> Momentary lapses of attention on the part of a driver, if they result in danger to the public, are not outside the ambit of the offence of dangerous operation of a motor vehicle merely because they're brief or momentary. If a driver adopts a manner of driving which is dangerous, in all the circumstances of the case, to other road users or to passengers in his vehicle it doesn't matter whether they are deliberately reckless, careless, momentary inattentive or even doing their incompetent best. However, the prosecution must prove that there was some serious breach of the proper conduct of the vehicle upon the roadway, so serious as to be in reality, and not speculatively, potentially dangerous to others.
>
> The consequences of the defendant's act or omissions can't add to the criminality of his driving. The quality of being dangerous to the public doesn't depend on the resultant damage. Whilst the immediate result of driving and the action may afford evidence from which the quality of the driving may be inferred, it's not the result which gives that quality. In this case, what that means is you don't conclude that because two people died it's automatically dangerous. You've got to have a look at what you conclude about the manner of his driving leading up to the accident, and say was that dangerous. If you find it was, then the elements of the offence are otherwise proven, and that we know the result and it's been admitted that it caused the death of those people and that he then left knowing they were dead and before police officers had arrived. So you've got to have a look at the circumstances leading up to the event itself."

[35] His Honour reminded the jury of counsel's submissions. Defence counsel had urged the jury to conclude on the basis of the appellant's evidence that there had been,

> "an emergency in which he'd had no time to react, presumably meaning to act in a way that didn't result in an accident…She said that something must have happened to explain the accident and that you should conclude it was this safe incident. She said that his conduct thereafter was a reaction to an emergency and was instinctive to push the safe off him to enable him to drive."

Counsel had gone on to say that the appellant's conduct was not a result of

> "a conscious choice, but a sudden hazard which presented itself to which he reacted with immediacy…".

On that topic, the trial judge told the jury:

> "They're all matters for you, but you've got to have regard to the fact that the defendant says this happened suddenly, and in an emergency situation he reacted in the way he did."

His Honour did not otherwise direct the jury on the extraordinary emergency defence.

[36] The excuse under s 25 of the *Code* is available to a person charged with dangerous driving.[4] There is no doubt that the scenario depicted by the appellant, if accepted, could amount to a circumstance of sudden emergency so as to attract the application of s 25. That being the case, the onus of excluding the excuse beyond reasonable doubt lay on the prosecution. A direction on the excuse would have told the jury that they had, firstly, to consider whether they were satisfied that the circumstances did not amount to a sudden emergency; and, if they were not so satisfied, then to consider whether the appellant's reaction was other than could reasonably be expected of an ordinary person with ordinary powers of self-control. In that context, the jury would have been told that the appellant was not expected to be wiser or better than an ordinary reasonable person in the same circumstances.

[37] There is no obvious forensic reason for the defence to have failed to seek a direction on the excuse under s 25. It is possible that the jury accepted the appellant's evidence but regarded the driving as nonetheless objectively dangerous. Had the matter been presented to them, however, as one in which the prosecution had to exclude the possibility that an ordinary person would have reacted as the appellant did, it is conceivable they would have found that possibility not excluded. The excuse required consideration of the reasonableness of the appellant's reaction as a person interrupted in his driving by a falling safe, rather than an objective consideration of what was involved in the safe operation of a vehicle.

[38] In my view, the failure to leave the excuse has deprived the appellant of a real chance of acquittal so that the appeal must be allowed on this point alone.

The failure to direct on other criminal activity

[39] For completeness, I will deal with the remaining appeal ground. The trial judge explained the prosecution's reliance on the appellant's involvement in the IGA break-in offence in the following way:

> "It said that it goes to show that in the 15 or so minutes before the accident, he was involved in the commission of that crime. It may, once they have driven away, have resulted in a sense of excitement or euphoria or some other emotion which might've affected his

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4 *R v Warner* [1980] Qd R 207.

> driving of the vehicle. You should not however, on the basis of his involvement in that crime, automatically conclude that he drove dangerously."

The appellant accepted that evidence of the break and enter was properly led to explain the provenance of the safe but submitted, firstly, that the direction would have left the jury to infer that his mood affected the way in which he was likely to have driven; and, secondly, that there should have been a reference in his Honour's direction to his evidence that he preferred to describe his state of mind as "relieved and happy."

[40] The trial judge was reprising the prosecution case. The suggestion that excitement might have been a factor in the appellant's driving was perfectly proper. Defence counsel concurred with the proposed direction when the trial judge foreshadowed it, and sought no elaboration of the appellant's preferred characterisation of his mental state; quite probably because she realised that reiteration of his attempt at distancing himself from the evidence he had previously given was unlikely to improve matters for him. There is nothing in this argument.

[41] The appellant also complained that the trial judge had failed to give a propensity direction in respect of his use of Mr Booth's car. A police officer who had gone to the motel where the appellant had taken refuge described seeing a car reported as stolen there. Another officer spoke of going to the motel and seeing the same vehicle, of which he believed the appellant might have been in possession. The inference, it was submitted, was that the appellant had stolen Mr Booth's car. In redirections, the trial judge pointed out, at the suggestion of defence counsel, that it was not put to the appellant that the car was stolen. His evidence was that Mr Booth's girlfriend had said he could take it and given him the keys, and she had not given any evidence to say it was stolen. But again, no propensity direction was sought, and it is not surprising. A direction that the jury should not regard theft of the car as pointing to guilt of dangerous operation would no doubt have undercut his Honour's direction that there was no evidence the car was stolen. Again, there is no substance in this ground.

Whether sentencing for the 2009 offence should be remitted

[42] The appellant had sought leave to appeal against the sentences imposed for both the 2009 and 2011 offences. The application in respect of the latter sentence is now, of course, superfluous. It is necessary to re-sentence in respect of the 2009 offence, if only because of the serious violent offence declaration attached to it. The learned sentencing judge, in passing sentence for both offences, made the observation that even had the final sentence imposed been less than ten years, he would have made a declaration that the appellant was convicted of a serious violent offence. To do otherwise would fail to recognise a number of features of the offending, including the fact that three people had died as a result of the appellant's conduct. It follows that his Honour's view as to the need for a declaration depended on the factual context of two separate sets of offending. The question of what sentence should be imposed must now be re-considered in the context of the 2009 offence standing alone.

[43] Counsel for the respondent proposed that the matter should be remitted to the District Court,[5] to be dealt with together with an offence of armed robbery, to which the appellant has pleaded guilty. However, that the fact that the appellant is to be

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[5] Section 61(3) of the *Supreme Court of Queensland Act* 1991 permits this court to order that the whole or part of a proceeding be remitted to another court for determination. "Another court" is defined as including the District Court.

sentenced on another offence provides no compelling reason for this Court to refrain from dealing with the application before it; nor does the prospect that he may, if convicted a second time, be once more sentenced on the 2011 dangerous driving charge. There is nothing remarkable about an appellant's having outstanding matters to be dealt with elsewhere; any other court dealing with the appellant will no doubt adjust its sentence as necessary having regard to the consequences of the sentence imposed here.

The 2009 offence

[44] An agreed schedule of facts was tendered in relation to the 2009 dangerous driving offence. The appellant, then 19 years old, had borrowed his parents' Landcruiser one evening. Early the following morning, driving it while intoxicated, he allowed the whole of the vehicle to veer onto the wrong side of the road. He collided with the rider of a moped travelling in the opposite direction, killing him instantly. The appellant left the scene and contacted police to report that his parents' vehicle had been stolen. The collision occurred at about 1.17 am. The appellant was breath-tested at 2.30 am and provided a reading of 0.12 per cent. A blood specimen taken at 9.50 am also detected the presence of amphetamine and methylamphetamine in his blood. Extrapolating back from his later breath test, his blood alcohol at the time of the collision would have been 0.149 per cent. Half a bottle of vodka was found in the Landcruiser between the front seats.

[45] A victim impact statement from the wife of the man killed in the collision described its profound effect on her, and her two young daughters, left without their father. She had struggled with depression and had required hospitalisation.

[46] The appellant had previously been convicted in 2008 of dangerous operation of a vehicle. On that occasion he had lost control of the vehicle he was driving; it had become airborne and skidded out of control, knocking over a palm tree and coming to rest in a driveway. In addition, the appellant had four times been before the court on charges of possessing dangerous drugs, receiving non-custodial sentences, and had been convicted of shoplifting and receiving stolen property charges.

Matters advanced in mitigation

[47] The appellant argued that he had not been given sufficient credit for his plea of guilty. He was originally charged with manslaughter, and a two day committal hearing took place. Once the indictment was presented, charging dangerous operation, a plea of guilty was promptly intimated. There is some force to the submission. It is clear that the circumstances of the 2009 offence taken alone would not warrant a serious violent offence declaration, and the appellant is entitled to some recognition of his co-operation through the plea of guilty.

[48] For the purposes of the re-sentencing, the appellant put evidence put before the court indicating that he had obtained some certificates in catering and health and safety while in custody. Some health conditions were also raised. He had given a history at the jail of a back injury and it was said that he had symptoms of post-traumatic stress disorder. As to the latter, the jail medical records contain a note that the appellant found being held in secure custody difficult because he was locked down early and had "too much time to think." The professional opinion relied on goes no higher than a note in the records of a diagnosis of adjustment disorder with features of post-traumatic stress disorder but "not full syndrome", made in the context of the appellant's having been given a long sentence, "which he wasn't expecting".

[49] The back injury seems purely a matter of self-report and I would place no weight on it. I would strongly suspect that adjustment disorder is a common manifestation in prisoners recently sentenced to lengthy terms of imprisonment. At any rate, without any medical opinion as to the severity or significance of the appellant's psychiatric symptoms, I would not accord them any weight either.

Pre-sentence custody

[50] It was submitted that the appellant should be given credit for earlier periods in custody, made up of periods of 193 days between 7 October 2010 and 17 April 2011; 679 days between 24 June 2011 and sentence on 2 May 2013; and the period from that date until judgment of this Court.

[51] The 193 days was a period which the appellant spent on remand in relation to the armed robbery charge to which he has pleaded guilty. It can be taken into account in sentencing on that charge, and there is no occasion to have regard to it here. The 679 day period commenced when the appellant was taken into custody in relation to the 2011 dangerous operation charge. At that time, he was on bail on the 2009 charge and remained so, according to the court order sheet and pre-custody certificate, until 30 April 2012, when his bail on that charge was revoked. Thereafter, he was held on remand on both dangerous operation charges. The period from 30 April 2012 until the date of sentence on 2 May 2013 should be taken into account, although not declared, in the re-sentencing on the 2009 offence. For clarity's sake, the period from 2 May 2013 to the date of this judgment should be declared as time served.

Sentence

[52] Even making allowance for the period of roughly a year spent on remand, a sentence of seven years imprisonment is appropriate, having regard to the aggravating circumstance of the appellant's leaving the scene knowing the other driver to have been killed or injured, and his previous conviction of dangerous operation of a vehicle. Cases such as *R v Vessey*; *ex parte Attorney-General*,[6] *R v Ross*,[7] *R v Hopper*[8] and *R v Hallett*,[9] all cases of dangerous operation of a motor vehicle causing death, involving sentences of seven, eight or nine years, support that view. In *Ross*, the only one of those cases with the same aggravating circumstance of leaving the scene of the incident, a sentence of eight years imprisonment was imposed without any recommendation for parole (despite a plea of guilty).

[53] The applicant should be given some recognition of his early guilty plea. His co-operation must be regarded as limited, however, given his attempt to deceive the authorities by attempting to set up a false scenario of a stolen vehicle. I would set a parole eligibility date at 2 May 2016, three years from the commencement of the sentence.

Orders

[54] The appeal against conviction should be allowed, the conviction set aside and a re-trial ordered. The application for leave to appeal against the sentence imposed in

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6 [1996] QCA 11.
7 [2009] QCA 7.
8 [2011] QCA 296.
9 [2009] QCA 96.

respect of the 2009 offence should be granted, the appeal allowed and a sentence of seven years imprisonment, with a parole eligibility date fixed at 2 May 2016, imposed. It should be declared that the appellant has served between 2 May 2013 and 12 December 2014 as imprisonment under that sentence, a period of 590 days.

[55] **MORRISON JA:** I have read the reasons of Holmes JA and agree with those reasons and the orders her Honour proposes.

[56] **ALAN WILSON J:** I agree with Holmes JA's reasons, and with the orders her Honour proposes.