

DIRECTOR OF PUBLIC PROSECUTIONS

v

ABBY STURGESS

JUDGE: His Honour Judge Rozen
WHERE HELD: Wodonga
DATE OF HEARING: 5 February; 9 April & 10 April 2024
DATE OF SENTENCE: 10 April 2024
CASE MAY BE CITED AS: DPP v STURGESS
MEDIUM NEUTRAL CITATION: [2024] VCC 428

REASONS FOR SENTENCE

Subject: CRIMINAL LAW
Catchwords: Dangerous driving causing death – Use of mobile phone – Not momentary inattention – Collision with cyclist from rear at high speed on country road – Early guilty plea – Youthful offender – No criminal history – Genuine remorse – Category 2 offence – Whether mental health exception applies – Importance of general deterrence – Custodial sentence required
Legislation Cited: *Crimes Act 1958* (Vic); *Sentencing Act 1991* (Vic)
Cases Cited: *DPP (Vic) v Chambers* (2006) 47 MVR 22; *DPP v Oates* [2007] VSCA 59; *DPP (Vic) v Neethling* (2009) 22 VR 466; *Stephens v The Queen* [2016] VSCA 121; *DPP v Weidlich* [2008] VSCA 203; *Bell v The Queen* [2018] VSCA 281; *The Queen v Towle* [2009] VSCA 280; *Pan v The Queen* [2020] VSCA 42; *DPP v Lombardo* [2022] VSCA 204; *Worboyes v The Queen* [2021] VSCA 169; *R v Mills* [1998] 4 VR 235; *DPP v Anderson* [2013] VSCA 45; *R v Verdins* [2007] VSCA 102; *Koukoulis v The Queen* [2020] VSCA 19; *DPP v Kenneison* [2023] VSCA 321; *DPP v Lombardo* [2022] VSCA 204; *Peers v The Queen* [2021] VSCA 264; *Director of Public Prosecutions v Dalglish (a pseudonym)* [2017] HCA 41; *DPP v Borg* [2016] VSCA 53; *DPP v Browne* [2023] VSCA 13; *Markarian v The Queen* (2005) 228 CLR 357; *DPP (Vic) v Gany* (2006) 163 A Crim R 322; *Parker v R* [2022] VSCA 207
Sentence: Imprisonment for 1 year and 4 months – Non-parole period of 6 months – Section 6AAA declaration – Imprisonment for 2 years with a non-parole period of 12 months

APPEARANCES:

Counsel

Solicitors

For the DPP

Ms D. Guesdon
(7 February 2024)
Mr B. Kerlin
(9 & 10 April 2024)

Office of Public Prosecutions

For the Accused

Ms J. Swiney

Keenes Little Lawyers

HIS HONOUR:

Introduction

- 1 One of the most important responsibilities we all have when we get behind the steering wheel is to take appropriate care for other road users. Cyclists are a vulnerable category of road user for obvious reasons.
- 2 In the case before the Court, Abby Sturgess, a young woman of otherwise impeccable character, has accepted by her plea of guilty to a single charge of dangerous driving causing death that she failed to take appropriate care for Anthony Reeckman on 27 January 2023. She was distracted by her mobile phone and collided with Mr Reeckman's bicycle from behind while travelling at considerable speed. The accident led to the death of Mr Reeckman, a 59 year old man who was an avid cyclist and photographer.
- 3 This Court must now decide the appropriate consequence for Ms Sturgess. That difficult task requires me to balance a number of considerations within the constraints of the laws laid down by parliament and the common law.
- 4 Because nearly all of us use the roads regularly, cases such as this are of great public importance. Because of this, the Court's published reasons will be available immediately on the County Court website after they have been read out.

A Plea of Guilty to a Serious Offence

- 5 Abby Sturgess, you have pleaded guilty to one charge of dangerous driving causing death ('DDCD'), contrary to s 319(1) of the *Crimes Act 1958* (Vic) ('*Crimes Act*'). The offence carries a maximum penalty of 10 years' imprisonment.
- 6 The offence of DDCD is what is known as a category 2 offence pursuant to s 5(2H) of the *Sentencing Act 1991* (Vic) ('*Sentencing Act*'). I will return to the significance of this categorisation later in these reasons.

- 7 Given the delay between your arraignment and sentencing, it is necessary to briefly rehearse the procedural history of your case.
- 8 Prior to the first listing of your plea, your lawyers sought an adjournment by email to obtain psychological and medical reports. The reports were not able to be obtained in time for the initial listing as you underwent surgery for an unrelated condition in December 2023. Given the potential consequences to you, these reports were obviously of significance.
- 9 Accordingly, I deemed it appropriate for the plea to commence on 7 February 2024, at which time you were arraigned, the prosecution opening read and victim impact statements read and tendered in court.
- 10 The matter was adjourned part heard for further plea on 9 April 2024, at which time I returned to Wodonga to finalise the matter.

Summary of the Offending

- 11 You are to be sentenced on the basis of the Summary of Prosecution Opening for Plea dated 22 December 2023¹ which is an agreed document.
- 12 That document sets out that at approximately 8:06 am on 27 January 2023, you left your home in Rutherglen and drove your car south along Rutherglen-Springhurst Road, Lilliput.
- 13 On the same morning, Anthony Reeckman was riding his bike on the same road. The rear of his bicycle was fitted with a red bicycle light which was intermittently flashing.
- 14 Rutherglen-Springhurst Road is a two lane stretch of road, with one lane in each direction separated by a single broken white line. At the time of the collision, the road was in good repair. There was a bitumen shoulder, followed by a grass verge,

¹ Exhibit A.

with light scrub and trees at the sides of the road. At the time of the collision, the road was dry, and the weather was fine. The sun was rising on your left side.

15 Prior to the impact, you had travelled approximately four and a half kilometres on the straight stretch of road. The speed limit applicable to that stretch of Rutherglen-Springhurst Road was 100 km/hr. It is not suggested that you exceeded that limit.

16 Other drivers who had passed Mr Reeckman in both directions observed there was a cyclist riding on the bitumen shoulder and noticed his red flashing rear light. According to one driver, the sun did not affect their ability to see Mr Reeckman.

17 As noted, Mr Reeckman was travelling ahead of you in the same direction. Your vehicle collided with the rear of his bicycle on the Rutherglen-Springhurst Road, approximately 415 metres south of Lilliput-Norong Road. You evidently did not see him as you made no attempt to slow down or avoid the collision. You were distracted by your mobile phone.

18 As a result of the impact, Mr Reeckman vaulted onto your bonnet and hit the windscreen before being thrown to the eastern side of the road. He landed in the grassed verge approximately 25.6 metres south of the impact location.

19 The prosecution case against you is put on the basis that the cause of the collision was inattention on your part as a result of you having been distracted by use of your mobile phone while driving. In this sense your driving was dangerous. The level of inattention was more than a momentary lapse, with social media apps being accessed by you on your mobile phone both in the minutes leading up to, and at the time of, the collision. This emerged from an examination by police of your mobile phone which was seized at the scene, yielding the following findings.

20 In the preceding 7 kilometres or 12 minutes of driving prior to the collision, your phone recorded your location and activity as follows:

(a) 7:59 am – you are recorded in the vicinity of your home;

- (b) 8:06 am – you travelled from your home, going east on Church Street, Rutherglen;
- (c) 8:07 am – travelling between 23 Fortune Street, Rutherglen and 94 Fortune Street, Rutherglen you sent three messages in the application ‘Snapchat’;
- (d) 8:08 am – travelling past 176 Fortune Street, Rutherglen you received a message in ‘Snapchat’;
- (e) 8:09 am – you sent a message in the application ‘Snapchat’, shortly after which the application ‘Instagram’ is recorded as “on screen”;
- (f) 8:10 am – travelling south on Rutherglen-Springhurst Road, Lilliput, approaching Kings Road and over Black Dog Creek, on the same road, ‘Instagram’ is recorded as “on screen”;
- (g) 8:11 am – continuing south on Rutherglen-Springhurst Road approaching Lilliput-Norong Road, ‘Instagram’ is recorded as “on screen”;
- (h) 8:12 am – approaching the collision scene on Rutherglen-Springhurst Road, ‘Instagram’ is recorded as “on screen”;
- (i) 8:12.49 am – you contacted 000 and remained on the call for 21 minutes and 9 seconds. Your recorded location does not change from the vicinity of 415 metres south of Lilliput-Norong Road until 10:36 AM, when the mobile phone was put into “aeroplane mode”;

21 Based on the data obtained from your phone, you were accessing applications immediately prior to the collision. You were accessing and sending messages via social media applications between 8:07am and 8:11.25 am. Recorded data depicting Instagram “on screen” between 8:12:37 – 8:12:38 am is consistent with the application having been active when you closed your mobile phone screen at 8:12:38 am, and then reopened it at 8:12:49 am to contact 000.

Post-Offending Conduct

- 22 You travelled a further 70 metres beyond the point of impact before coming to a controlled stop, conducting a U-Turn, and returning to park in the grassed verge on the western side of the road with your hazard lights operating, opposite where Mr Reeckman had come to rest.
- 23 You stepped out of your car, assessed the victim, established him to be not breathing, and immediately called 000. You commenced CPR on Mr Reeckman under the instruction of the 000 operator. Other drivers stopped at the collision scene to assist.
- 24 Tragically, and despite your best efforts and those of paramedics, Mr Reeckman was unable to be revived and was declared deceased by attending ambulance paramedics at the scene.
- 25 A witness who stopped to assist had a short conversation with you whilst at the scene. You told him that you didn't see the victim because of the dazzling sun.

Investigation

- 26 Later that day, the investigative team from the Collision Reconstruction and Investigation Unit attended the scene and conducted an examination. Scene walk-through videos, measurements and photographs of the scene, including your vehicle, were obtained. The driver's side sun glare visor in your Hyundai was observed to be in an upright position.
- 27 Collision reconstructionist, Detective Senior Constable Dr Yuxing Zhao, examined the scene and expressed the views that:
- (a) there was no evidence of emergency braking; and
 - (b) your vehicle was travelling at a minimum speed of between 79 and 87 km/hr at the time of impact.

- 28 Your vehicle was inspected and there was no mechanical issue found that could have contributed to the collision.
- 29 In addition, drive-throughs at different speeds at 8:13 am were subsequently conducted and investigators concluded that the sun did not affect the driver's view of the road.

Arrest and Interview

- 30 You were arrested at the scene and transported to the Wodonga Hospital where you provided a sample of your blood which was analysed and there were no alcohol or other drugs in your system.
- 31 You were then transported to Wodonga Police Station where a record of interview was commenced. During the interview, you denied using your mobile phone and stated that the sun flickering through the trees had impacted your ability to see. You also told investigators that:
- (a) you were familiar with Rutherglen-Springhurst Road as you travelled it daily to work;
 - (b) it [the drive] was different today as the sun was out, it was in your eyes and bothered you;
 - (c) the sun was coming through the passenger window on the left;
 - (d) when asked what you did about that, you stated "I'd rather not say";
 - (e) when asked if you had seen the cyclist, you stated "I'd rather not say";
 - (f) you had observed a white car a couple of hundred metres in front of [you];
 - (g) your mobile phone was plugged into the vehicle via a USB cord;
 - (h) you did not use [your] mobile phone at all before or at the time of the collision;

- (i) whilst driving, you had both hands on the steering wheel and your phone was charging in the console; and
- (j) after police informed you that they would be checking your phone data and apps, you said you always keep your phone open so your parents can track you using the “Life360” app.

Objective Gravity of Your Offending

32 In determining the appropriate sentence to impose on you, it is appropriate that I start by assessing the objective gravity of your offending.

33 A driving offence that results in the death of another person is obviously very serious;² so much is clear from the maximum penalty of imprisonment for 10 years.

34 The gravity of dangerous driving causing death or serious injury offending is gauged by considering the offender’s moral culpability and the objective dangerousness of their driving.³

35 The Court of Appeal has explained the correct approach that a court must follow in assessing the objective gravity of a given instance of the offence of DDCCD:

Driving will be dangerous where there is ‘some serious breach of the proper conduct of a vehicle so as to be in reality and not speculatively, potentially dangerous to others.’ The driving must have some feature 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 than due care and attention.’ A Court’s assessment of the dangerousness of the driving will be informed by the extent of the risk which the driving created, as well as by the extent of potential harm should the risk materialise⁴

² *DPP (Vic) v Chambers* (2006) 47 MVR 22, 27.

³ *DPP v Oates* [2007] VSCA 59, [21], [31], [39] (*‘Oates’*); *DPP (Vic) v Neethling* (2009) 22 VR 466, [33] (*‘Neethling’*).

⁴ *Stephens v The Queen* [2016] VSCA 121, [20] (citations omitted) (*‘Stephens’*).

- 36 In your case, the extent and nature of injuries on Mr Reeckman resulted in his death.
- 37 An aggravating aspect of your driving is your use of a mobile phone whilst driving. As outlined above, your use of the mobile phone was not simply a momentary lapse in judgment but persisted throughout the brief journey and continued as you travelled at significant speed. At such speeds, consistent and prolonged inattention represents a clear departure from the standard expected of drivers and places other road users, especially cyclists, at considerable risk of grave harm.
- 38 Your counsel accepted that the objective gravity of your offending was not low but submitted that it was less than moderate.⁵ Then prosecution submitted that the offending is 'at the mid-range of this type' when regard is had to all of the circumstances.⁶
- 39 I accept the prosecution submissions. Your sustained use of your phone in the minutes leading up to the collision makes yours a moderately serious case of DDCCD.

Moral Culpability

- 40 An assessment of the objective gravity of your offending is incomplete without regard to your moral culpability. In other words, to what extent are you to blame for Mr Reeckman's death?
- 41 This in turn involves a consideration of the extent to which you are 'personally responsible for both the prohibited acts and their consequences'.⁷ This assessment requires consideration of all the circumstances of your offending and the extent to which you should have foreseen the consequences of your driving.

⁵ Outline of Defence Submissions on Plea (undated), [33].

⁶ Prosecution Submissions on Sentence dated 9 April 2024, [18].

⁷ *DPP v Weidlich* [2008] VSCA 203, [17].

- 42 An offender's moral culpability will be higher if they knew the risks associated with their driving behaviour.⁸ Their moral culpability will be lower if the accident occurred because of momentary inattention⁹ or misjudgement¹⁰, or where external circumstances such as the poor design of an intersection, contributed to the accident.¹¹
- 43 The degree of dangerousness of the offender's driving is assessed by reference to the extent of risk that it creates. The extent of risk includes both the likelihood that something will go wrong, and the extent of harm which will result if it does.¹²
- 44 As recorded earlier in these reasons, your use of your mobile device was prolonged and persistent. The extent of risk created by distracted drivers is universally known and the focus of road safety campaigns in Victoria.
- 45 You were travelling at considerable speed in a motor vehicle without due attention to the road before you, creating a significant risk of serious harm to the public. There is no evidence before the Court about the traffic common on Rutherglen-Springhurst Road at the time of the incident, but I infer from the Opening that the road was being used by other drivers and indeed, a cyclist, at the time.
- 46 Therefore, the extent of the risk created, combined with the extent of the harm which will result from its eventuation, can lead to no other conclusion than that your moral culpability for the offending is considerable.

⁸ *Stephens* (n 4) [25]-[28].

⁹ *Bell v The Queen* [2018] VSCA 281, [54].

¹⁰ *The Queen v Towle* [2009] VSCA 280, [50]-[51].

¹¹ *Pan v The Queen* [2020] VSCA 42, [83], [85]-[86].

¹² *Ibid*, [66].

Victim Impact

- 47 The devastation your offending has caused to this small community is manifest in the two victim impact statements tendered in this matter.¹³ Both statements were movingly read in open court by their makers.
- 48 Barbara Reeckman, Tony's sister, spoke eloquently of the enduring impact Tony's death has had on their closeknit family. Ms Reeckman, as well as her three siblings, have experienced persistent sleeping problems occasioned by grief and nightmares. It is clear from Ms Reeckman's statement the enormous role Tony played in the lives of those around him and that his loss will be felt for the rest of their lives.
- 49 Debra Enshaw, Tony's partner, opened her statement in Court stating that 'the worst day of [her] life was the last of [Tony's]'. In doing so, Ms Enshaw captured the very essence of the impact of losing her partner of seven years in this offending. Ms Enshaw went on to recall, in harrowing detail, the day Tony was killed and the immense shock and sadness it caused.
- 50 Ms Enshaw stated that she has been robbed of the future she and Tony were looking forward to, had planned and prepared for. Without Tony, and the certainty they had assured for themselves, she feels a smaller, duller and sadder version of herself. Ms Enshaw will miss Tony every single day for the rest of her life – nothing and no one can replace her partner.
- 51 I take into account the impact of your offending on the victims.¹⁴ I must emphasise that the sentence I impose should not be seen by anyone as the Court's evaluation of the life lost on 27 January 2023. Mr Reeckman's life was of course priceless.

Personal Circumstances

¹³ Victim Impact Statement of Barbara Reeckman dated 11 December 2023 (Exhibit B); Victim Impact Statement of Debra Enshaw dated 1 February 2024 (Exhibit C).

¹⁴ *Sentencing Act 1991* (Vic), s 5(2)(daa).

- 52 You are now 23 years old. You grew up in a secure family, but your parents separated when you were eight. Your mother re-married when you were 12 and you remain close with both of your parents.
- 53 You had lived in Rutherglen since 2021 but moved to Wangaratta in 2023 after the accident. The publicity the accident received meant that you no longer felt comfortable in Rutherglen.
- 54 You completed secondary school and achieved your enrolled nurse qualification in July 2023. You hope to become a registered nurse specialising as a midwife.
- 55 You are presently working as an enrolled nurse at North East Health in Wangaratta.

Mental Health

- 56 You have been treated by a psychologist, Dr Alana Harridge, since August 2023. Dr Harridge, who has seen you on seven occasions has diagnosed you as meeting the diagnostic criteria for Post-traumatic Stress Disorder and Adjustment Disorder with mixed anxiety and depressed mood.¹⁵ Dr Harridge states that you have 'reported some suicidal ideation following the incident, however, denied intent'.¹⁶
- 57 Dr Harridge notes that it has been difficult for you to fully process and address your symptoms 'whilst simultaneously navigating the criminal justice process'.¹⁷ Dr Harridge has treated you for the conditions and recommends ongoing treatment including a possible referral to a psychiatrist.
- 58 For the purposes of this court case, you were assessed by a forensic psychologist, Ms Rebecca Fakhri. Ms Fakhri saw you on 23 February 2024 and produced a detailed report of her findings dated 22 March 2024.¹⁸ Ms Fakhri gave evidence in

¹⁵ Report of Dr Alana Harridge dated 21 March 2024 (Exhibit D2), 2.

¹⁶ Ibid.

¹⁷ Ibid, 3.

¹⁸ Report of Rebecca Fakhri dated 22 March 2024 (Exhibit D1).

court on 10 April 2024 when she was cross examined by Mr Kerlin for the prosecution.

59 Ms Fakhri, who had the benefit of Dr Harridge's report, also considers that you present with symptoms of 'depression, stress and anxiety which are consistent with an Adjustment Disorder (with a depressed and anxious mood)'.¹⁹ Ms Fakhri also considers that your anxiety symptoms are more indicative of Social Anxiety Disorder (SAD) than Generalised Anxiety Disorder.²⁰ Finally, and consistently with Dr Harridge's diagnosis, Ms Fakhri considers that you meet the criteria for PTSD.²¹

60 In relation to the impact of a custodial sentence on you, Ms Fakhri considers that:

... imprisonment is likely to have a negative effect on Ms Sturgess' development and future behavioural outcomes through loss of positive social structures and educational and vocational access, and exposure to negative peers at her impressionable developmental stage. Australian and international research has demonstrated the potential criminogenic effects of imprisonment stemming from reinforcement of criminal identity and exposure of susceptible young adult offenders such as Ms Sturgess to older offenders with entrenched offending behaviour patterns²²

61 Ms Fakhri explains this opinion further in her report in which she opines that:

... [t]here is potential for significant mood fluctuation and the volatile nature of the prison environment can further exacerbate her symptom profile and risk of decompensation.

This is particularly pertinent for individuals with trauma and anxiety symptoms who are at higher risk of inappropriate or disproportionate responses due to poor emotional regulation and impulsive behaviour, which can result in unintentional sanctions and higher vulnerability to experiencing issues with other offenders or with staff. She is also

¹⁹ Ibid, [96].

²⁰ Exhibit D1, [99].

²¹ Ibid, [101].

²² Ibid, [106].

more likely than someone without her conditions to be triggered in custody which can cause further deterioration of her mental health.

Access to programs and treatment is generally reduced compared to the community, and it is unlikely that Ms Sturgess' trauma and affective state will be adequately managed and treated, particularly as there is no intensive treatment of her conditions (given the specialised, consistent nature of interventions required for her PTSD and ADHD) available in custody. Further, incarceration is likely to disrupt the progress Ms Sturgess has made with regard to engaging with a psychologist for treatment.

Her Social Anxiety Disorder (SAD) appears to cause her significant distress, which indicates she would be subject to a substantially and materially greater than ordinary burden if she were to receive a custodial sentence, and the risk of further decompensation of her mental state is therefore high. Her SAD makes her prone to acquiesce to the opinions and demands of others, making her more likely to experience difficulties in this respect²³

- 62 Finally, Ms Fakhri makes a number of recommendations about your future treatment needs and also considers that:

Any custodial sentence should incorporate a period of support and supervision after her release to support her transition between prison and the community, specifically, to provide relevant referrals to the aforementioned support services and treatment programs and ensure continued engagement²⁴

- 63 At the request of the prosecution, Ms Fakhri gave oral evidence on 10 April 2024. Ms Fakhri did not depart from the opinions expressed in her report in any meaningful way that is relevant to the Court's sentencing task.

Character References

²³ Exhibit D1, [108]-[111].

²⁴ Ibid, [112](h).

64 The Court has received a number of written character references about you which I have read carefully. These references are from:

- (a) Your sister, Ms Rebekka Anne Carey (5 February 2024);
- (b) A work colleague, Ms Dianne Egan (undated);
- (c) Your mother, Ms Julie Anne Carey (11 December 2023);
- (d) Your manager, Ms Claire Benton (12 December 2023);
- (e) Your sister and brother-in-law, Ms Lucy and Mr Sam Doyle (undated);
- (f) A family friend, Mr Brian Bowman (undated);
- (g) Your supervisor, Ms Anna-Maria Jones (5 April 2024);
- (h) A work colleague, Ms Kristy Lee Howell (8 April 2024);
- (i) Family friends, Mr Neville and Ms Vicky Barry (15 December 2023);
- (j) Your manager, Mr Alastair Browne (December 2023); and
- (k) A friend, Ms Abby Talbot (12 December 2023).²⁵

65 The references are most impressive. They paint a picture of a young woman who contributes to her community and is hard working and loved by those with whom she comes into contact. Many members of your family and friends were present in court to support you.

Statutory Considerations

66 While I must decide what sentence to impose on you, I do so constrained by the law.

²⁵ Exhibit D3, (a)-(k).

67 As observed earlier in these reasons, dangerous driving causing death is a category 2 offence under the *Sentencing Act*. As a result, a court is required to sentence a person who is found guilty of the offence to a sentence of imprisonment unless one of the exceptions in s 5(2H) of that Act is applicable. The only exception relied upon by your counsel in this case is that found in s 5(2H)(c)(ii).

Section 5(2H)(c)(ii)

68 Section 5(2H)(c)(ii) provides that a court is not required to impose a sentence of imprisonment in respect of a category 2 offence if the offender 'has impaired mental functioning' that would result in them being subject to 'substantially and materially greater than the ordinary burden or risk of imprisonment'.

69 'Impaired mental functioning' is defined, relevantly, in s 10A as a 'mental illness within the meaning of the *Mental Health Act 2014*, which is a 'medical condition that was characterised by a significant disturbance of thought, mood, perception or memory'.

70 The mental illnesses relied upon in your case are PTSD, Adjustment Disorder, Major Depressive Disorder and Social Anxiety Disorder

71 In *DPP v Lombardo*²⁶, the Court of Appeal, in considering this exception observed:

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. 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 offender²⁷

72 I accept that you presently suffer from these mental illnesses for which you have a need for further treatment. There is no evidence before the Court about what treatment you may receive in custody, but I will proceed on the assumption that it

²⁶ [2022] VSCA 204 ('*Lombardo*').

²⁷ *Ibid*, [46].

would not be as comprehensive as the treatment you are presently receiving from Dr Harridge.

- 73 The question posed by the statutory test is: would you be exposed to ‘substantially and materially greater than the ordinary burden or risks of imprisonment’? I will return to this question later in these reasons.

Matters in Mitigation

Plea of Guilty and Remorse

- 74 You pleaded guilty to the offence at the committal mention stage in the Magistrates’ Court and maintained that plea in Court. A plea entered at this time can be readily characterised as early, as is conceded by the prosecution.
- 75 The community has, by your guilty plea, been spared the time and cost of a trial. Because of your plea, witnesses, and the family and friends of Mr Reeckman, have been spared what would have been a traumatic trial. Although the effects of the pandemic on the Court’s backlog have largely ended, the prosecution conceded that you are still entitled to a small additional *Worboyes*²⁸ discount in addition to the ordinary discount on a plea of guilty.
- 76 Although you initially lied about the circumstances of your offending to police in your record of interview, I accept that this was a product of your youth and a panicked attempt to avoid responsibility. Shortly after this occurred, you accepted responsibility, and this was followed by your eventual plea of guilty.
- 77 In a heartfelt letter you wrote to the Court you express your sorrow for your actions.²⁹ You apologise to Mr Reeckman’s family and to your own. You say that a part of you died on 27 January 2023 and that you can no longer be proud of yourself.

²⁸ *Worboyes v The Queen* [2021] VSCA 169.

²⁹ Letter to the Court from Abby Sturgess (undated) (Exhibit D4).

78 I take into account your guilty plea and your genuine remorse in mitigating the sentence I am to impose.

Youth

79 Your youth is also a significant consideration in this sentencing exercise. You were 22 at the time of the offending. You are now 23. You have your entire adult life ahead of you.

80 In the case of *R v Mills*,³⁰ the Victorian Court of Appeal endorsed several general propositions about sentencing youthful offenders. Two have particular application in your case:

(a) First, that the youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises; and

(b) Secondly, in the case of a youthful offender, rehabilitation is usually far more important than general deterrence. This is because punishment and incarceration in an adult prison may in fact lead to further offending.³¹

81 In *DPP v Anderson*,³² the Court of Appeal stated that it is a 'cardinal principle of sentencing law that, when a young offender is to be sentenced, the sentencing disposition should be tailored — so far as possible consistently with other applicable sentencing principles — to promote the offender's rehabilitation'.³³

82 I have given due weight to your youth in determining the appropriate head sentence and especially the non-parole period in your case.

³⁰ [1998] 4 VR 235.

³¹ *Ibid*, 241.

³² [2013] VSCA 45.

³³ *Ibid*, [49].

Prospects of Rehabilitation

- 83 I accept that the consequences of your offending, together with your experience in the criminal justice system, have had a wholly deterrent effect on you. I do not consider you to be a risk of re-offending either generally or in relation to driving offences. I note that this is also the assessment of Ms Fakhri.
- 84 The various character references that have been provided to the Court describe the remorse that you have expressed to your friends, family and work colleagues.
- 85 I am troubled by your apparent refusal to accept that you were using your mobile phone in the lead up to the collision. You continued to claim to Ms Fakhri that you did not see Mr Reeckman because the sun was in your eyes. Ms Fakhri states that this 'could be interpreted as minimisation and deflection'.³⁴
- 86 However, I note that you have conceded to your treating counsellor that that '[your] phone had been active just prior/during the incident'.³⁵ Further, I accept your counsel's submission that your letter to the Court is evidence of your genuine remorse.
- 87 On balance, and despite this concern, taking into account your work history, your plans for the future, your general character and the support of family, work colleagues and friends as evidenced by the glowing character references, I accept that your prospects of rehabilitation are excellent.

Verdins

- 88 Your counsel submitted that limbs 5 and 6 of the so-called *Verdins*³⁶ principles are enlivened in your case. It was argued on your behalf that:

³⁴ Exhibit D1, [56].

³⁵ Exhibit D2, 1.

³⁶ *R v Verdins* [2007] VSCA 102 ('*Verdins*').

- (a) Imprisonment will weigh more heavily on you than it would on a person in normal health; and
- (b) There is a serious risk that imprisonment will have a significantly adverse effect on your mental health.

89 As discussed earlier in these reasons, these are matters that were expressly addressed by Ms Fakhri in her report and in her oral evidence.

90 The prosecution conceded that there is evidence before the Court to make out the application of both limbs 5 and 6 of *Verdins*.

91 On the basis of this evidence, I accept that limb 5 of *Verdins* is relevant as the time you spend in custody will be more burdensome than would be the case for a person who does not suffer from poor mental health.

92 The evidence before the Court also enables me to conclude that there is a serious risk of the custodial environment adversely affecting your mental health.

93 I have taken both of these matters into account in mitigation of sentence.

94 The finding I make in relation to limb 6 of *Verdins* is not the same as what is required to satisfy the test in s 5(2H)(c)(ii) of the *Sentencing Act*. That test is more onerous.

Current Sentencing Practices

95 The Court was referred to a number of appellate cases concerning DDCCD during the course of the plea.³⁷ Such cases are of course not precedents. As has been explained by the High Court, they merely provide some guidance to a sentencing court about the range of applicable sentences.³⁸ A determination of the appropriate

³⁷ *Koukoulis v The Queen* [2020] VSCA 19; *DPP v Kenneison* [2023] VSCA 321; *Lombardo* (n 26); *Peers v The Queen* [2021] VSCA 264 ('Peers').

³⁸ *Director of Public Prosecutions v Dalgleish (a pseudonym)* [2017] HCA 41, [83].

sentence in a particular case requires a consideration of a range of factors involving both the offending and the offender.

96 Having said that I have been assisted in understanding the applicable sentencing principles in cases involving DDCD.

97 The principles that emerge from the case law may be summarised as follows.

98 In *Peers*, the Court of Appeal observed that it had:

... previously noted that the offence of dangerous driving causing death is a serious one, and 'it is difficult to see how any sentence other than one of immediate imprisonment could possibly meet the needs of general deterrence, adequate punishment, and denunciation'³⁹

99 The Court added that:

... [i]t is the necessary reality for offending of this kind that people with unblemished records, undoubted remorse, and with little or no prospect of re-offending, will receive an immediate term of imprisonment⁴⁰

100 Finally, in the recent case of *DPP v Browne*⁴¹, the Court referred to the earlier case of *Neethling* and noted that:

... [i]n that case, this Court stated that a non-custodial sentence for the offence of dangerous driving causing death should be seen as exceptional and that the degree of the offender's moral culpability will be 'a key factor' in determining whether such a sentence is available as a sentencing option⁴²

101 The Court went on to explain that:

³⁹ *Peers* (n 37) [72]; by reference to *DPP v Borg* [2016] VSCA 53.

⁴⁰ *Ibid*, [73].

⁴¹ [2023] VSCA 13 ('*Browne*').

⁴² *Ibid*, [47].

... that statement was endorsed in the more recent case of *Director of Public Prosecutions v Lombardo*, where this Court stated that, whilst non-custodial sentences are exceptional for the offence of dangerous driving causing death, the exception applies where the offender's moral culpability is low, such as where there has been momentary inattention or misjudgement⁴³

Submissions of the Parties

102 On your behalf it was submitted that all of the relevant sentencing purposes could be met by a Community Correction Order (either as a stand-alone sentence or in combination with a term of imprisonment) in the event that the court was satisfied that an exception under s 5(2H) was made out.⁴⁴

103 By contrast, it was submitted by the prosecution that only a head sentence and a non-parole period would be adequate.

Consideration

104 A Victorian judge is required to impose a sentence in a particular case that is just and appropriate. The methodology that a Judge employs to achieve this outcome is known as 'instinctive' or 'intuitive' synthesis. It has been said that sentencing is an art and not a science and it is certainly not a mathematical exercise.

105 McHugh J of the High Court explained that instinctive synthesis is:

... the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence⁴⁵

⁴³ Ibid (citations omitted).

⁴⁴ On 10 April 2024 the Court received a report from Corrections Victoria (Exhibit D6) in which the author concluded that you are suitable for such an Order.

⁴⁵ *Markarian v The Queen* (2005) 228 CLR 357, [51].

106 Section 5 of the *Sentencing Act* provides that the only purposes for which you may be sentenced are:

- (a) To punish you in a manner and to an extent which is just in all the circumstances;
- (b) To deter you or others from committing similar offences in the future;
- (c) To facilitate rehabilitation;
- (d) To manifest the denunciation of your conduct;
- (e) To protect the community; or
- (f) A combination of two or more of these purposes.

107 In *Oates*, Neave JA, with whom Warren CJ agreed, stated that general deterrence must be given considerable weight in sentencing an offender for dangerous driving causing death or serious injury.⁴⁶ This sentencing consideration is particularly important in sentencing young drivers for such offences.⁴⁷ Other young drivers must be made aware of the very serious consequences that they will suffer if their manner of driving causes the death of another road user. This will be the case even where such a driver is unaffected by alcohol or other drugs.

108 Moreover, the inherent seriousness of this, and like offences, and the need for their deterrence means that features such as youth, good character and remorse carry less weight in mitigation than they otherwise would.⁴⁸ Serious driving offences often involve offenders who, like you, are young, are of generally good character and who have excellent prospects for rehabilitation.

109 Accordingly, I consider the principles of general deterrence, denunciation and rehabilitation to be at the forefront of the sentencing synthesis. I accept your

⁴⁶ *Oates* (n 3) [22].

⁴⁷ *Neethling* (n 3) [55].

⁴⁸ *DPP (Vic) v Gany* (2006) 163 A Crim R 322, [35].

counsel's submission that specific deterrence is of much less importance. For the reasons discussed earlier, I accept that you are unlikely to re-offend.

110 Returning now to the central question argued by your counsel concerning whether I am required by law to send you to jail.

111 I have ultimately found it unnecessary to determine if the exception created by s 5(2H)(c)(ii) of the *Sentencing Act* applies in your case. This is because, even assuming in your favour that it does, I would still then have a discretion about whether to send you to prison. If I was exercising that discretion, I would conclude that, having regard to the authorities I have summarised earlier, the objective gravity of your offending and your degree of moral culpability mean that only a custodial sentence can adequately address the relevant sentencing purposes. This is so despite the numerous matters of mitigation of sentence that are called in aid by your counsel in her very able submissions on your behalf.

112 I have concluded earlier that yours is not a case of momentary inattention or misjudgement.⁴⁹ It is not one of the exceptional class of cases of DDCCD that does not call for a custodial sentence.

113 Therefore, whether I am bound by s 5(2H) of the *Sentencing Act* to impose a custodial sentence, or whether I am at large in the exercise of a discretion, the result is the same just as it was in the case of *Peers* cited by your counsel.

Orders

114 Turning then to the orders I make in this case. Ms Sturgess, please stand:

- (a) On Charge 1, dangerous driving causing death, you are sentenced to 1 year and 4 months' imprisonment. The minimum term you are to serve before

⁴⁹ In contrast to a case such as *Parker v R* [2022] VSCA 207 where the offender was sentenced to a Community Correction Order.

being eligible for release on parole is 6 months. Whether you are released on parole is a question for the Adult Parole Board and not this Court.

(b) I have set an unusually short non-parole period in reflection of your youth and your rehabilitation prospects. I have also taken into account the evidence about your mental health condition and treatment needs and the opinion of Ms Fakhri in this regard.⁵⁰

(c) I will direct that a copy of Ms Fakhri's report be provided to Corrections Victoria along with these reasons.

115 Pursuant to s 6AAA of the *Sentencing Act*, I declare that but for your plea of guilty, I would have imposed a sentence of 2 years' imprisonment with a non-parole period of 12 months.

116 Finally, pursuant to s 89(2)(a) of the *Sentencing Act*, any licences held by you are to be cancelled and you are disqualified from obtaining a further licence for a period of 18 months (being the statutory minimum) to commence today.

⁵⁰ Exhibit D1, [112](h).