JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	LIBRI -v- THE STATE OF WESTERN AUSTRALIA [2013] WASCA 113
CORAM	**:**	BUSS JA NEWNES JA MAZZA JA
HEARD	**:**	15 FEBRUARY 2013
DELIVERED	**:**	3 MAY 2013
FILE NO/S	**:**	CACR 129 of 2012
BETWEEN	**:**	JAY JOSEPH LIBRI Appellant AND THE STATE OF WESTERN AUSTRALIA Respondent

ON APPEAL FROM:

Jurisdiction	**:**	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	**:**	CURTHOYS DCJ
File No	**:**	IND 1088 of 2011

Catchwords:

Criminal law - Appeal against sentence - Dangerous driving occasioning grievous bodily harm - *Road Traffic Act 1974* (WA), s 59(3)(b)(ii) - Appellant drove at 50 - 55 km per hour through crowd of pedestrians milling on the road - Struck pedestrian - Failed to stop after accident and failed to report accident until following day - Pedestrian suffered life-threatening injuries and serious

long term disabilities - Appeal against 3 years and 3 months' imprisonment for dangerous driving occasioning grievous bodily harm dismissed - Appeal against total effective sentence of 4 years' imprisonment allowed - Appellant resentenced to total effective term of 3 years and 3 months' imprisonment

Legislation:

Road Traffic Act 1974 (WA), s 59(3)(b)(ii)

Result:

Appeal allowed
Appellant resentenced to total effective term of 3 years and 3 months' imprisonment

Category: B

Representation:

Counsel:

Appellant	:	Mr T F Percy QC & Mr S Nigam
Respondent	:	Ms C Barbagallo

Solicitors:

Appellant	:	S C Nigam & Co
Respondent	:	Director of Public Prosecutions (WA)

Case(s) referred to in judgment(s):

Abeyakoon v Brown [2011] WASCA 63
Chan v The Queen (1989) 38 A Crim R 337
Cheung v The Queen [2001] HCA 67; (2001) 209 CLR 1
Eves v The State of Western Australia [2008] WASCA 7; (2008) 49 MVR 259
Longbottom v The State of Western Australia [2008] WASCA 203; (2008) 38 WAR 396
Lowndes v The Queen [1999] HCA 29; (1999) 195 CLR 665
McLaughlin v The State of Western Australia [2012] WASCA 204
Muldrock v The Queen [2011] HCA 39; (2011) 244 CLR 120

Postiglione v The Queen (1997) 94 A Crim R 397; (1997) 189 CLR 295
Roffey v The State of Western Australia [2007] WASCA 246
Taylor v The State of Western Australia [2009] WASCA 226
The State of Western Australia v JWRL (a child) [2010] WASCA 179
The State of Western Australia v Olive [2011] WASCA 25; (2011) 57 MVR 269
Wilson v The State of Western Australia [2010] WASCA 82

1 **REASONS OF THE COURT**: This is an appeal against sentence. The appellant was found guilty after trial in the District Court of dangerous driving occasioning grievous bodily harm, failing to stop after an accident, and failing to report an accident. He was sentenced (relevantly) to a total effective sentence of 4 years' imprisonment with eligibility for parole.

2 The conviction for dangerous driving occasioning grievous bodily harm was a conviction for an alternative offence. The appellant had been charged with unlawfully doing grievous bodily harm contrary to s 297(1) of the *Criminal Code* (WA). The maximum penalty for that offence is 10 years' imprisonment.

3 Mazza JA granted leave to appeal on two of the appellant's three grounds of appeal and referred the remaining ground to the hearing of the appeal.

Background

4 The offending occurred at about 10.45 pm on 4 February 2011. Earlier in the evening the appellant and three friends had been at a tavern. The friends included a Joseph Round-Rawlins, who during the course of the evening expressed a desire to go to a 17th birthday party being held in Duncraig in order to confront one of those attending the party, a Mr Peghini. The appellant agreed to drive Mr Round-Rawlins to the party. The appellant did not hold a current driver's licence, having been disqualified from holding a driver's licence for traffic offences.

5 The appellant drove Mr Round-Rawlins and the two other friends to the party in Mr Round-Rawlins' car. Shortly before they arrived party guests had spilled out of the house where the party was being held onto the front lawn and the adjacent road verge.

6 As the appellant approached the house he saw people outside the house and on both sides of the road. The appellant parked on the verge on the left-hand side of the road and he and his three passengers got out of the car. Mr Round-Rawlins and Mr Peghini engaged in a verbal altercation and subsequently became involved in some pushing and shoving. A number of party guests came to watch. The fight was broken up by a party guest and the appellant and his three passengers got back into the car. The appellant drove off and the party guests walked back towards the party.

7 However, due to his unfamiliarity with the area, the appellant ended up back on the road where the party was being held, driving towards the party. The area was well lit and as he approached the house where the party was being held the appellant could clearly see people on either side of the road and on the verge. As the sentencing judge put it, 'there were people everywhere'. The appellant, however, made no attempt to slow down. He continued at a speed of between 50 - 55 km per hour. As he rounded the bend in the road where the house was situated, the right hand corner of the car struck the complainant. The complainant hit the windscreen and the right wing mirror before falling to the ground. As the car hit the complainant, the appellant saw a flash of white and the windscreen cracked. The sentencing judge accepted that the appellant did not see the complainant before the impact because he was focusing on another pedestrian.

8 The appellant drove away from the scene of the accident without stopping. A passenger in the car exclaimed, '[d]ude, you just hit him. You just hit him'. The appellant replied, '[n]o one say nothing. No one say names. No one mention shit'. He continued to Mr Round-Rawlins' house where he parked the car. He and one of the passengers then walked back to the tavern where they had been earlier in the evening and began drinking. The appellant did not leave the tavern until he was ejected. Upon arriving home, the appellant told his father that he had hit someone with a car. The appellant did not report the accident to police until the next morning.

9 In the meantime, bystanders had summoned an ambulance and the complainant was taken to Royal Perth Hospital where a CT scan revealed bleeds in the brain consistent with very significant acceleration-deceleration injury to the brain. Without medical intervention, the complainant would have died. He is now seriously, and probably permanently, disabled.

Sentencing remarks

10 The sentencing judge noted that at the time of the offending the appellant was not under the influence of drugs or alcohol. His Honour found that the accident was a consequence of the appellant's speed and his limited ability to take evasive action. He noted that the appellant had deliberately chosen to drive at 50 - 55 km per hour towards pedestrians in circumstances where, because there were people on both sides of the road, his options to take evasive action were severely limited. His Honour observed that the appellant must have known the party-goers would have

been drinking and that their potential reaction time would have been affected, as was the case with the complainant. The sentencing judge described the appellant's driving as demonstrating a 'callous and reckless disregard for fellow road users'.

11 The sentencing judge noted that the appellant had exhibited no remorse at the time, having failed to stop after the accident and done nothing to seek help for the complainant. Nor had he shown any remorse when later told by police that the complainant's injuries were life-threatening, instead seeking to blame the complainant for the accident. His Honour observed that some, belated, remorse appears from a subsequent psychiatric report.

12 His Honour noted that the complainant had suffered serious and long term (if not permanent) injuries, including both physical disabilities and significant residual compromise of his mental capacity, involving personality and behavioural changes. The complainant would remain significantly restricted in any recreational or social activities requiring mobility or physical exertion. It was unlikely that he would ever be able to drive a motor vehicle or return to paid employment.

13 The sentencing judge also referred to the appellant's 'lamentable' traffic record, noting that in the 16 month period the appellant had been eligible to hold a driver's licence he had been convicted of a number of driving offences, including two previous convictions for reckless driving. Over that period he had been disqualified from holding or obtaining a driver's licence for a total of 21 months. At the time of the accident, the appellant was disqualified from holding or obtaining a driver's licence.

14 His Honour observed that the appellant had had a comfortable upbringing. A psychiatric report had concluded that there was no indication of any psychiatric or personality disorder and the appellant was at a low risk of reoffending. His Honour commented, however, that the latter conclusion had to be balanced against the appellant's previous record. The sentencing judge considered that the main, if not the only, mitigating factor was the youth of the appellant, who was 18 years and 4 months old when the offending occurred.

15 The sentencing judge concluded that the actual collision and the failure to stop were separate incidents and the appellant should be sentenced accordingly. He sentenced the appellant as follows:

Offence	Sentence
Dangerous driving causing grievous bodily harm	3 years' and 3 months' imprisonment 3 years' licence suspension (cumulative)
Failure to stop	1 month's imprisonment (concurrent) 12 months' licence suspension (cumulative)
Failure to report accident	9 months' imprisonment (cumulative) 9 months' licence suspension (concurrent)

16 The total effective sentence was therefore 4 years' immediate imprisonment. The appellant's driver's licence was suspended for 4 years. There is no appeal against the latter.

Grounds of appeal

17 The appellant was granted leave to appeal on two grounds, both relying on inferred error. One ground (ground 1) was that the sentence on the first count, dangerous driving occasioning grievous bodily harm, was manifestly excessive. The other (ground 2) was that the total effective sentence infringed the totality principle. The remaining ground (ground 1A) was as follows:

> The learned sentencing Judge erred in his assessment of the factual basis for sentencing the offender by failing to take into account to any extent the evidence of the Prosecution witnesses Joseph Round-Rawlins and David Jackson, which were significantly mitigatory of the offender's culpability.
>
> **Particulars**
>
> 1. The witness Joseph Round-Rawlins gave evidence to the effect that the accused and his friends got back into their vehicle because they were 'outnumbered and the situation was getting nasty' (page 423 of the trial transcript).
>
> 2. The witness David Jackson gave evidence that a male, namely Callan Butcher, had jumped in the middle of the road in front of the offender's car, inadvertently resulting in the offender swerving and clipping the complainant (page 237 of the trial transcript).
>
> 3. The learned sentencing Judge was in error by sentencing the offender without regard to this evidence.

The disposition of the appeal

Ground 1A

18 It is convenient to deal first with ground 1A. We did not understand the relevant principles to be in issue. They are conveniently summarised in ***The State of Western Australia v JWRL (a child)*** [2010] WASCA 179 [9] - [10] as follows.

19 Where the offender to be sentenced has been found guilty following trial by jury, the judge must determine the facts relevant to the sentencing process. The facts found by the trial judge for the purposes of sentence are to be made on the evidence adduced at trial, together with any further material received during the sentencing process. Although the facts found by the sentencing judge must be consistent with the verdict of the jury, it is the trial judge who must find those facts, rather than speculate about the facts that may or may not have been found by the jury. Provided the facts found by a sentencing judge are not inconsistent with the jury's verdict, a sentencing judge may well make an assessment of an offender's degree of culpability which would not be supported by all, or perhaps any, members of the jury. See also ***Cheung v The Queen*** [2001] HCA 67; (2001) 209 CLR 1.

20 The appellant's contention, as we understand it, is that the sentencing judge failed to have regard to evidence which was relevant to the appellant's degree of culpability. In that regard, as we understand it, the appellant submits that, based on Mr Round-Rawlins' evidence at trial, the sentencing judge should have found as a fact, and taken into account, that the appellant drove as he did because he believed that some of the party-goers intended to attack his passengers. Similarly, it is contended that, based on the evidence of Mr Jackson at trial, the sentencing judge should have found as a fact, and taken into account, that another person, one Callan Butcher, had jumped into the middle of the road in front of the appellant's car, causing the appellant to swerve and hit the complainant.

21 There is no substance in either contention. The relevant evidence at trial of Mr Round-Rawlins was simply to the effect that after the pushing and shoving was broken up they returned to the car and left because they were outnumbered and 'the whole situation was getting quite nasty' (ts 423). His Honour's finding that there was no threat or danger to the appellant or his passengers (ts 717) when the appellant returned to the road where the party was being held, was a finding which was open to him on the evidence and plainly was not inconsistent with the jury's verdict.

22 The second contention is based upon a misunderstanding of the evidence. The evidence of Mr Jackson was not to the effect asserted by the appellant. Mr Jackson gave evidence that Mr Butcher was standing in the middle of the road (ts 237). He said Mr Butcher avoided being hit because he 'stood back'. When asked if the car swerved slightly to miss Mr Butcher, Mr Jackson said he did not remember but he did not think so (ts 238).

23 We would refuse leave to appeal on this ground.

Ground 1

24 A ground of appeal asserting manifest excess relies upon the implication of error from the sentence itself. The implication arises where, although it is not possible to discover the exact nature of the error, the sentence is so unreasonable or unjust that the court must conclude that a substantial wrong has occurred: ***Wilson v The State of Western Australia*** [2010] WASCA 82 [2]. It is not, however, sufficient that the appellate court might have imposed a different sentence. It may interfere only where it is shown that the sentencing judge has failed properly to exercise his or her discretion: ***Lowndes v The Queen*** [1999] HCA 29; (1999) 195 CLR 665 [15].

25 In determining whether a sentence is manifestly excessive it is necessary to consider the maximum penalty for the offence, the customary standard of sentencing for such offences, the seriousness of the offending and the personal circumstances of the appellant: ***Chan v The Queen*** (1989) 38 A Crim R 337, 342.

26 The maximum penalty for the offence of dangerous driving occasioning grievous bodily harm, where the offence is not committed in circumstances of aggravation, is 7 years' imprisonment: *Road Traffic Act 1974* (WA), s 59(3)(b)(ii). We note in passing that the maximum penalty for failing to report an incident occasioning grievous bodily harm is 10 years' imprisonment: s 56(2); and for failing to stop after an incident occasioning grievous bodily harm is 14 years' imprisonment: s 54(3)(b). It is not immediately obvious why the maximum penalty for the offence of dangerous driving occasioning grievous bodily harm should be substantially less than the other two offences.

27 The offending is this case was very serious. The appellant drove while he was disqualified from driving as a result of previous traffic offences. As he drove toward the party he saw that party-goers were milling about on the verge and the road. He must have known that many

of them had been drinking and that their faculties were likely to be impaired by alcohol. It would therefore have been readily apparent that their ability to avoid a vehicle travelling at any appreciable speed was likely to be diminished, and much more so a vehicle travelling at 50 - 55 km per hour. Despite that, the appellant made no attempt to slow down but, as is evident from his record of interview, took the view that it was up to them to get out of his way. He proceeded through the throng at a speed which in the circumstances was quite obviously dangerous. It was not a momentary misjudgement but a conscious decision to do so and the appellant's decision-making was unaffected by alcohol or drugs.

28 The complainant, who was 17 years of age at the time, suffered very serious and probably permanent disabilities as a result of the accident. He was fortunate to survive. The extent of his injuries is not surprising in light of the speed at which the appellant was travelling when he struck the complainant. To travel at such a speed through an area where people were milling about on or near the road was to invite such an outcome.

29 There was no substantial mitigation beyond the appellant's age. Such remorse as the appellant demonstrated came very late and was certainly not evident immediately following the accident or even when the extent of the complainant's injuries was made known to him. His first reaction was to blame the complainant. The appellant's youth, however, is an important mitigating factor for sentencing purposes. His immaturity is evident in the fateful decision he made that night and his failure to learn from his previous convictions for traffic offences.

30 Given the short time he had held a driver's licence, the appellant's traffic record was appalling. Relevantly, on 7 September 2010, the appellant was convicted of reckless driving, for which he was fined $700 and disqualified from driving for 6 months. On 4 January 2011, he was again convicted of reckless driving, for which he was fined $500 and disqualified from driving for 6 months. He had also been disqualified from driving as result of convictions for drink driving offences on 7 December 2010 (3 months) and 4 January 2011 (3 months). The current offending (which it will be recalled occurred on 4 February 2011) occurred only a month after his second conviction for reckless driving. It also occurred while all of the above disqualifications were extant. The fact that the appellant was driving while disqualified is a serious feature of the offending. It reflects a cavalier attitude to the law.

31 The sentences imposed for the offence of dangerous driving occasioning or causing grievous bodily harm in other cases are of limited

assistance for two reasons. The first is that there is a wide variety in the circumstances of the offences and the offenders. The second is that from 1 August 2008 the maximum penalty for the offence was increased from 4 years' imprisonment to 7 years' imprisonment by s 38 of the *Criminal Law Amendment (Homicide) Act 2008* (WA). We were not referred to any comparable cases in this court since the penalty was increased and our own research has not uncovered any. Counsel did refer to ***Abeyakoon v Brown*** [2011] WASCA 63, where the increased penalty was applicable, but the circumstances of that case were entirely different to the present case and it provides no assistance.

32 Nevertheless, we have had regard to the cases referred to by counsel on the appeal and some other cases. Cases involving dangerous driving causing death prior to the 2008 amendment also provide some limited assistance. Previously the maximum penalty for dangerous driving causing death was the same as for dangerous driving causing grievous bodily harm, except where there were circumstances of aggravation. It is unnecessary to canvass all of the cases. We will refer to ***Eves v The State of Western Australia*** [2008] WASCA 7; (2008) 49 MVR 259; ***Taylor v The State of Western Australia*** [2009] WASCA 226; ***Longbottom v The State of Western Australia*** [2008] WASCA 203; (2008) 38 WAR 396 and ***The State of Western Australia v Olive*** [2011] WASCA 25; (2011) 57 MVR 269. The review of ***Eves***, ***Taylor*** and ***Longbottom*** has been reproduced from the reasons of Buss JA in ***Olive*** [75] - [82].

33 In ***Eves***, the offender was convicted, after a trial, on three counts of dangerous driving causing death, contrary to s 59(1)(b) of the *Road Traffic Act*. The maximum penalty for each offence was, relevantly, 4 years' imprisonment. He was sentenced to 1 year and 8 months' imprisonment on each count. The sentences were ordered to be served cumulatively. The total effective sentence was therefore 5 years' imprisonment. A parole eligibility order was made. The salient facts were these.

34 The offender had been driving a Toyota Landcruiser utility, attached to which was a large trailer. He was driving north on the Old Coast Road near Lake Clifton and was returning to Perth from Bunbury. As the offender travelled north on the Old Coast Road, he was observed by others to swerve from side to side. The driver of a following vehicle (a van) endeavoured to attract the offender's attention so as to get him to pull over. He was unsuccessful. The driver of the van then slowed his vehicle so that he was about 90 m behind the offender. The offender continued to drive erratically. His trailer moved to a point 1 m over the

midline of the road. An oncoming Sigma sedan struck the trailer. This caused the Sigma to rotate onto the wrong side of the road and hit the van. The Sigma exploded into flames. Both of its occupants were killed. The driver of the van was also killed. A passenger in the van was injured. The offender, who was aged 29 years, had driven erratically because he was tired and unwell. Although he had been convicted of previous motor vehicle offences, he did not have any convictions since the age of 21.

35 This court (Steytler P & McLure JA, Miller JA dissenting) allowed the offender's appeal against sentence. The majority considered that the individual sentences were appropriate but that the orders for cumulation should be set aside and, in lieu thereof, orders for partial cumulation should be made. The majority ordered that the sentence on count 2 commence 10 months after the commencement of the sentence on count 1, and that the sentence on count 3 commence 10 months after the commencement of the sentence on count 2. The total effective sentence was therefore 3 years and 4 months' imprisonment. The offender remained eligible for parole. The majority varied the sentencing outcome in order to avoid multiple punishments for the common element of each offence (being the same episode of dangerous driving) and to give proper effect to the totality principle.

36 In ***Taylor***, the offender was convicted, after a trial, on one count of dangerous driving causing grievous bodily harm and one count of dangerous driving causing death. The maximum penalty for each offence was, relevantly, 4 years' imprisonment. He was sentenced to 14 months' imprisonment on count 1 and 26 months' imprisonment on count 2. The sentences were ordered to be served concurrently. The total effective sentence was therefore 2 years and 2 months' imprisonment. The material facts and circumstances of the offending were as follows.

37 The offender had driven from Kalgoorlie to Perth with friends, to spend a week in Perth and celebrate a friend's birthday. On 28 July 2007, the offender and his friends went to a house in Rockingham. At that time the offender was aged about 18 years and 6 months. He was the designated driver and, as a result, he did not consume any alcohol that evening. A little after midnight, the offender was driving a motor vehicle with some of his friends as passengers, including the deceased. The vehicle he was driving was not his own and, apparently unknown to him, had four bald tyres. At or near a set of traffic lights on Mandurah Road, a Holden Commodore driven by an adult male (Mr Archer) stopped to the left of the offender's vehicle. Mr Archer revved his engine in what the sentencing judge accepted was an invitation to a drag race. The offender

accepted this invitation. The area was dark, it had been raining lightly and the road was wet. During the drag race, the offender reached a speed of about 120 km per hour. He then slowed to about 90 km per hour. The applicable speed limit was 80 km per hour. The race lasted a very brief period of time. The whole event occupied no more than about 90 seconds. The crucial events which resulted in the occurrence of the death and the grievous bodily harm were summarised by Wheeler JA (McLure P & Owen JA agreeing):

> It appears that the two vehicles may have touched briefly, probably as a result of Mr Archer moving around a vehicle pulled up on the roadside. Both drivers lost control of their vehicles and left the road. They were slowed by vegetation before coming to a stop. When the appellant's vehicle came to a stop, it was immediately apparent that Chloe Schoppe was not in the vehicle. She had not been wearing a seat belt and was thrown from the vehicle. She died at the scene of the accident as a result of head injuries. She was 16 years of age. It is clear from the victim impact statement of her father that, as one would expect, the effect of her death has been devastating.
>
> Mr Archer sustained life-threatening injuries and remained in intensive care until 6 August 2007. He suffered serious spinal injuries and also underwent a craniotomy [7] - [8].

38 This court allowed the offender's appeal against sentence. The sentence originally imposed in respect of count 2 was quashed and a sentence of 1 year and 8 months' imprisonment substituted. There was no challenge to the sentence on count 1. The terms of imprisonment on count 1 and count 2 were ordered to be served concurrently. In the result, the total effective sentence substituted by this court was 1 year and 8 months' imprisonment. The offender remained eligible for parole. Wheeler JA said:

> There were, as the learned sentencing judge noted, a number of serious aspects of the case. They included the accepting of Mr Archer's invitation to race, coupled with the fact that the appellant knew, or should have known, that he was a relatively inexperienced driver, the fact that the road was wet, and the fact that he had accepted responsibility for the passengers in his vehicle. However, there were a number of features of the appellant's conduct which suggested that his behaviour was not at the higher end of culpability. He was sober, and there was no suggestion that, prior to the decision to race, his driving had been other than appropriate. Although he was speeding at the time of the accident, he was in excess of the speed limit by something of the order of 10 km per hour; this is not, compared to the many very serious speeding cases which result in death, an example of extreme speed. The period of bad driving, although deliberate, was

> extremely brief. Other than his speed, there was apparently no other feature of the appellant's driving which was dangerous.
>
> So far as the appellant's personal circumstances were concerned, it is true that he had not entered a plea of guilty, and therefore was not entitled to any discount on account of his plea. However, the learned sentencing judge, who had the advantage of being the trial judge, accepted that the appellant was deeply ashamed of his behaviour and remorseful. At the time of the offence, he was only 18 years of age, and was 20 at the time of sentencing. It is a serious matter to send a young person to gaol for the first time. He had one prior driving offence, involving alcohol, as a child, but otherwise had no record. He had a number of very favourable references. He had completed a programme in the prison and had played a role in the prison, assisting others, while in custody awaiting sentence.
>
> Having regard to other cases of dangerous driving, the driving in this case cannot be characterised as being of the most serious kind, or even towards the upper end of the range of possible dangerous driving. When that fact is coupled with the personal circumstances of the appellant, I am satisfied that the sentence imposed was manifestly excessive.
>
> The maximum penalty available for the offence of dangerous driving causing death was 4 years' imprisonment. Penalties significantly less than 26 months were accepted as appropriate in ***Eves v The State of Western Australia*** [2008] WASCA 7 (29-year-old offender, after trial, no deliberate decision to drive dangerously, but lengthy period of driving when too tired) and ***Wood v The Queen*** [2002] WASCA 95 (24-year-old offender, also convicted at trial, also driving while tired) [14] - [17].

39 In ***Longbottom***, Steytler P considered the application of the totality principle in the case of an offender who was convicted, after a trial, of two counts of dangerous driving causing death. The maximum penalty for each offence was, relevantly, 4 years' imprisonment. After drinking alcohol, and notwithstanding that his driver's licence had been disqualified, the offender drove his vehicle, with three passengers in it, at a speed that was excessive in the circumstances. Despite one of his passengers asking him, twice, to slow down, he did not do so. He lost control of the vehicle and there was an accident. Two of his passengers died. The offender's blood alcohol level at the time of the accident was 0.089%. The sentencing judge imposed a term of immediate imprisonment of 1 year and 8 months in respect of each count and ordered that the sentences be served cumulatively. The total effective sentence was therefore 3 years and 4 months' imprisonment.

40 The offender appealed on the ground that the order for total accumulation was an error because it necessarily had the result that he was punished twice for the commission of common elements of each

offence (the dangerous driving arising out of the appellant having driven at an excessive speed and with a blood alcohol level in excess of the statutory limit). This court (Steytler P, Wheeler & Miller JJA) unanimously dismissed the appeal.

41 In ***Olive***, the offender was convicted after trial of three counts of dangerous driving causing death. The maximum penalty for each offence was, relevantly, 4 years' imprisonment. The offender was driving on a two lane carriageway at night and at the point at which the two lanes merged into one, she overtook another vehicle in order to reach the single lane first, passing very close to the other vehicle at a speed of approximately 130 km per hour (the speed limit was 100 km per hour). That caused the driver of the other vehicle to veer left to avoid a possible collision. He lost control of his vehicle, causing it to cross to the incorrect side of the road where it collided with another vehicle. Three people died in the collision. The offender, who was 22 years of age, was disqualified from driving at the time and had a poor driving record. An appeal against a total effective sentence of 18 months' imprisonment was dismissed.

42 In each of those cases the maximum penalty at the time for dangerous driving causing grievous bodily harm and dangerous driving causing death respectively was 4 years' imprisonment. The maximum penalty for (relevantly) dangerous driving occasioning grievous bodily harm has since been increased from 4 years' imprisonment to 7 years' imprisonment.

43 The maximum penalty fixed by the Parliament for an offence demonstrates the Parliament's view of the gravity of the offence. If the Parliament, by a legislative amendment, increases the maximum penalty, the Parliament's new view of the gravity of the offence must be taken into account in deciding upon sentencing outcomes. See ***McLaughlin v The State of Western Australia*** [2012] WASCA 204 [59] - [60] (Buss JA, Mazza JA agreeing) and the cases there cited. An increase in the maximum penalty is an indication that sentences for the offence in question should be increased. See ***Muldrock v The Queen*** [2011] HCA 39; (2011) 244 CLR 120 [31] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

44 Although the appellant, in the present case, was assessed as being at a low risk of reoffending, his appalling traffic record made personal deterrence a sentencing factor of some significance. General deterrence was also of importance.

45 In the circumstances, we do not consider that the sentence of 3 years and 3 months falls outside a sound exercise of the sentencing discretion. It was not manifestly excessive. We would dismiss this ground.

Ground 2

46 The appellant contended that the total effective sentence infringed the first limb of the totality principle, which requires the sentencing judge to ensure that the total effective sentence is an appropriate and just measure of the overall criminality involved in all the offences, viewed in their entirety and having regard to the circumstances of the case, including those referable to the appellant personally: ***Postiglione v The Queen*** (1997) 94 A Crim R 397; (1997) 189 CLR 295, 307 - 308; ***Roffey v The State of Western Australia*** [2007] WASCA 246 [24] - [25]. The appellant submitted that the total effective sentence of 4 years' imprisonment was so disproportionate to the overall offending as to manifest error.

47 The first count was undoubtedly very serious for the reasons set out earlier. The other two offences, whilst serious, were not in the most serious category. While the appellant failed to stop after the accident, it was not a case where the complainant was left in a situation where he might be without immediate assistance. It was apparent that immediate assistance would be at hand from other party-goers. Similarly, while the appellant did not report the accident that night, he reported it to police the following morning.

48 In the application of the totality principle, there are two personal circumstances which weigh significantly in the appellant's favour. They are his youth and the fact that this is the first time the appellant has been sentenced to a term of detention or a term of imprisonment. It has often been said that it is a serious step to send a young offender to prison. In this case, the seriousness of the offending on the first count meant that a term of immediate imprisonment was inevitable. However, we consider that a sentence of 4 years' imprisonment is disproportionate to the overall criminality involved in all of the offending, having regard, in particular, to the personal circumstances we have mentioned.

49 We would allow this ground of appeal.

Resentencing

50 It is therefore necessary to resentence the appellant. The court has the material necessary to do so.

51 We would not interfere with the individual sentences imposed by the sentencing judge. However, we consider that all relevant sentencing considerations would be appropriately satisfied by the imposition of a total effective sentence of 3 years and 3 months. To that end, we would order that the sentences on the second and third counts be served concurrently with each other and concurrently with the sentence on the first count. The sentences are to be taken to have taken effect on 10 February 2012. The appellant remains eligible for parole. The suspension of the appellant's driver's licence remains unaffected by the appeal.

Conclusion

52 We would:

1. refuse leave to appeal on ground 1A;

2. allow the appeal;

3. set aside the orders for concurrency and accumulation made by the sentencing judge;

4. order that the individual sentences imposed by the sentencing judge be served concurrently with each other; and

5. order that the sentences are to be taken to have taken effect on 10 February 2012.

53 The total effective sentence is therefore 3 years and 3 months' imprisonment. The appellant remains eligible for parole. He will be eligible to be considered for release on parole when he has served one half of the new total effective term calculated from 10 February 2012. The suspension of his driver's licence is unaffected by the appeal.