CITATION:	*The Queen v Newaz* [2022] NTCCA 1
PARTIES:	THE QUEEN v NEWAZ, Muhammed Shah
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	No. CA 22 of 2020 (21933947)
DELIVERED:	17 January 2022
HEARING DATE:	16 April 2021
JUDGMENT OF:	Blokland, Barr and Brownhill JJ

CATCHWORDS:

CRIME – Appeals – Crown appeal against sentence –– dangerous driving causing death – whether sentence was manifestly inadequate – whether sentence imposed was within limits of a sound exercise of sentencing discretion – principles applicable to imposition of suspended sentence – principles applicable to imposition of sentence upon drivers of heavy vehicles - sentence not manifestly inadequate – appeal dismissed.

Bates v The Queen [2020] NSWCCA 259; *Canet v Hales* [2001] NTSC 100; *Edmonds v The Queen* [2019] NTCCA 1; *Ellis v The Queen* [2020] NSWCCA 303; *House v The King* (1936) 55 CLR 499; *Markarian v The Queen* [2005] 228 CLR 357; *R v Clampitt-Wotton* [2002] NSWCCA 383; *R v Guilfoyle* (1973) 57 Cr App R 549; *R v Jurisic* (1998) 45 NSWLR 209; *R v Mossman* (2017) 40 NTLR 144; *R v Musumeci* (unreported, NSWCCA, 30 October 1997); *R v Osenkowski* (1982) 30 SASR 212; *R v Roe* [2017]

NTCCA 7; *R v TT* [2021] NTCCA 7; *R v Whyte* [2002] NSWCCA 343; *Whitehurst v The Queen* [2011] NTCCA 11, referred to.

Criminal Code 1999 (NT) s 174(f)

Sentencing Act 1995 (NT) s 40(6)

REPRESENTATION:

Counsel:

Appellant:	S Robson SC
Respondent:	R Murphy

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Murphy & Associates, Barristers and Solicitors

Judgment category classification:	B
Number of pages:	14

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Newaz [2022] NTCCA 1
No. CA 22 of 2020 (21933947)

BETWEEN:

THE QUEEN
Appellant

AND:

MUHAMMED SHAH NEWAZ
Respondent

CORAM: BLOKLAND, BARR and BROWNHILL JJ

REASONS FOR JUDGMENT

(Delivered 24 January 2022)

THE COURT:

[1] This is a Crown appeal against sentence on the ground that the sentence imposed by the Supreme Court was "manifestly inadequate in all of the circumstances". Counsel for the appellant contends that the sentence was "unreasonable or plainly unjust".[1]

[2] On 9 December 2020, the respondent entered a plea of guilty to the offence of driving a motor vehicle dangerously and causing the death of a female

1 *House v The King* (1936) 55 CLR 499 at 505.

victim.[2] The maximum penalty was 10 years' imprisonment. He was sentenced to a term of imprisonment of three years, suspended on the rising of the court. The sentencing judge fixed an operational period of three years.[3]

[3] The principles applicable to an appeal of this kind are well settled. They were recently set out by this Court in *The Queen v TT*.[4] In that decision, the Court also set out (at [38]-[40]) principles applicable to the suspension of sentences of imprisonment, quoting with approval from the reasons of Riley CJ in *Whitehurst v The Queen*.[5]

[4] As the majority of the High Court re-affirmed in *Markarian v The Queen*:[6]

> As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King*, itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy".

[5] Of some relevance to this appeal is the understanding of courts over many years that there must always be a place for leniency, certainly for first

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2 *Criminal Code*, s 174F(1).

3 *Sentencing Act 1995* (NT), s 40(6).

4 [2021] NTCCA 7 at [37] per Southwood and Kelly JJ and Burns AJ, quoting from *The Queen v Roe* [2017] NTCCA 7 at [11]-[20] per Grant CJ, Southwood and Blokland JJ.

5 [2011] NTCCA 11 at [23]-[30] per Riley CJ (Mildren and Martin JJ agreeing).

6 *Markarian v The Queen* (2005) 228 CLR 357 at [25], per Gleeson CJ, Gummow, Hayne and Callinan JJ.

offenders, but extending even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at a particular stage of an offender's life might lead to reform.[7]

[6] The appellant does not complain that the head sentence of three years imprisonment was outside the appropriate range. Rather, the appellant contends that the sentencing judge's decision to suspend the sentence of imprisonment on the rising of the court resulted in a sentence which was manifestly inadequate. In order to succeed, the appellant must show that the sentence imposed was wholly outside the range of sentences available to the learned sentencing judge.

[7] In *The Queen v Mossman*,[8] although the principle of double jeopardy no longer made it necessary to ensure that appellate intervention was rare and exceptional, as had been the case prior to the enactment of s 414(1A) of the *Criminal Code*, the Court observed as follows:[9]

> It remains the case, however, that this Court will not intervene where no point of principle arises, and will be slow to intervene where there is a countervailing factor which may warrant the exercise of the residual discretion.

[8] The matter of principle identified by the Crown on this appeal is said to be "sentencing standards in the Northern Territory for offences of dangerous

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7 *The Queen v Osenkowski* (1982) 30 SASR 212 at 212-213 per King CJ, cited with approval in *The Queen v Roe* [2017] NTCCA 7 at [13] per Grant CJ, Southwood and Blokland JJ, and repeated in *The Queen v TT* [2021] NTCCA 7 at [37] per Southwood and Kelly JJ and Burns AJ.

8 *The Queen v Mossman* (2017) 40 NTLR 144.

9 Ibid at [17] per Grant CJ, Southwood and Hiley JJ.

driving causing death (or serious harm), especially where heavy vehicles are involved".[10]

[9] At the time of the offence the respondent was driving an almost fully laden garbage truck weighing 17.2 tonnes along McMillans Road, Darwin, towards a roundabout at the intersection of McMillans Road and Vanderlin Drive.[11] He was driving in the right hand lane. It was approximately 4:46pm on a weekday (Tuesday 30 July 2019) and traffic was heavy in both directions.[12] The speed limit was 80 km/h. At material times the respondent's truck was travelling at 81 km/h.

[10] From the crest of a hill some 540 metres from the roundabout, the respondent had a clear and unobstructed view to the roundabout. The respondent had a better vantage point than the driver of an ordinary passenger vehicle because of the height of his seat.[13] When the respondent reached the crest, traffic was banked up from the roundabout in both lanes on McMillans Road. The vehicles in front of the respondent had to slow and stop. However, the respondent failed to identify that traffic ahead in his lane had begun to slow and stop. He continued driving at 81 km/h.

[11] When the respondent saw the vehicle travelling in front of his truck slow, the responded applied the brakes of his vehicle, but was unable to stop in time. His truck skidded into the rear of the vehicle in front, shunting it off to

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10 Appellant's Outline of Submissions, [3].

11 Appeal Book (**AB**) 25, [2], [6].

12 AB 27, [16].

13 AB 26, [7].

the left, and then collided with the rear of another vehicle, forcing it off the road. The respondent's truck then crossed over into the oncoming lane and collided head-on with the deceased's vehicle.[14]

[12] Relevant to the issues on the hearing of the appeal, par 18 of the agreed facts read as follows:[15]

> An analysis of the scene revealed that the minimum speed of the offender's vehicle was 81 km an hour prior to the commencement of skidding. The distance from the crest to the start of the skid marks (identifying the first application of the truck's brakes) was 204.8 m. Using this speed and distance it was calculated that the offender had approximately 9 seconds available to him to respond to changing traffic conditions ahead of him and slow down but he failed to do so until a crash was unavoidable.

[13] In the sentencing proceeding, defence counsel acknowledged that the respondent had a clear and unimpeded view all the way from the crest of the hill to the roundabout. Defence counsel also acknowledged the significant delay in the respondent's response to the changing traffic conditions.[16] The respondent's explanation was that he was focused on the car immediately ahead of him and failed to look over the top of that vehicle to identify that traffic ahead was slowing.[17] In response to a question from the judge, defence counsel agreed that an aspect of the respondent's dangerous driving was that he was driving too close to the rear of the vehicle in front.[18]

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14 AB 26, [12].

15 AB 27, [18].

16 AB 48, [9].

17 AB 49, [8].

18 AB 49, [9]; 50, [2].

Defence counsel submitted that it was only when the vehicle travelling in front braked quickly that the respondent first realized the danger.[19]

[14] It may be noted that the respondent's explanation was given by his counsel. The respondent did not give evidence. However, before adjourning the matter, his Honour addressed the prosecutor and received the following responses:[20]

> His Honour: … I adjourn the matter to 10am on 15 December 2020. Now, before we go to that, you have heard what [defence counsel] his said from the Bar table about the more precise circumstances in which this tragic incident occurred. Does the Crown accept what was said from the Bar table, which was essentially to the effect, rather than looking up ahead, he was concentrating on the car immediately in front of him, he got too close to that car, it has jammed in its brakes and the accident has ensued?
>
> The Prosecutor: We would not be able to produce evidence to the contrary, so ---
>
> His Honour: So it is accepted ---
>
> The Prosecutor: Yes
>
> His Honour: --- that it cannot be objected to on that basis?
>
> The Prosecutor: Perhaps that is the right way to put it.
>
> His Honour: Yes
>
> The Prosecutor: Yes

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19 There was evidence that the vehicle in front had braked quickly. Par 9 of the agreed facts read as follows: "The drivers in Vehicle 2 [the vehicle immediately in front of the truck driven by the respondent] and Vehicle 3 [the vehicle in front of it] had noticed the bank up of traffic in front of them and did apply their brakes and at one point quickly to respond to the traffic directly in front of them …".

20 AB 57, [5].

[15] When the matter resumed a week later, his Honour sought to confirm his understanding of the Crown and defence positions, as appears from the transcript extract below:[21]

> His Honour [addressing defence counsel]: … Just to confirm my understanding of how you put what occurred on the last occasion, namely that the offender had momentarily failed to give full attention to the road ahead of him. He was focused on the rear of the car immediately in front of him, vehicle 2, and as things transpired, he ended up driving too close to the rear of the vehicle. The vehicle 2 was required to brake suddenly. He braked as soon as vehicle 2 braked, but because of the truck's momentum, he was unable to bring the garbage truck to a halt before it collided with vehicle 2. And the accident ensued.
>
> Defence counsel: Correct, your honour, yes.
>
> His Honour [addressing the prosecutor]: And as I understand it, the Crown takes no objection to that description of the accident?
>
> The Prosecutor: Your Honour, in terms of what the offender was doing prior to the accident, we are obviously not able to speak with any further clarity on that.
>
> His Honour: Yes, look. As I understand it, you accepted what Mr Murphy said from the Bar table. That is what I am asking about now.
>
> The Prosecutor: Yes, your Honour.
>
> His Honour: Because the alternative is to call the offender.
>
> The Prosecutor: No, we didn't take issue, or we didn't seek to object to that. We characterised the offending more than as a momentary loss of concentration, though, your Honour.
>
> His Honour: Yes, but it occurs, obviously, in a particular context.
>
> The Prosecutor: It does, your honour. But it occurs in circumstances where there is some nine seconds and 200 metres.
>
> His Honour: But so what? What do you draw from that, that is inconsistent with what [defence counsel] has put?
>
> The Prosecutor: What I put from that is that the – we suggest that the gravamen of the offence is captured in that length of time during which ---
>
> His Honour: And what does that mean ---

21 AB 60-61.

> The Prosecutor: That he had that period of time to appreciate his surroundings and the entirety of his surroundings, not just the car in front of him. And during that nine second period of time, he didn't.

[16] In sentencing remarks, his Honour referred to the fact that the respondent should have been able to see that the traffic was backed up from the roundabout, causing traffic heading towards the roundabout to slow and stop, but that the respondent "had failed to make this observation and continued driving at a speed of 81 km/h towards the roundabout".[22] His Honour accepted the explanation provided by the respondent through his counsel, essentially as appears at the start of in the extract at [15] above.[23]

[17] His Honour made the following remarks in relation to the respondent's offending conduct:

> The offending is serious, as all offences are which result in the death of another human being. However, the offending is towards the lower end of the range of such offences which result in the death of another person.
>
> The offender's moral culpability is not high. The offender was not affected by alcohol or other drugs. He was driving in the course of his employment. He had agreed to work overtime to cover the shift of a colleague who was not at work that day. The offender was not driving at an excessive speed, nor was he texting or otherwise communicating on the telephone, nor was he driving in a reckless manner. .....
>
> The offender remained at the crash scene and assisted police in their inquiries. He also attended [Police Headquarters] to assist police with their inquiries, and he provided police with his mobile telephone access code so they could confirm he was not using his mobile telephone at the time of the accident.

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22 AB 66, [4].

23 AB 69, [1].

[18] The fact that a rear end collision ultimately occurred confirms that the respondent failed to keep a proper lookout and failed to drive at a sufficient distance behind the vehicle in front to permit him to stop in the event of an emergency. These matters are self-evident.

[19] On the hearing of the appeal, it was accepted by the appellant that cases of dangerous driving causing death have traditionally been divided into two broad categories: (1) cases where the accident may be attributed to inattention or misjudgment and (2) cases where the offender has driven in a manner which demonstrates a selfish disregard for the safety of his passengers or other road users, or with a degree of recklessness.[24] However, senior counsel for the appellant submitted that the categories are not immutably fixed and that "the lines may become blurred", such that, even in cases of apparent inattention, the greater or longer the departure from commonly understood safe norms of driving, the closer the driving may come to selfish disregard or recklessness.[25] In that context, the appellant placed considerable reliance on par 18 of the agreed facts, extracted in [10] above, to establish "circumstances of continued inattention that were inherently dangerous and pregnant with disaster".[26]

[20] We would be reluctant to draw any adverse inferences from par 18 of the agreed facts beyond the factual findings made by the sentencing judge.

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24 *R v Guilfoyle* (1973) 57 Cr App R 549 at 552; *Canet v Hales* [2001] NTSC 100 at [20]-[24].

25 Appellant's Outline of Submissions, [10].

26 Appellant's Outline of Submissions, [17].

Specifically, while it is clear that the respondent's vehicle was at an unsafe distance from the vehicle in front for some of the nine second period, certainly towards the end of that period, it cannot be inferred that he drove at an unsafe distance from the vehicle in front for the whole of the nine second period and thereby created a longer-lasting ongoing dangerous situation. It is reasonably possible that his vehicle only came within an unsafe distance in the last two or three seconds of the nine second period. As was noted in the course of argument, there was no evidence from the driver of vehicle 2 that the respondent had been 'tailgating' that vehicle, that is, driving too close for an extended period of time.

[21] Given the matters explained in [20], and the explanation given by the respondent's counsel (accepted by the sentencing judge) that the respondent's attention had been focused on the vehicle immediately in front, and that he had not taken advantage of the cabin height of his vehicle to look ahead, over and beyond the vehicle in front, we cannot see that this case was other than one of momentary inattention or misjudgment. We are mindful also that there was no challenge on appeal to his Honour's specific finding that the respondent was not driving in a reckless manner.

[22] The respondent had a persuasive subjective case. He was a man of prior good character, as found by the learned sentencing judge.[27] A total of five references were referred to in the remarks. On the basis of the references

27 AB 64.

and a psychological report which had been tendered in the defence case, the sentencing judge remarked that the respondent was "truly remorseful for having inadvertently take the life of [the deceased]".[28] The judge also observed that the respondent had suffered emotional and psychological trauma as a result of causing the death of the deceased, in the form of post-traumatic stress disorder and attendant suicidal thoughts, depression, sadness, unhappiness, worthlessness and a general sense of feeling bad and angry about himself.

[23] With all offending against s 174F(1) of the *Criminal Code*, the real substance of the offence is dangerous driving in association with the taking of a human life.[29] Numerous matters have been identified in the authorities as aggravating factors in such offending,[30] namely: (i) nature and extent of injuries; (ii) number of people put at risk; (iii) degree of speed; (iv) degree of intoxication or of substance abuse; (v) erratic or aggressive driving; (vi) competitive driving or showing off; (vii) length of the journey during which others were exposed to risk; (viii) ignoring of warnings; (ix) escaping police pursuit; (x) degree of sleep deprivation; and (xi) failing to stop.

[24] Observations have also been made in some authorities to the effect that, where the vehicle involved was a heavy vehicle such as a truck, the driver's

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28 AB 69.

29 *The Queen v Clampitt-Wotton* [2002] NSWCCA 383 ('*Clampitt-Wotton*') at [23] per Hidden J (Levine and Howie JJ agreeing), citing *The Queen v Musumeci* (unreported, NSWCCA, 30 October 1997) at 5 per Hunt CJ at CL.

30 See *The Queen v Whyte* [2002] NSWCCA 343 ('*Whyte*') at [216]-[217] per Spigelman CJ, repeated in *Clampitt-Wotton* at [14].

duty to drive without putting other road users at risk of harm is greater than drivers of light vehicles.[31] The rationale for the higher standard is obvious – the greater potential for harm to other road users in a collision created by the mass and force of a moving heavy vehicle.

[25] In *Ellis* (at [59(g)]), one of the features identified to support the Court's conclusion that the sentence was not manifestly excessive was 'the need for general deterrence, particularly in relation to drivers of heavy vehicles, and recognition that general deterrence is usually given primacy over considerations that are personal to the offender including subjective features such as remorse'. The authority cited for this proposition was *The Queen v Jurisic*,[32] in which Spigelman CJ set out principles relating to the then new offence of dangerous driving causing death. The relevant principle was not directed to drivers of heavy vehicles, but to the need to give the youth of the offender less weight as a subjective matter than in other types of cases, and the need to 'tread wearily' in showing leniency for good character, given the need for public deterrence in the offence of dangerous driving associated with the taking of a human life.

[26] Both *Jurisic* and *Whyte* were 'guideline judgments'[33] for the offence of dangerous driving causing death in New South Wales. In *Jurisic,* it was

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31 See, for example, *Clampitt-Wotton* at [18], [24]; *Ellis v The Queen* [2020] NSWCCA 303 ('*Ellis'*) at [59(g)] per Hoeben CJ at CL (Harrison and Bellew JJ agreeing); *Bates v The Queen* [2020] NSWCCA 259 at [29] per Bellew J (Simpson AJA and Rothman J agreeing), citing the sentencing judge's remarks with apparent approval.

32 (1998) 45 NSWLR 209 at [228] per Spigelman CJ (Wood CJ at CL agreeing).

33 There is no statutory scheme for the delivery of guideline judgments in this jurisdiction: *Edmonds v The Queen* [2019] NTCCA 1 at [25] per Grant CJ, Blokland and Barr JJ.

accepted (at [228]) that it cannot be said that a full-time custodial sentence is required in every case, particularly because the offence can be committed even though the offender had no more than a momentary or casual lapse of attention and so there must always be room for a non-custodial sentence. It was said that the case in which a sentence other than one involving full time custody is appropriate is rarer than the previous offence of culpable driving. In *Whyte*, it was said (at [214]) that, with respect to the typical case, a custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgment. The 'typical case' was said (at [204]) to have the following characteristics: (i) young offender; (ii) of good character with no or limited prior convictions; (iii) death to a single person; (iv) the victim being a stranger; (v) no or limited injury to the driver or the driver's intimates; (vi) genuine remorse; and (vii) a plea of guilty of limited utilitarian value.

[27] We agree that there is a higher standard of driving applicable to drivers of heavy vehicles. We also agree that general deterrence may assume greater weight than factors personal to the offender, such as youth or good character, both generally speaking and in cases involving drivers of heavy vehicles. We also agree that a custodial sentence will very often be appropriate in the typical case, but in cases where the offender has a low level of moral culpability, such as involving momentary inattention or misjudgment, a non-custodial sentence may be appropriate.

[28] In this case, a sentence of imprisonment was imposed, although it was immediately suspended. A heavy vehicle was involved but, as we have found above, this was a case involving momentary inattention or misjudgment. We also note the matters set out at [22] above, particularly that, while the offender did not suffer physical injuries from the collision, he did suffer emotional and psychological trauma in the form of diagnosed post-traumatic stress disorder.

[29] The appellant has not shown that the sentence imposed was wholly outside the range of sentences available to the learned sentencing judge. It was not manifestly inadequate. Even if it were, we consider this to be a case in which it was appropriate for the sentencing judge to apply leniency, and the factors referred to in [28] above are countervailing factors which would warrant the exercise of the residual discretion.

[30] The appeal is dismissed.
