CAAR 5/2018

[2019] HKCA 1459

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

Application for review no 5 of 2018

(on appeal from DCCC NO 452 of 2018)

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###### BETWEEN

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| Secretary for Justice | | | Applicant |
| and | | |  |
| Chu Wing Yin Christine (朱詠妍) | | | Respondent |
|  |

Before: Hon Macrae VP, Pang JA and Zervos JA in Court

Dates of Hearing: 12 July 2019 and 23 September 2019

Date of Judgment: 23 December 2019

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| J U D G M E N T |

Hon Macrae VP:

1. With leave granted by Hon Yeung VP on 5 **‍**December **‍**2018, the Secretary for Justice applies for a review of the sentence of a Community Service Order for 200 hours, being the main component of the sentence imposed on the **‍**respondent by HH Judge Casewell (“the judge”) in the District Court on 12 November 2018, following her conviction on a charge of causing grievous bodily harm by dangerous driving, contrary to section 36A of the Road **‍**Traffic Ordinance, Cap 374 (“the RTO”). To this charge, the respondent had pleaded guilty.
2. When the matter originally came before this Court on 12 **‍**July **‍**2019, we were concerned that we had not been provided with sufficient material from the parties to assess the appropriate quantum of sentence, the arguments being primarily focussed on matters of sentencing principle. Accordingly, we drew a number of authorities from England and Wales, and from various State jurisdictions in Australia, to the attention of the parties and requested to be addressed on the principles and quantum of sentence applicable in these jurisdictions as well. We also wished to be advised of the prevalence and current levels of sentencing for the offence locally in the District Court. Since the parties were obviously not in a position to assist the Court immediately, we adjourned the matter for further argument to a date to be fixed.
3. At the resumed hearing on 23 September 2019, having heard full argument from the parties, we reserved our decision and indicated that we would hand it down at a later date. This is our decision and the reasons therefor.

Circumstances of the offence

1. The facts admitted by the respondent were that at 7:48 am on **‍**3 **‍**November 2017, she was driving a private vehicle in a northwest direction along Gascoigne Road in Yau **‍**Ma **‍**Tei, Kowloon. She approached a pedestrian crossing controlled by traffic lights near the junction of Gascoigne Road and Chi Wo Street in Yau Ma Tei at a speed of about 50 kph. Three females, PW1, PW2 and PW3, had been standing on the safety island in the centre of the road waiting for the pedestrian traffic lights to turn green in their favour so that they could cross the northwest bound carriageway. On that morning, the weather was fine, the road surface was dry and the traffic flow was normal. The particular section of Gascoigne Road in question was in good repair. The traffic lights at the pedestrian crossing were all functioning properly.
2. After the traffic lights controlling vehicles on the northwest bound section of Gascoigne Road turned red, the pedestrian lights controlling the pedestrian crossing turned green. PW1, PW2 and PW3 accordingly stepped onto the pedestrian crossing in order to cross the northwest bound carriageway. The respondent, however, failed to brake or stop at the pedestrian crossing and collided with the three women with the offside front of her vehicle. PW1 and PW2 bounced off the respondent’s vehicle and landed in the carriageway. PW3 fell backwards in an attempt to avoid the respondent’s vehicle. The respondent continued on for a short distance before bringing the vehicle to a halt. At all material times, the traffic signals governing the northwest bound carriageway in which the respondent was travelling were red.
3. As a result of the impact, PW1 sustained serious multiple injuries; while PW2 and PW3 were also injured, PW2 more so than PW3. PW1 and PW3 were conveyed to Queen Elizabeth Hospital; PW1 in an unconscious state. PW2 initially returned home but attended the hospital later that day.

Footage from the respondent’s vehicle camera

1. A camera installed in the respondent’s vehicle captured the course of the traffic accident as it happened. The circumstances gleaned from the video footage from that camera were agreed as summarised below:

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| Time | Incidents |
| 7:48:19 am | The respondent’s vehicle (“V”) was travelling along the 3rd lane of Gascoigne Road in a westbound direction. |
| 7:48:20 am | V was driving forward, as the red overhead traffic lights at the pedestrian crossing appeared in the footage. |
| 7:48:22 am | V continued moving forward and the red traffic lights at the safety island also appeared in the video footage. |
| 7:48:24 am | The pedestrians on the safety island began to cross the road, and one of them stepped onto the pedestrian crossing. |
| 7:48:25 am | Three pedestrians were crossing the 3rd lane of Gascoigne Road on the pedestrian crossing, but V was still travelling forward without braking or slowing down. |
| 7:48:26 am | One of the pedestrians looked to her left, and then tried to step back immediately. When the front of V reached the white stop line at the pedestrian crossing, a tassel suspended inside V swung forward[[1]](#footnote-1). Immediately thereafter, V hit the pedestrians on the pedestrian crossing |
| 7:48:27 am | V came to its final stopping position. |

Medical condition of PW1, PW2 and PW3

1. Upon medical examination, following her admission to hospital, PW1 was found to have sustained an abrasion over her forehead. An immediate CT scan revealed that she had suffered a traumatic subarachnoid haemorrhage and small subdural hematoma, as well as a fracture to her left superior pubic ramus and left sacrum. Her condition deteriorated throughout the day, as a result of which a further CT scan was performed upon her. A craniotomy with clot evacuation was then performed. Post-operatively, PW1 developed persistently high intra‑cranial pressure, which led to a further craniotomy and an infarctectomy being performed. She was subsequently discharged from hospital on 7 ‍December 2017. A follow‑up on 3 January 2018 revealed she had residual dysphasia and acalculia (the impairment of mathematical skills).
2. In a subsequent interview, PW1 stated, *inter alia*, that she was continuing to suffer from aphasia, right body paralysis, movement difficulties, and mild cognitive impairment. As a result, she required a care giver to assist with her daily activities.
3. PW2 attended the hospital at 1:35 pm on 3 November 2017. Medical examination revealed that she was suffering from epigastric tenderness, and right upper quadrant bruises. She was diagnosed with road accident trauma with splenic laceration. She was discharged from hospital on 11 November and recommended for 26 days’ sick leave from 3 to 29 November 2017.
4. PW3 was conveyed to the hospital immediately after the accident and given 7 days’ sick leave[[2]](#footnote-2).

Expert evidence

1. According to the expert evidence of a forensic scientist who examined the camera of the respondent’s vehicle, the speed of the vehicle was 52 kph, + or – 5 kph, at about 0.97 of a second before impact. Further, the vehicle had its brakes applied from the time the tassel fell forward at 7:48:26 am, which was when the vehicle had reached the white stop line of the pedestrian crossing.
2. Physical examination of the vehicle by a motor vehicle examiner confirmed that it had no mechanical defects. However, the vehicle had sustained damage to its front offside bodywork, its windscreen and its right rear view mirror.

The respondent’s arrest and cautioned response

1. At about 9 am on 3 **‍**November **‍**2017, the respondent was arrested at the scene of the accident. Under caution, she said she remembered that the lights were green in her favour when she arrived at the traffic lights controlling the pedestrian crossing; accordingly, she continued driving through the crossing. However, at that moment, some pedestrians suddenly stepped onto the carriageway from her right. She immediately applied the brake, but still knocked the pedestrians down.

Procedural history of mitigation and sentencing hearing

1. The mitigation and sentencing in the present case occurred over three days. On 12 October 2018, the judge ordered a background and psychiatric report on the respondent, since she was said to be suffering from post-traumatic stress disorder, and adjourned the hearing until 26 **‍**October 2018. The respondent was ordered to be remanded in jail custody pending the preparation of the reports.
2. On 26 October 2018, having viewed the video footage from the camera of the respondent’s car, and after considering the reports, the judge ordered the preparation of a further report as to the respondent’s suitability for a Community Service Order, and adjourned the hearing to 12 November 2018. The respondent was granted bail pending the preparation of the report.
3. On 12 November 2019, the respondent was sentenced, with her consent, to a Community Service Order for 200 hours. She was further disqualified from driving for a period of 4 years and ordered to take and complete a driving improvement course at her own expense within the last three months of the disqualification period. No issue is taken at this application in respect of the orders of disqualification and the completion of a driving improvement course.

Mitigation

1. The respondent was 33 years of age and single at the time of sentencing. She resided with her parents, who were retired, and also her brother. She obtained her driving licence in 2015 and purchased the vehicle in question in August 2016, mainly using it at weekends to take her parents out. She had no previous traffic or other criminal convictions.
2. Counsel for the respondent at trial contended that she had misread the traffic signals and made a momentary mistake rather than deliberately disobeyed the traffic signals. Following the accident, she had been diagnosed with post-traumatic stress disorder and had resolved not to drive again. In a letter to the court, the respondent said that the accident had taught her a bitter lesson and left an indelible mark on her.
3. Counsel cited and relied on three first instance decisions in the **‍**District Court in order to try and persuade the judge to impose **‍**a Community **‍**Service Order on the respondent: namely *HKSAR v Tong* ***‍****Siu* ***‍****Yan, Tommy*[[3]](#footnote-3); *HKSAR v Lee Yeung Chi, Richard*[[4]](#footnote-4);and *HKSAR v Lam Lap Fung*[[5]](#footnote-5)*.*

Reasons for sentence

1. Acknowledging that drivers were expected to exercise greater caution when approaching and driving through pedestrian crossings, the judge nevertheless took the view that the pedestrian crossing in question provided “very fine margins”[[6]](#footnote-6) for the driver to stop.
2. He referred to *Secretary for Justice v Poon Wing Kay*[[7]](#footnote-7), which set out a list of factors the court should take into consideration during sentencing for dangerous driving, and reminded himself that in assessing the overall seriousness of dangerous driving cases, culpability was the dominant factor.
3. Nevertheless, the judge took the view that this particular pedestrian crossing “was disguised by the road flyover that (the pedestrians) were coming out from under. The red light comes into view some 5 to 6 ‍seconds before impact if the car is driven on the speed limit, which given that the car would take at least 4½ seconds to bring to a halt, provides a fine margin”[[8]](#footnote-8); further, the junction was in a dual carriageway without any traffic calming or speed reducing measures[[9]](#footnote-9). The judge found that the respondent had failed to exercise the extra level of attention and care that was necessary when approaching a pedestrian crossing[[10]](#footnote-10). The respondent had “show(n) a lapse of attention for a number of seconds”[[11]](#footnote-11). The judge considered that the present case was “one of those rare and exceptional cases where a different approach from the usual can be taken to sentencing”[[12]](#footnote-12).

Application for review of sentence

1. Pursuant to section 81A of the Criminal Procedure Ordinance, Cap 221, the applicant applies with leave to review the imposition by the judge of the Community Service Order only, on the grounds that it was wrong in principle (Ground 1) and/or manifestly inadequate (Ground 2).

Applicant’s submission

Ground 1

1. Ms Vinci Lam, with her Mr Ivan Cheung, on behalf of the applicant, has argued essentially three points. First, on the facts as outlined, an immediate sentence of imprisonment was warranted. Secondly, such an offence committed at a pedestrian crossing constituted a serious aggravating factor in sentencing. Thirdly, the judge gave insufficient reasons for imposing a Community Service Order.
2. In respect of her first submission, Ms Lam relied on *HKSAR v Lee Yau Wing[[13]](#footnote-13)*, where it was held that in determining the culpability of a defendant’s dangerous driving, which was the dominant factor in sentencing for an offence of causing grievous bodily harm by dangerous driving, there was no reason to treat the offence any differently from the other dangerous driving offences in the RTO. The Court also considered that the body of case law which has developed since the case of *Poon* ***‍****Wing ‍Kay* for the offence of causing death by dangerous driving was equally applicable to that of causing grievous bodily harm by dangerous driving, after making necessary allowance for the fact that the latter offence did not involve a death. As such, in accordance with *Lee* ***‍****Yau ‍Wing*, Ms ***‍***Lam submitted that the sentence for an offence of causing grievous bodily harm by dangerous driving would also inevitably be one of immediate imprisonment.
3. In *Secretary for Justice v Ian Francis Wade*[[14]](#footnote-14), the Court had held that all offences of dangerous driving must be deterred, but that was particularly so where the dangerous driving resulted in death or serious injury, which offences were “to be visited by very different penalties to those imposed for dangerous driving simpliciter”[[15]](#footnote-15). Ms Lam submitted that “very different penalties” meant much more severe sentences. She drew comparisons with offences of causing death by dangerous driving, where it has been said that the sentence should normally only be an immediate custodial one, in order to deter other drivers and reflect the serious consequences of the driving: see *R v Cooksley*[[16]](#footnote-16); *HKSAR v Fong* ***‍****Chai Man*[[17]](#footnote-17); and *Secretary for Justice v Ng Hop Sing aka Ng* ***‍****Hop* ***‍****Shing*[[18]](#footnote-18). Ms Lam argued that an offence of causing grievous bodily harm should also normally carry an immediate custodial sentence.
4. In respect of her second submission, Ms Lam referred to *Secretary for Justice v Lam Siu Tong*[[19]](#footnote-19), *Secretary for Justice v Wong* ***‍****Wai* ***‍****Hung*[[20]](#footnote-20) and *Lee* ***‍****Yau* ***‍****Wing*, in which all of the offences had been committed at pedestrian crossings. The sentences in all of these cases were ones of immediate imprisonment. There was nothing exceptional about the facts and circumstances of the present case and no justification for imposing a Community Service Order on the respondent.
5. Ms Lam further took issue with the judge’s statement that “not all pedestrian crossings are the same”[[21]](#footnote-21), if the implication of his statement was that this particular pedestrian crossing was more problematic than any other in terms of its location and design. All pedestrian crossings demanded extra care and attention on the part of drivers approaching them, given their common function, whatever their design and their location. As the Court had emphasised in *Lam Siu Tong*, an accident at a pedestrian crossing constituted a serious aggravating feature. The camera recording from the respondent’s vehicle showed that the pedestrian crossing was plainly visible to the driver. The judge was not correct, therefore, to suggest that the pedestrian crossing and those standing on the central reservation were somehow disguised by the flyover.
6. Finally, in respect of her third submission, Ms Lam contended that the judge had given undue weight to the respondent’s good character and remorse and not enough consideration to the injuries occasioned to PW1 and PW2. Though the dominant factor in sentence was the culpability of the driving misconduct, the harm suffered by the two victims, one of whom was still suffering from a form of paralysis at the time of sentencing, was also an important factor. The judge had failed to accommodate the sentencing principles of retribution, deterrence and denunciation, as considered by the Court in *Lee* ***‍****Yau* ***‍****Wing*, when sentencing for an offence of this nature.
7. The applicant invited the Court to substitute for the Community Service Order a sentence of immediate imprisonment, whilst giving an allowance for the hours of community service she has performed. It was submitted that any completion of the Community Service Order by the respondent, in whole or in part, should not be a bar to the relief sought by the applicant.

Respondent’s submissions

1. In opposing the applicant’s application for review, Mr ***‍***HY ***‍***Wong, on behalf of the respondent, argued that the judge had conscientiously applied his mind to all relevant factors and come to the conclusion that the present case was “one of those rare and exceptional cases where a different approach from the usual can be taken to sentencing”[[22]](#footnote-22). He argued that the judge had properly considered all the relevant sentencing principles expressed in *Lee Yau Wing* when sentencing the respondent. Having watched the camera footage and carefully analysed the matters to be weighed, the judge accepted that it was momentary inattention on the respondent’s part in keeping a proper lookout, as opposed to a deliberate running through the red light, or a wilful refusal to stop.
2. Mr. Wong further drew the Court’s attention to the following passage in *Attorney-General’s Reference No 4 of 1989*[[23]](#footnote-23):

“it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.” … [In an application to review a sentence by the prosecution] even where it considers that the sentence was unduly lenient, this Court has a discretion as to whether to exercise its powers.”

1. He reminded the Court that on an application for review pursuant to Section 81A of Criminal Procedure Ordinance, even where it considers that the sentence was unduly lenient, this Court still has a discretion as to whether to exercise its power. The respondent had fulfilled and completed all of the requirements of the Community Service Order. Given the length of time between the passing of the sentence and the hearing of the present application, the interests of justice did not compel the Court to impose a custodial sentence on the respondent.

Discussion

1. The respondent pleaded guilty to a charge of causing grievous bodily harm by dangerous driving, with a maximum sentence of 7 years’ imprisonment on indictment. It was not a charge of careless driving. We make this point because some of the language employed by the judge in sentencing, namely that the respondent was not “paying a proper lookout to the road ahead”[[24]](#footnote-24), that she registered “the existence of the pedestrians late”[[25]](#footnote-25) and that there was on her part “a lapse of attention for a number of seconds”[[26]](#footnote-26) rather than “deliberate disobedience of the red light”[[27]](#footnote-27) does not, in our view, properly reflect the respondent’s appallingly dangerous piece of driving, in which she drove through a pedestrian crossing against a red light, and did not brake until a fraction of a second before she hit the pedestrians. Such driving caused serious and permanent injuries to at least one of the victims, who were lawfully and properly using the pedestrian crossing.
2. Furthermore, having carefully examined the camera recording from the respondent’s vehicle, we do not accept the judge’s view that this was a pedestrian crossing with “very fine margins”[[28]](#footnote-28), or that the crossing in question is somehow defective in the degree of warning it gives motorists using the westbound carriageway of Gascoigne Road[[29]](#footnote-29). According to the vehicle camera, the respondent had just come to a complete halt at the junction of Gascoigne Road with Jordan Road some 200 yards earlier. As she increased speed and approached the pedestrian crossing in question, there was a triangular sign next to the outer lane under the flyover warning of a traffic signal ahead.
3. From an examination of the vehicle camera, at 7:48:20 am, the red light of the overhead traffic signal controlling the pedestrian crossing can be seen illuminated. By this stage, the respondent was about 100 **‍**yards from the pedestrian crossing. At 7:48:22 am, the respondent would have been able to see not only the overhead read traffic light, but at least the two red lights to her right controlling the pedestrian crossing at street level under the flyover. At 7:48:24 am, pedestrians began to cross the crossing from both sides. Yet the respondent’s vehicle showed no signs of slowing down. On the contrary, the vehicle’s speed as recorded on the vehicle camera increased from 47 kph to 50 kph as the vehicle reached the pedestrian crossing. At 7:48:26 am, with at least five pedestrians on the crossing (three coming from the respondent’s right and two from the left), the vehicle reached the white line marking the boundary of the crossing and, for the first time, a tassel on her windscreen was projected forward as the car braked. Immediately thereafter, the respondent’s vehicle collided with the three pedestrians. At 7:48:27 am, the respondent’s vehicle came to a complete halt.
4. It thus becomes quite clear, and indeed was admitted by the respondent in the Summary of Facts, that, notwithstanding that the red lights of the traffic signal controlling the pedestrian crossing had first become visible against the respondent at 07:48:20 am, she made no attempt at all to brake her vehicle until 07:48:26 am, some 6 seconds later. With respect, therefore, the judge’s finding that braking had commenced at 7:48:24 to 7:48:25 am[[30]](#footnote-30) is unsupportable and contrary to the admitted evidence contained in the Summary of Facts. But, even if the judge had been correct, the respondent should have braked her vehicle as soon as the red light was visible at 7:48:20, which would have given her more than enough time to come to a stop in a normal fashion. No “fine margins” were involved at all.
5. As the judge correctly recognised, a particularly serious view is taken by the courts of accidents at pedestrian crossings and motorists must exercise the utmost care when approaching such a crossing: see***‍****Wong* ***‍****Wai Hung*[[31]](#footnote-31); *Lam Siu Tong*[[32]](#footnote-32). Unfortunately, we think that the judge then rather neutralised his own acknowledgment of these principles by holding that the pedestrian crossing in question was somehow defective in the warning it gave to motorists. The fact is that ample warning was given to the respondent but, for whatever reason, she simply never registered that the lights were red against her and that there were pedestrians using the crossing until it was manifestly too late. Her claim to the police that the lights were green in her favour was clearly not correct, as the camera in her vehicle stood testament.
6. In the absence of evidence as to why the respondent did not register the traffic conditions, we are prepared to accept the judge’s finding that the respondent did not deliberately drive through red traffic lights knowing that they were against her but that, for whatever reason, she simply never saw either the red lights or the pedestrians at all, when she should have done, until it was too late. Nevertheless, given that she drove at or about the maximum speed through the red traffic lights of a pedestrian crossing, which should have been obvious to her, seriously injuring at least two pedestrians who were lawfully and properly using the crossing, we are of the view that a sentence of imprisonment for such appallingly dangerous driving was inevitable.
7. We have looked at the sentencing decisions of other jurisdictions in respect of comparable offences. They are useful in establishing principles and, perhaps, the general range of sentences applicable: however, caution should be exercised, since the maximum sentence may be different as may local conditions and the prevalence of the offence. In England and Wales, for example, the offence of causing serious injury by dangerous driving only came into effect in December **‍**2012, carrying a maximum sentence of 5 years’ imprisonment. In different jurisdictions of Australia, the maximum penalties for slightly different formulations of the offence in its basic form (not aggravated, for example, by drink or drugs or escaping from the police) vary between 5 **‍**years’ imprisonment in Victoria, 7 years’ in New **‍**South **‍**Wales, Western **‍**Australia and Northern Territory, 10 years’ in Queensland and Australian Capital Territory and 15 years’ in South **‍**Australia. In Tasmania, the maximum sentence is 21 years’ imprisonment.
8. In England and Wales, the approach to sentence for the offence, in the absence of specific guidelines, is to look to the guideline of the Sentencing Guideline Council relating to causing death by dangerous driving and make a discount for the less serious harm involved: see *R v Ellis*[[33]](#footnote-33); *R v Dewdney*[[34]](#footnote-34); and *R v Miah*[[35]](#footnote-35). In *R v Hussain*[[36]](#footnote-36), the Court considered[[37]](#footnote-37):

“…that a fruitful approach and one which is now commonly adopted by the Sentencing Council is to assess first culpability and then, having done so, assess harm”.

1. In *R v Bennett*[[38]](#footnote-38), the appellant, a man of good character with an unblemished driving record, drove a bus across a pedestrian crossing at 26 mph (below the speed limit) about two seconds after the traffic lights governing vehicles had changed to red. He struck a pedestrian who had stepped out onto the crossing when the lights had changed to red for vehicles, causing very serious injuries including fractures to his skull and face, and perforations to his lungs and liver, requiring several operations. The judge adopted a starting point of 24 months’ imprisonment, reduced to only 20 months’ imprisonment for the appellant’s late plea and other mitigation. His appeal was dismissed.
2. We have found a number of decisions from Australia particularly instructive. In New South Wales, the Court of Criminal **‍**Appeal in *R v Jurisic*[[39]](#footnote-39) had formulated what was to be termed a “numerical guideline” for the offence of dangerous driving occasioning grievous bodily harm under section 52A(3) of the Crimes Act 1900, the maximum sentence for which is 7 years’ imprisonment. In doing so, it listed several aggravating factors which may be present in cases of dangerous driving occasioning death or grievous bodily harm. The Court held that on a plea of guilty, wherever there was present to a material degree any aggravating factor involving the conduct of the offender, a custodial sentence of less than 2 years should be exceptional[[40]](#footnote-40).
3. The aggravating factors enumerated in the judgment of Spigelman CJ (now Spigelman NPJ) were: (i) the extent and nature of the injuries inflicted; (ii) **‍**the number of people put at risk; (iii) the degree of speed; (iv) the degree of intoxication or of substance abuse[[41]](#footnote-41); (v) whether there was erratic driving; (vi) whether there was competitive driving or showing off; (vii) **‍**the length of the journey during which others were exposed to risk; (viii) whether there was any ignoring of warnings; and (ix) whether the defendant was escaping police pursuit.
4. In *R v Whyte*[[42]](#footnote-42), the same Court, differently constituted, reformulated the guideline, holding that the guideline had a role to play in ensuring consistency, whilst acknowledging that “there is a tension between the principle of individualised justice and the principle of consistency”. The Court observed[[43]](#footnote-43):

“Some sentencing judges find it very difficult to accept that a person of good character who is unlikely to re-offend should be sent to gaol. However, Parliament has made it quite clear that the injuries occasioned by driving dangerously and, no doubt, the prevalence of the offence, require condign punishment”.

1. We too recognise that there will be occasions when a sentencing court may find it difficult to impose a custodial sentence on an offender who is a person of good character and who had no intention of committing such a serious traffic offence. However, the legislature has decreed by the penalty provision that a custodial sentence should be passed where the dangerousness of the driving and the moral culpability of the driver warrant such punishment. It is important to bear in mind that this offence provision is set in the context where a person has driven a vehicle in a dangerous manner causing the death of, or serious injury to, another. The dangerousness of the driving is an aspect of the offence that must be clearly recognised by sentencing courts, and guidance as to how it should be assessed has been provided by the relevant legislative provisions.
2. This issue was succinctly summarised by the Court in *HKSAR v Man* ***‍****Chun Pun*[[44]](#footnote-44):

“As defined under the RTO, driving will be dangerous when the way a person drives falls far below what would be expected of a competent and careful driver; and it would be obvious to such a driver that driving in that way would be dangerous. In this context, “dangerous” refers to danger of injury to a person or of a serious damage to property. In determining what would be expected of, or obvious to, a competent and careful driver in a particular case, regard should be had to all the circumstances of the case including:

“(a) the nature, condition and use of the road concerned at the material time;

(b) the amount of traffic which is actually on the road concerned at the material time or which might reasonably be expected to be on the road concerned at the material time; and

(c) the circumstances (including the physical condition of the accused) of which the accused could be expected to be aware and any circumstances (including the physical condition of the accused) shown to have been within the knowledge of the accused.”[[45]](#footnote-45)”

1. The Court in *Whyte* further took the opportunity to revisit the aggravating factors it had formulated in *Jurisic*. Aggravating factor (v) in *Jurisic* was amended to “erratic or aggressive driving”, while two further factors were added, namely: (x) the degree of sleep deprivation; and (xi) **‍**failing to stop. However, as the Victorian Court of Appeal made clear in *Stephens v The Queen*[[46]](#footnote-46), these factors “do not constitute some mere checklist nor are they intended to be exhaustive”[[47]](#footnote-47).
2. A case which we have found particularly helpful in its analysis of the approach to sentencing in cases of this nature is the decision of the Victorian Court of Appeal in *R v Woldesilassie*[[48]](#footnote-48), where the statutory offence is dangerous driving causing serious injury, under section 319(1A) of the Crimes Act 1958, carrying a maximum of 5 years’ imprisonment. The Court held that[[49]](#footnote-49):

“…the offence of dangerous driving may encompass a very wide range of conduct. In the determination of the appropriate sentence, it is necessary to take into account both the objective dangerousness of the offender’s driving, and the moral culpability of the offender. In particular, it is recognised that the moral culpability of the driver is of central importance to the sentencing task”.

1. In assessing moral culpability, the Court noted[[50]](#footnote-50):

“It is common for a sentencing judge to assess the moral culpability of a particular offender, or the gravity of the offending, by characterising it as being either low, medium, or high. However, it is important to bear in mind that the characterisation by a sentencing judge of an offender’s moral culpability, or of the objective gravity of the offending, in that way is not a matter of exactitude or precision. Importantly, such a characterisation should not be subjected to a degree of artificial analysis involving fine and often inappropriate distinctions. Nor should it obscure a proper analysis of the underlying factors that inform the assessment of the offender’s culpability.”

The Court concluded[[51]](#footnote-51):

“In determining the appellant’s sentence, it was of course necessary for the judge to weigh the gravity of the offending, as we have just described it, against his moral culpability, and the mitigating factors outlined by the judge. Taken together, those mitigating factors were not insubstantial. However, the cases to which we have referred, make it clear that the sentencing purposes of general deterrence, denunciation and protection of the public are accorded particular weight in respect of offences such as those to which the appellant pleaded guilty.”

1. In the course of its judgment, the Court made the point which resonates with other decisions in Australia and the United Kingdom, that had the appellant sought to take the risk of deliberately running a red light, “his level of moral culpability would have been substantially greater”[[52]](#footnote-52). That is not a factor, on the judge’s findings, in the present case.
2. From this survey of relevant authorities in Hong Kong, England and Wales and Australia, certain fundamentals may be stated when a judge approaches his task of sentencing for causing grievous bodily harm by dangerous driving. First, the dominant factor to be considered in sentencing for this offence is the defendant’s culpability. This will involve two related assessments. The first is the objective dangerousness of the defendant’s driving; the second is his moral culpability.
3. To illustrate the distinction, driving through a red traffic light in a built up area would go to the objective dangerousness of the driver’s conduct: driving in that way so as to jump a red traffic light would go to his moral culpability. Speeding or driving aggressively would go to the objective dangerousness of the driver’s conduct: doing so in order to race another vehicle, or out of “road rage”, would go to his moral culpability. Driving erratically would go to the objective dangerousness of the driver’s conduct: sending or reading a text message on a mobile telephone whilst doing so would go to his moral culpability.
4. There will of course, be an overlap or inter-twining of these two assessments, one of which focusses more on what the driver did, the other on why he did it. Both, however, are concerned with addressing the dominant question of culpability.
5. Secondly, having assessed culpability, a judge should then consider the harm and impact caused to the victim(s). Really serious injury will already have been caused and this will be an important factor in the sentencing exercise[[53]](#footnote-53). As with the varying level of culpability attending a defendant’s driving, the degree of harm and impact on the victim(s) will also vary; from a laceration to the fracture of a limb to brain damage to lifetime incapacity. There will also be a difference in the harm and impact caused by a vehicle hitting one pedestrian and a vehicle ploughing into a row or group of pedestrians.
6. In assessing the issues of culpability and harm, a sentencing judge will have regard to the sort of aggravating factors described in the authorities, mindful that they do not represent an exhaustive list, and conscious that the value to be placed on any particular factor will vary according to the circumstances of each case.
7. Thirdly, a judge will proceed on the basis that the normal sentence for an offence of causing grievous bodily harm by dangerous driving is one of immediate imprisonment. The length of such sentence will be determined by his assessment of the first two factors, bearing in mind that the maximum sentence for the offence upon indictment is a fine at level 5 and imprisonment for 7 years. We consider that other sentencing options would only be available in exceptional cases.
8. Turning to the prevalence of this offence in this jurisdiction, we have been helpfully provided by Mr Cheung with the details of 28 **‍**cases **‍**dealt with by the District Court between 10 August 2018 and 4 **‍**September **‍**2019. Clearly, this is a prevalent offence in Hong Kong, for which the courts should be aiming at consistency of approach whilst making due allowance for the myriad circumstances in which the offence may be committed. We can also see that most of the cases in this jurisdiction have been dealt with by way of immediate imprisonment: only a very few have been disposed of by way of non-custodial sentences.
9. A slightly earlier judgment of the District Court, which we have found, with respect, not only useful in the similarity of its facts but also in its **‍**identification of the appropriate starting point, is the sentence of HH **‍**Judge **‍**E Lin in *HKSAR v Wong* ***‍****Kam* ***‍****Chuen*[[54]](#footnote-54). There, a young woman was crossing a road at a pedestrian crossing when the pedestrian lights had just turned in her favour. After she had taken about 10 steps, she was knocked down on the second lane by a light goods vehicle driven by the defendant. The road conditions were good and the traffic volume moderate. The defendant had driven through the crossing at a consistent speed, but within the speed limit of 50 kph. The young woman was rendered unconscious with severe head injuries, requiring two brain surgeries and resulting in residual hearing impairment and double vision.
10. The judge found that the defendant “must have consciously chosen to run through a red light and had, for reasons unknown, failed to notice the victim on the road and proceeded without slowing”[[55]](#footnote-55). This deliberate risk taking was regarded as an aggravating factor. He assessed the starting point at 21 months’ imprisonment, which he reduced for the defendant’s plea and clear record to 14 months’ imprisonment.
11. In the case before us, we do not know why the respondent did not see either the red lights controlling her approach to the pedestrian crossing or the presence of three pedestrians already on the crossing. The judge seemed to accept that there was nothing on the respondent’s part to demonstrate “deliberate disobedience of the red light or excessive speed” but rather there was “a lapse of attention for a number of seconds”[[56]](#footnote-56). Nevertheless, the respondent did not slow down as she approached the pedestrian crossing and went through the crossing against a red light when it should have been obvious to an attentive driver that there were people crossing the road. We find, in this case, that three of the aggravating factors cited by Spigelman CJ in *Jurisic* and *Whyte* are relevant to her culpability and the harm caused to the victims, namely, (i), (ii) and (viii), in addition to the fact that the offence took place at a pedestrian crossing.
12. Had there been evidence of the respondent deliberately jumping or running a red light, we would have adopted a starting point of 24 months’ imprisonment. Had she been found to be distracted by using her mobile telephone, causing her not to notice the condition of the pedestrian crossing and the people on it, we would have considered a starting point considerably greater than 24 months’ imprisonment. As it is, there was no such evidence.
13. In all the circumstances, we would have adopted a starting point in the present case of 18 months’ imprisonment, which, on a plea of guilty and with the respondent’s good character, we would have reduced to 12 months’ imprisonment. In our judgment, the Application for Review of sentence by the Secretary for Justice is well-founded and the sentence of the learned judge was manifestly inadequate and wrong in principle. Accordingly, we allow the application.

Conclusion

1. The difficult question, which now presents itself, is how we are to dispose of the matter, having accepted that the respondent ought to have been given a custodial sentence. We have been informed that the respondent has completed the terms of her Community Service Order, and with various **‍**commendations for her performance. That is a factor which this **‍**Court **‍**may take into account, but it is by no means determinative: see **‍***Secretary* ***‍****for* ***‍****Justice v Law Tat Leung*[[57]](#footnote-57); *Secretary for Justice v Andrew* ***‍****Marc Dank & Anor*[[58]](#footnote-58); and *HKSAR v Pau Chin Hung Andy*[[59]](#footnote-59).
2. What concerns us more is that when this matter originally came on for hearing before us on 12 July 2019, it quickly became clear that we had not been provided with sufficient authority by either side to enable us to deal with the matter fully or properly. Consequently, on our own motion, we adjourned the hearing to a date to be fixed, which resulted in the application coming back before us on 23 September 2019. On that occasion, we were supplied with the authorities we had requested from various jurisdictions, as well as further written submissions from each party based on those authorities. Given the volume of cases from four jurisdictions, in addition to cases from Hong Kong, and the issues which fell to be considered, we found it necessary to reserve our decision.
3. The result of this procedural history, therefore, is that the respondent has had hanging over her head the knowledge that this Court might substitute a sentence of imprisonment for the sentence passed upon her by the judge in the District Court, ever since *ex parte* leave to apply for a Review of sentence was granted on 5 **‍**December 2018. That is now more than a year ago. That she has had to wait so long is no fault of hers. We should emphasise that wherever an Application for Review of sentence is concerned, and there is no accompanying application for leave to appeal against conviction, such Application should normally be listed expeditiously within a matter of a few weeks or, at the most, a few months of leave being obtained, and both parties will be expected to be ready at the hearing.
4. In the circumstances, we have decided, not without considerable hesitation, that it would not be just to impose now the sentence, even in a reduced form to reflect the fact that this is an Application for Review, which should have been imposed by the judge in the District Court.
5. Accordingly, whilst we allow the Application for Review and declare that the sentence which ought to have been passed on the respondent at first instance upon her plea of guilty is 12 months’ imprisonment, the justice of the case demands that we leave the sentence that was passed undisturbed.

Hon Pang JA:

1. I agree with the judgments of Macrae VP and Zervos JA.

Hon Zervos JA:

1. I entirely agree with the judgment of the Vice-President but I felt it might be useful to summarise in short compass the relevant principles and the approach which should be adopted by sentencing courts when determining the appropriate sentence for the offence of dangerous driving causing grievous bodily harm.
2. Under the Road Traffic Ordinance, Cap 374 (“RTO”), there is a gradation of offence and penalty for conduct involving dangerous driving. There is dangerous driving per se contrary to section 37 of the RTO, for which the maximum sentence upon conviction on indictment is 3 years’ imprisonment, and on summary conviction 12 months’ imprisonment. Causing grievous bodily harm by dangerous driving under section 36A of the RTO attracts a maximum sentence of 7 years’ imprisonment on indictment, and 2 years on summary conviction. The maximum sentence for causing death by dangerous driving contrary to section 36 of the RTO is 10 years’ imprisonment on indictment and 2 years’ imprisonment on summary conviction.
3. The offence of dangerous driving needs to be contrasted with the offence of careless driving under section 38 of the RTO, for which the maximum penalty is 6 months’ imprisonment. It is pertinent to note that a person drives carelessly if he drives a vehicle without due care and attention, or without reasonable consideration for other persons using the road.
4. There are two important threshold elements to the offence of causing grievous bodily harm by dangerous driving. First, the driving has to be dangerous, that is the defendant’s standard of driving must fall *far* *below* the standard which would be expected of a competent and careful driver, as required by section 36A(10)(a) of the RTO; and it must be obviously dangerous, as required by section 36A(10)(b) of the RTO. This also includes driving a motor vehicle where it would be obviously dangerous to drive in its current state, under section 36A(11) of the RTO.
5. It is provided under section 36A(12) of the RTO that “dangerous” refers to danger either of injury to any person or of serious damage to property. In this regard, the assessment of dangerousness of the driving will be affected by the extent of the risk of danger which the driving created, as well as by the extent of potential harm should the risk materialise. It is further provided, under section 36A(13) of the RTO, that in determining what would be expected of, or obvious to, a competent and careful driver, regard should be had to all the circumstances of the case, including (a) the nature, condition and use of the road at the material time; (b) the amount of traffic which is actually on the road at the material time or which might reasonably be expected to be on the road; (c) the circumstances of which the defendant could be expected to be aware and any circumstances shown to have been within the knowledge of the defendant (this includes the physical condition of the defendant). See ‍paragraph 48 of the judgment of Macrae VP.
6. Secondly, the dangerous driving must cause grievous bodily harm. Whilst there is no definition of grievous bodily harm in the RTO, it should be given its ordinary and natural meaning of really serious injury.
7. The steps and considerations when approaching sentence for this type of offence are, therefore, as follows.
8. First, the dominant factor to be considered is the offender’s culpability which will involve two related assessments:

(1) the objective dangerousness of the offender’s driving (see **‍**paragraphs 48-50 of the judgment of Macrae VP); and

(2) the moral culpability of the offender (see paragraphs 51 and 52 of the judgment of Macrae VP).

1. Secondly, closely allied to culpability is the harm and impact caused to the victim(s) (see paragraph 56 of the judgment of Macrae VP). This will involve an assessment of the nature and degree of the really serious injury to the victim or victims.
2. Aggravating factors may include:
   * 1. the extent and nature of the injuries inflicted;
     2. the number of people put a risk;
     3. the degree of speed;
     4. the extent of intoxication or of substance abuse (see **‍**section **‍**36A(7) of the RTO);
     5. whether there was erratic or aggressive driving;
     6. whether there was competitive driving or showing off;
     7. the length of the journey during which others were exposed to risk;
     8. whether there was any ignoring of warnings;
     9. whether the offender was escaping police pursuit;
     10. the degree of sleep deprivation;
     11. whether the offender failed to stop;
     12. the fact that the offence took place at a pedestrian crossing (see *Secretary for Justice v Lam Siu Tong*[[60]](#footnote-60)); and
     13. whether the offender was driving a public service vehicle (see **‍***HKSAR v Man Chun Pun*[[61]](#footnote-61)).
3. Thirdly, the normal sentence for this type of offence is an immediate custodial sentence. The length of the sentence will be determined by an assessment of the two factors of culpability and harm, bearing in mind that the maximum sentence for the offence is 7 years’ imprisonment on indictment. Only in exceptional circumstances would other sentencing options be available and this will be dependent upon the circumstances of the offence and of the offender.
4. Fourthly, the sentencing court will evaluate any mitigating factors with an appropriate adjustment to the sentence.
5. Fifthly, the sentencing court must consider the imposition of any other consequential orders, such as disqualification from driving, the completion of a driving improvement course and compensation.

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| (Andrew Macrae)  Vice President | (Derek Pang)  Justice of Appeal | (Kevin Zervos)  Justice of Appeal |

Ms Vinci Lam DDPP and Mr Ivan Cheung SPP, of the Department of Justice, for the Applicant

Mr H Y Wong, instructed by Yu & Associates, assigned by the Director of Legal Aid, for the Respondent

1. The significance of the tassel moving forward is that it suggested that at this moment the vehicle was braked. [↑](#footnote-ref-1)
2. PW3 was not cited in the particulars of the charge, since she could not be said to have suffered grievous bodily harm. [↑](#footnote-ref-2)
3. *HKSAR v Tong Siu Yan, Tommy* (Unrep., DCCC 18/2017, 26 May 2017). [↑](#footnote-ref-3)
4. *HKSAR v Lee Yeung Chi, Richard* (Unrep., DCCC 26/2017, 14 June 2017). [↑](#footnote-ref-4)
5. *HKSAR v Lam Lap Fung* (Unrep., DCCC 183/2017, 7 August 2017). [↑](#footnote-ref-5)
6. AB p 16C. [↑](#footnote-ref-6)
7. *Secretary for Justice v Poon Wing Kay* [2007] 1 HKLRD 660. [↑](#footnote-ref-7)
8. AB pp 18R-19A. [↑](#footnote-ref-8)
9. AB p 19A-D. [↑](#footnote-ref-9)
10. AB p 19E-G. [↑](#footnote-ref-10)
11. AB p 19H. [↑](#footnote-ref-11)
12. AB p 19N-O. [↑](#footnote-ref-12)
13. *HKSAR v Lee Yau Wing* [2013] 1 HKC 572. [↑](#footnote-ref-13)
14. *Secretary for Justice v Ian Francis Wade* [2016] 3 HKC 274. [↑](#footnote-ref-14)
15. *Ibid.*, at 286F-G. [↑](#footnote-ref-15)
16. *R v Cooksley* [2003] 2 Cr App R 18, at para 11. [↑](#footnote-ref-16)
17. *HKSAR v Fong Chai Man* [2008] 3 HKLRD 493, at para 10. [↑](#footnote-ref-17)
18. *Secretary for Justice v Ng Hop Sing aka Ng Hop Shing* (Unrep., CAAR 1/2017, 22 September 2017), at para 37. [↑](#footnote-ref-18)
19. *Secretary for Justice v Lam Siu Tong* [2009] 5 HKLRD 601. [↑](#footnote-ref-19)
20. *Secretary for Justice v Wong Wai Hung* [2011] 2 HKC 224. [↑](#footnote-ref-20)
21. AB p 18I. [↑](#footnote-ref-21)
22. AB p 19N-O. [↑](#footnote-ref-22)
23. *Attorney General’s Reference No 4 of 1989* (1989) 11 Cr App R (S) 517. [↑](#footnote-ref-23)
24. AB p 15J-K. [↑](#footnote-ref-24)
25. AB p 18Q-R. [↑](#footnote-ref-25)
26. AB p 19H-I. [↑](#footnote-ref-26)
27. AB p 19G-H. [↑](#footnote-ref-27)
28. AB p 16C; see also pp16G and 18U. [↑](#footnote-ref-28)
29. AB pp 16D-G; 18Q-U; 71N-R. [↑](#footnote-ref-29)
30. AB p 16A-B. [↑](#footnote-ref-30)
31. *Secretary for Justice v Wong Wai Hung* [2011] 2 HKC 224. [↑](#footnote-ref-31)
32. *Secretary for Justice v Lam Siu Tong* [2009] 5 HKLRD 601. [↑](#footnote-ref-32)
33. *R v Ellis* [2014] 2 Cr App R (S) 50, at [13]. [↑](#footnote-ref-33)
34. *R v Dewdney* [2015] 1 Cr App R (S) 5, at [20] - [25]. [↑](#footnote-ref-34)
35. *R v Miah* [2018] EWCA 364 (Crim), at [10]. [↑](#footnote-ref-35)
36. *R v Hussain* [2015] 2 Cr App R (S) 52. [↑](#footnote-ref-36)
37. *Ibid.*, at [12]. [↑](#footnote-ref-37)
38. *R v Bennett* [2017] EWCA Crim 748. [↑](#footnote-ref-38)
39. *R v Jurisic* (1998) 45 NSWLR 209. [↑](#footnote-ref-39)
40. *Ibid.*, at 231. [↑](#footnote-ref-40)
41. It should be noted that in Hong Kong, it is specifically provided that a person commits the offence in circumstances of aggravation if, at the time of committing the offence, he exceeds the blood alcohol limit; or there is present in his blood or urine any concentration of a specified illicit drug: see section 36A(7) of the RTO. [↑](#footnote-ref-41)
42. *R v Whyte* [2002] NSWCCA 343, at [146]. [↑](#footnote-ref-42)
43. *Ibid.*, at [145]. [↑](#footnote-ref-43)
44. *HKSAR v Man Chun Pun* (Unrep., CACC 83/2018, 30 August 2019). [↑](#footnote-ref-44)
45. Sections 36(7), 36A(13) and 37(7) of the RTO. [↑](#footnote-ref-45)
46. *Stephens v The Queen* (2016) 50 VR 740. [↑](#footnote-ref-46)
47. At [25]. [↑](#footnote-ref-47)
48. *R v Woldesilassie* [2018] VSCA 285. [↑](#footnote-ref-48)
49. *Ibid.*, at [23]. [↑](#footnote-ref-49)
50. *Ibid.*, at [30]. [↑](#footnote-ref-50)
51. *Ibid.*, at [45]. [↑](#footnote-ref-51)
52. *Ibid.*, at [36]. [↑](#footnote-ref-52)
53. It may be noted that only the injuries on PW1 and PW2 were serious enough to warrant the respondent being charged with the offence, and their names included in the particulars of offence. The injuries on PW3 did not amount to grievous bodily harm. [↑](#footnote-ref-53)
54. *HKSAR v Wong Kam Chuen* (Unrep., DCCC 351/2017, 21 September 2017). [↑](#footnote-ref-54)
55. *Ibid.*, at [18]. [↑](#footnote-ref-55)
56. AB p 19G-I. [↑](#footnote-ref-56)
57. *Secretary for Justice v Law Tat Leung* [2008] 5 HKLRD 927. [↑](#footnote-ref-57)
58. *Secretary for Justice v Andrew Marc Dank & Anor* (Unrep., CAAR 7/2007, 30 June 2007). [↑](#footnote-ref-58)
59. *HKSAR v Pau Chin Hung Andy* [2014] 1 HKLRD 600. [↑](#footnote-ref-59)
60. *Secretary for Justice v Lam Siu Tong* [2009] 5 HKLRD 601. [↑](#footnote-ref-60)
61. *HKSAR v Man Chun Pun* (Unrep., CACC 83/2018, 30 August 2019). [↑](#footnote-ref-61)