IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA708/2023
[2024] NZCA 332

BETWEEN	NIKLAS GEBHARDT Appellant
AND	THE KING Respondent

Hearing: 18 June 2024

Court: Cooke, Venning and van Bohemen JJ

Counsel: G H Vear and E E McClay for Appellant
A J Ewing for Respondent

Judgment: 19 July 2024 at 10.30 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal is allowed.

C The sentence of five years' imprisonment and disqualification from driving for seven years from the date of release from prison is quashed.

D We substitute a sentence of four years and three months' imprisonment and order that the appellant is disqualified from driving for one year and six months from the date of release from prison.

REASONS OF THE COURT

(Given by van Bohemen J)

[1] Niklas Gebhardt pleaded guilty to one charge of manslaughter. He was sentenced to five years' imprisonment and disqualified from holding or obtaining a driver's licence for seven years after his release from prison imposed by Doogue J on 3 August 2022.[1] Mr Gebhardt appeals against his sentence.

[2] Mr Gebhardt contends the Judge adopted an excessive starting point by holding his actions were deliberate, provided an insufficient discount for his physical and psychological injuries and remorse, and ordered an excessive driving disqualification period. Through his counsel, Ms Vear, Mr Gebhardt submits the sentence was manifestly excessive.

Relevant background

[3] Mr Gebhardt and his ex-partner, Kim Manson, shared custody of their son, Lachlan Gebhardt. After they separated, Mr Gebhardt and Ms Manson negotiated an agreement where Lachlan would spend half the week with each parent. However, because Ms Manson had arranged to take their son on a trip to Australia on a weekend on which Mr Gebhardt was to have custody of Lachlan, Mr Gebhardt sought to have custody on a day on which Ms Manson would usually have had custody.

[4] As to what followed, we set out what the agreed summary of facts relevantly provides:

> …
>
> **CIRCUMSTANCES**
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> At about 8:18am on Tuesday 5 November 2019, the defendant sent a text message to MANSON, who was supposed to have custody of the victim that day. In the text message, the defendant asked if he could pick the victim up later that day.
>
> MANSON agreed and an arrangement was made for the defendant to pick up the victim at about 4pm from the Dudley Swimming Pool complex on Church Street, Rangiora.
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> At about 3:46pm, the defendant arrived at Dudley Swimming Pool complex driving a blue Mazda Axela motor vehicle … . He parked the vehicle in the public carpark at the pool.

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1 *R v Gebhardt* [2022] NZHC 1899 [Sentencing notes].

The vehicle was registered and had a current warrant of fitness, having passed an inspection in May 2019. The inspection included checks to the brakes, steering and suspension which were all deemed road worthy.

The defendant walked into the swimming pool complex where he spoke with the victim and his grandmother.

At about 3:50pm, the victim's grandmother left the pool complex.

At about 4:08pm, the defendant and the victim left the pool and got into the Mazda Axela … .

The defendant drove the vehicle out of the parking area, the victim was sitting in the rear of the vehicle.

The defendant drove out of Rangiora and onto Lehmans Road, travelling in a northerly direction.

As he drove along Lehmans Road, he began to accelerate driving in excess of the posted speed limit of 80 km/h.

Approximately 1 km prior to the end of Lehmans Road, the defendant overtook another vehicle in his lane, swerving sharply back into his lane to avoid a collision with an oncoming vehicle.

The defendant continued driving at high speed towards the end of Lehmans Road to the right turn where it intersects at a sharp right-hand bend into River Road. This intersection has an advisory speed limit of 25 km/h.

To the west of this intersection is an unsealed stop bank road which runs parallel to River Road, and perpendicular to Lehmans Road. Beyond the stop bank is a forested area with well-established trees.

The defendant did not brake or attempt to slow the vehicle as he approached the intersection.

He made no attempt to swerve or take the right-hand corner.

The defendant continued driving in a straight line off the sealed road and onto the grass, striking the bottom left corner of the 25km/h advisory speed sign with the right side of the vehicle.

The vehicle continued up the rise towards the stop bank, which caused the vehicle to vault, becoming airborne. Preliminary results from the Police Serious Crash Unit show the vehicle travelled approximately 24 metres through the air until it impacted with a tree, seven metres higher than the vehicle's take off point. The vehicle spun to the left, coming to rest on the ground where it caught fire.

Members of the public in the area witnessed the incident, they responded and called for the emergency services.

As the fire began to spread, a member of the public was able to partially open the front passenger door where they located the defendant on the front passenger seat. They extracted the defendant from the vehicle.

As the fire began to consume the vehicle, members of the public were unable to approach it again.

Once the defendant was out of the vehicle, he was heard to say:

> "put me back in, swap me with my son, I want to swap"
>
> "my son's in the back, he's such a good boy, he's such a nice boy, I want to swap"
>
> "I need a bullet"

As a result, the defendant sustained burns to approximately 30% of his body, a fractured femur and facial injuries.

The speed of the Mazda at the point it left Lehmans Rd was initially calculated by an expert, Professor John Raine, to be within the range of 125 +/- 8 km/h. This was subsequently reviewed by Professor Raine whose calculations considering the effect of stop bank gouging on the vehicle launch speed, the pine tree deflection, and vehicle damage, mean that the vehicle speed was not less than 130 km/h and potentially higher.

The defendant did not brake, swerve or take any evasive action as the vehicle left Lehman's Road.

The defendant knew that stretch of road very well, having travelled along it [many] times in the past.

INJURIES TO THE VICTIM

The victim died in the vehicle at the scene.

DEFENDANT COMMENTS

When interviewed on 24 December 2019 the defendant stated that he could not recall anything about the crash.

The defendant has not previously appeared before the court.

[5] As a result of the crash, Mr Gebhardt sustained burns to approximately 30 per cent of his body, various fractures including in his face, ribs, right leg and spine, punctured lungs, and various lacerations. He also sustained a traumatic brain injury, causing some cognitive impairment.

[6] Following the incident, Mr Gebhardt was taken to Christchurch Public Hospital where he was put into a drug-induced coma for 10 days, during which he was transferred to the National Burns Unit at Middlemore Hospital. After spending five weeks at Middlemore, Mr Gebhardt was returned to Christchurch Public Hospital for

a further 10 days of hospital care. Mr Gebhardt was discharged from hospital on 20 December 2019 but had ongoing community burns management.

[7] Mr Gebhardt was first interviewed by the police on 24 December 2019 at Christchurch Central Police Station. At that interview, he said he could remember going to the Dudley Swimming Pool complex to pick up Lachlan and the reasons why he was collecting Lachlan that day. He said he had chosen the route he had taken after picking up Lachlan because he had wanted to beat the traffic. He could remember driving on Lehmans Road towards the Ashley River but that was as far as he could remember. The next thing he could remember was being out of the car and on fire, and people putting the fire out. He recalled asking what had happened to Lachlan and when told he was gone, his reaction was that he wanted to be left there. But he was put in an ambulance and then the next thing he remembered was waking up in Middlemore Hospital in Auckland.

[8] On 12 June 2020, Mr Gebhardt was charged with manslaughter and dangerous driving causing death.

[9] Between July and November 2020, Mr Gebhardt engaged in various bizarre behaviours, including putting a parcel in the fire on his son's birthday, walking outside naked, and presenting himself naked at a police station and asking to be arrested.

[10] On 30 October 2020, Mr Gebhardt presented himself at the Kaiapoi Police Station and said he wanted to talk to the police about the crash. He was formally interviewed and said he had murdered Lachlan with a car. He also said his memory stopped at picking up Lachlan at the swimming pool. He said he had driven down Lehmans Road, had overtaken a car "at about 130 K's", sped up to the corner, hit the bank at about 176 kilometres per hour and hit a tree. When asked what his intention was when overtaking the car and speeding up the bank, he said it was to murder Lachlan. When asked why, he said he did not know, but it was intentional. When asked what had happened beforehand, he said nothing important happened, but he did not or could not remember. He said he wanted to be arrested because it was the right thing to do.

[11] Later the same day, and on the following day, he told family members and the police that the admissions he had made at this interview were not correct.

[12] On 3 November 2020, Mr Gebhardt was admitted voluntarily to the Acute Mental Health Inpatient Unit because of an escalation in bizarre behaviour, including his confession to the police which he immediately retracted.

[13] On 24 November 2020, Mr Gebhardt was charged with murder.

[14] The Crown applied under s 101 of the Criminal Procedure Act 2011 for the statement made on 30 October 2020 to be ruled admissible at Mr Gebhardt's trial. Although the High Court ruled that the statement in its entirety was admissible,[2] the Court of Appeal reversed that decision and ruled that the statement was not admissible at trial.[3] The Court stated:

> [74] In the present case, we consider that the circumstances in which the statement was made by Mr Gebhardt indicate a real and substantial risk that it is not reliable. The uncontested expert evidence in this case establishes that it is likely Mr Gebhardt was acting under the influence of complicated grief. He was experiencing intense guilt in relation to the death of his son, and he appears to have engaged in punishment-seeking behaviour in response to that guilt. His conduct at the interview itself was peculiar: he was insistent on the fact that he had intentionally killed his son, but was unwilling (and perhaps unable) to respond to questions about when he had formed that intention, and why: questions that one would expect him to be able and willing to address if his admissions were indeed reliable. Mr Gebhardt's frustration with the legal process, and the protracted nature of the proceedings against him, are further factors indicating a real risk that the admissions were made to achieve closure, rather than because they were true.

[15] The Crown subsequently withdrew the murder charge.

[16] On 3 June 2022, Mr Gebhardt pleaded guilty to manslaughter on the basis of the agreed summary of facts.

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2 *R v Gebhardt* [2021] NZHC 1728.
3 *Gebhardt v R* [2022] NZCA 54.

Sentence imposed by the High Court

[17] The Judge noted that there is no guideline judgment for manslaughter and that the appropriate starting point is normally set by comparison with other cases.[4] The Judge had regard to this Court's decision in *Gacitua v R* which identified aggravating and mitigating factors in cases involving motor manslaughter with reference to the decision of the English Court of Appeal in *R v Cooksley*.[5]

[18] The Judge identified five aggravating factors to the offending:[6]

> (a) [Mr Gebhardt] engaged in a course of excessive speed — [he] reached not less than 130 km/h as [his] vehicle moved from the road towards the stop bank. This is more than 50 km/h above the speed limit and 105 km/h more than the advisory speed limit for the ninety-degree corner;
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> (b) [Mr Gedbhardt was] driving in an aggressive and highly deliberate manner without explanation — [he] accelerated heavily over the course of one kilometre at least;
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> (c) [Mr Gedbhart] overtook another vehicle and put [himself] in a position where [he] had to swerve sharply back into [his] lane to avoid a collision with an oncoming vehicle;
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> (d) the path of [his] vehicle from the road to the stop bank was consistent, sustained and targeted, in other words [he] drove in a direct straight line towards the stop bank; and
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> (e) there was no evidence of [Mr Gebhardt] swerving or taking evasive action, nor of braking or slowing down as [he] had done when [he] overtook the other vehicle.

[19] The Judge noted there was no external explanation for the crash.[7] Mr Gebhardt was an unimpaired driver who was psychiatrically well, his vehicle had no mechanical issues, and he knew the road well.[8] Mr Gebhardt made no attempts to slow down, brake or take any evasive action. While the Judge accepted no murderous intent could be attributed to Mr Gebhardt, she concluded that:[9]

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4 Sentencing notes, above n 1, at [14].
5 At [16]–[18], citing *Gacitua v R* [2013] NZCA 234; and *R v Cooksley* [2003] EWCA Crim 996 at [15].
6 Sentencing notes, above n 1, at [19].
7 At [20].
8 At [21] and [24].
9 At [22].

> … the only available conclusion for the Court is that [Mr Gebhardt] aimed to drive [his] vehicle up and over the stop bank in a manner that was grossly reckless and was highly likely to cause significant physical trauma to [him] and Lachlan, or even the death of both or one of [them].

[20] Accordingly, the Judge considered Mr Gebhardt's "high level of recklessness" to be a significant aggravating factor that warranted particular denunciation. The Judge held that Mr Gebhardt was "deliberately engaging in highly dangerous and reckless driving which was likely to cause injury or death."[10]

[21] The Judge also noted Mr Gebhardt's disregard for the welfare of Lachlan, a vulnerable child, and his breaches of trust with Ms Manson as a co-parent, and that inherent in a father-son relationship with Lachlan.[11]

[22] Having considered cases referenced by the Crown and Mr Gebhardt, with starting points ranging from three to 10 years' imprisonment, the Judge remarked that this case was "truly exceptional on its facts" and comparisons with those cases were of limited utility.[12] The Judge observed that, "[t]his was a deliberate crash at very high speed" and noted the very unusual feature that Mr Gebhardt's lack of impairment needed to be characterised as an aggravating rather than a mitigating feature.[13]

[23] For the reasons given, the Judge found Mr Gebhardt to be seriously culpable.[14] The Judge then adopted a starting point of seven years and six months' imprisonment.[15]

[24] The Judge applied a 20 per cent discount for Mr Gebhardt's guilty plea.[16] The Judge also applied a 10 per cent discount for Mr Gebhardt's psychiatric condition, grief, burn injuries, and brain injury.[17] In so doing, the Judge noted the Crown's position that Mr Gebhardt's diagnosis of complicated grief did not exist at the time of

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10 At [23].
11 At [25]–[26].
12 At [31].
13 At [33].
14 At [35].
15 At [35].
16 At [37]–[40].
17 At [42]–[52].

the offending so it had no causal nexus and that it was implicit that his grief was the foreseeable consequence of what he had done.[18]

[25] The Judge noted that the evidence of a psychologist was that Mr Gebhardt's complicated grief could prove to be a long persisting issue but that Mr Gebhardt had told a consultant psychiatrist he had noticed a slow and steady improvement in his emotional and psychological state for the previous 14 to 16 months.[19] The Judge accepted that Mr Gebhardt, as well as Lachlan's mother, would have lifelong grief. However, given that the presentation of that grief might resolve with the assistance of experts, the Judge said it was not a particularly compelling factor in mitigation.[20]

[26] The Judge also noted that Mr Gebhardt's physical injuries were significant, that there was evidence of cognitive impairment, and that it was likely that the burn and brain injuries would require careful management throughout the rest of his life.[21] However, the Judge considered that any discount for the injuries had to be limited given that the injuries were the direct result of Mr Gebhardt's own actions.[22]

[27] The Judge declined to apply a further discount for remorse because she considered she had given sufficient credit for psychological grief, which overlapped directly with the issue of remorse.[23] However, the Judge applied a discount of five per cent for Mr Gebhardt's good character.[24]

[28] The Judge considered that, until Mr Gebhardt gained insight into the context that gave rise to him engaging in dangerous driving behaviour, he remained a high risk of causing fatalities or serious injury.[25] The Judge considered that, in the circumstances of this very unusual case and Mr Gebhardt's psychological presentation, Mr Gebhardt should be disqualified from driving for seven years following his release from prison.[26]

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18 At [43]–[44].
19 At [46]–[47]
20 At [48].
21 At [49].
22 At [51].
23 At [57]–[58].
24 At [60]–[62].
25 At [66].
26 At [67].

[29] The Judge said that, taking a starting point of seven years and six months' imprisonment and applying discounts totalling 35 per cent resulted in an end sentence of five years' imprisonment.[27]

Leave to appeal out of time

[30] This appeal was filed just over 14 months out of time. Ms Vear says the delay in filing the appeal was largely the result of the psychological impact of sentencing on Mr Gebhardt. Ms Vear says that, at the time of sentencing, Mr Gebhardt was suffering extreme grief and guilt for his role in his son's death and was shocked to hear the Judge characterise his conduct as deliberate, targeted and calculated. That grief and shock coupled with a lack of understanding by Mr Gebhardt of how to challenge the Judge's finding of deliberateness prevented him from progressing his appeal in a timely manner.

[31] Provided Mr Gebhardt does not seek a disputed facts hearing, Ms Ewing, Crown counsel, accepts there is no prejudice and does not oppose the extension of time application.

[32] We grant the necessary extension of time accordingly.

Approach on appeal

[33] Under s 250(2) of the Criminal Procedure Act, the Court must allow an appeal against sentence if it is satisfied that, for any reason, there was an error in the sentence and that a different sentence should be imposed. In any other case, it must dismiss the appeal.[28]

[34] It is well-established that an appeal against sentence will be successful only if the appellant can point to an error, either intrinsic to the Judge's reasoning, or as a result of materials submitted on the appeal, that is material to the exercise of the lower court's sentencing discretion.[29] Unless there is a material error in the end sentence,

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27 At [68].
28 Criminal Procedure Act 2011, s 250(3).
29 *R v Shipton* [2007] 2 NZLR 218 (CA) at [138]; *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30]; and *Tamihana v R* [2015] NZCA 169 at [14].

the Court will not intervene.[30] The focus is on whether the end sentence is within the available range, rather than the process by which the sentence was reached.[31] Mere tinkering is not permitted.[32]

The appeal

[35] Ms Vear submits the Judge imposed a sentence that was manifestly excessive. She says the Judge erred in holding Mr Gebhardt's actions were deliberate, targeted and grossly reckless. Ms Vear submits that error led the Judge to adopt an excessive starting point through overstating Mr Gebhardt's culpability and characterising his lack of intoxication as an aggravating factor. She also submits the Judge provided an insufficient discount for Mr Gebhardt's physical and psychological injuries and remorse and ordered an excessive driving disqualification period.

[36] Ms Ewing submits the Judge was entitled to infer that Mr Gebhardt had driven deliberately off the road at high speed as the agreed summary of facts offered no other explanation. Ms Ewing also submits the Judge's starting point and discounts were appropriate and the end sentence was within range.

[37] It is common ground that the Judge miscalculated the end sentence and that it should be adjusted downwards to correct that error. The Judge considered a total discount of 35 per cent to be deducted from a starting point of seven years' and six months' imprisonment was appropriate. However, an end sentence of five years' imprisonment was imposed — a 33 per cent discount. Had the full 35 per cent discount been applied, an end sentence of 4 years and 10 months' imprisonment would have resulted.

The starting point

Submissions for Mr Gebhardt

[38] Ms Vear submits that, by finding Mr Gebhardt made a conscious and deliberate decision to crash, being at least grossly reckless as to whether Lachlan survived, the

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30 *Tamihana v R,* above n 29, at [14], citing *Te Aho v R* [2013] NZCA 47 at [30].
31 *Tamihana v R,* above n 29, at [14], citing *Tutakangahau v R*, above n 29, at [36].
32 See for example, *Cao v Police* [2022] NZHC 2034 at [19]; and *Maihi v R* [2013] NZCA 69 at [21].

Judge adopted an excessive starting point similar to those adopted in cases where the driver was intoxicated or intended to cause the victim harm.

[39] Ms Vear submits the Court erred in equating the absence of an alternative explanation for Mr Gebhardt not turning or braking his vehicle with evidence that he had done so deliberately. She says that the finding of deliberateness went beyond the agreed summary of facts and placed an onus on Mr Gebhardt to proffer an explanation, when it was known his traumatic brain injury was likely to be inhibiting his memory and ability to provide one.

[40] Ms Vear notes that, as a result of his traumatic brain injury suffered during the crash, Mr Gebhardt could not recall the crash and was unable to offer an explanation. She says Mr Gebhardt's lack of memory ought not to be equated with an evasion of responsibility or the absence of an explanation for the crash. Ms Vear suggests the inference of deliberateness was more consistent with the withdrawn murder charge and Mr Gebhardt should have had an opportunity to dispute it before the Judge relied on deliberateness as a significant aggravating factor.

[41] Ms Vear further submits that equating the absence of an impairment with increasing Mr Gebhardt's culpability further coloured the sentencing exercise. She says intoxication is an aggravating factor and the absence of intoxication is a neutral factor.

Submissions for the Crown

[42] Ms Ewing submits that the Judge was entitled to infer that Mr Gebhardt had intentionally driven the car off the road at high speed. She says that, however inexplicable this choice may have been, it was the only plausible inference available on the agreed facts.

[43] Ms Ewing says any suggestion there could have been an alternative explanation for Mr Gebhardt's actions is not plausible. She suggests it is not just Mr Gebhardt's amnesia standing in the way of an alternative explanation; it is the objective, and agreed, facts about his driving. Ms Ewing submits the Judge's observation that Mr Gebhardt's lack of impairment and sobriety needed to be

characterised as an aggravating, rather than mitigating, feature was merely to make the point that, on the spectrum of culpability for motor manslaughter, someone who deliberately crashes their car can hardly point to their sobriety and claim to be less culpable than someone who, driving while very drunk, crashes by accident.

[44] Ms Ewing suggests that, while manslaughter does not require proof of murderous intent, it encompasses offending that necessarily shades into murder. Ms Ewing notes that the charge to be preferred in borderline cases is a matter of prosecutorial discretion but that, for sentencing purposes, there may be little distinction. While Ms Ewing accepts that motor manslaughter cases will ordinarily not approach that mark because death or serious injury is not usually intended, she submits that manslaughter that involves deliberately causing a car crash is in a different category because the driver will usually have subjectively foreseen a risk of serious harm, if not death, resulting from that deliberate act.

[45] Ms Ewing submits that the starting point adopted by the Judge was appropriate for a deliberate act endangering, and ultimately killing, a vulnerable child. She further submits that, where death results from a deliberate act, motor manslaughter attracts high starting points, even if the culpable driving was relatively brief. Ms Ewing refers to the decisions of this Court in *Anderson v R*, *Taiapa v R* and *Worthy Redeemed (aka Lee Errol James Silvester) v R* in which starting points of seven years, nine years and 13 years were either upheld or were not challenged on appeal.[33]

Analysis

[46] Section 24 of the Sentencing Act 2002 contemplates that the facts upon which sentencing will be based can be agreed between the prosecution and defence. This will usually arise from the summary of facts to which the guilty plea is entered. If facts that are relevant to the determination of the sentence are disputed, the procedure contemplated by s 24(2) should be followed.

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[33] *Anderson v R* [2010] NZCA 339; *Taiapa v R* [2019] NZCA 524; and *Worthy Redeemed (aka Lee Errol James Silvester) v R* [2013] NZCA 61.

[47] When sentencing Mr Gebhardt, the Judge reached the conclusion that Mr Gebhardt had deliberately crashed the vehicle containing him and his son.[34] We agree with Ms Ewing that the facts recorded in the summary of facts allowed that inference to be drawn. It recorded that Mr Gebhardt did not brake or attempt to slow his vehicle, that he made no attempt to swerve or take the corner or take any evasive action, and that he knew the stretch of road very well.

[48] It is well established that inferences can be drawn from the summary of facts.[35] As this Court recently said in *Zagros v R*, when dealing with the role that the particular defendant took in the offending described in a summary of facts:[36]

> [28] The purpose of a summary of facts is, as the name suggests, to record the facts of the offending. A disputed facts hearing is concerned with proof of facts, not inferences that might be drawn from them. The Judge was entitled to draw inferences based on the agreed summary of facts to determine what role [the defendant] played within the syndicate based on those facts. The determination of an appropriate starting point on the basis of the summary of facts and the inferences to be drawn from it is a legal question for the sentencing judge.

[49] But we accept that there is some difficulty with the question of Mr Gebhardt's intention being left to the inferences drawn by the Judge in the particular circumstances of this case. The summary did not explain why Mr Gebhardt would have wanted to deliberately crash his vehicle, and we do not understand that any explanation has been identified. An intention to deliberately crash the vehicle carries with it the inference that Mr Gebhardt intended to harm his son and/or himself. Mr Gebhardt had earlier been charged with murder on the basis he had intentionally crashed the vehicle and accordingly had murderous intent. The version of the summary of facts when murder was alleged had included recording Mr Gebhardt's statement at interview that he had deliberately tried to kill his son using the vehicle. This Court then concluded this evidence was inadmissible given the substantial risk that the statements were unreliable because of Mr Gebhardt's complicated grief, amongst other factors.[37] The murder charge was then withdrawn and replaced with the manslaughter charge. Reference to Mr Gebhardt's statement at interview was

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34 Sentencing notes, above n 1, at [22] and [33].

35 *R v Kinghorn* [2014] NZCA 168 at [19]–[22] and [31], citing *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 (HL) at 169–170.

36 *Zagros v R* [2023] NZCA 334.

37 *Gebhardt v R*, above n 3 at [83].

then removed from the revised summary. The revised summary recorded that he could not recall anything about the crash.

[50] In reducing the charge to manslaughter and dangerous driving causing death, and by removing the reference to Mr Gebhardt's statement, the Crown can be taken not to have been pursuing an allegation that he had a murderous intent. The revised summary of facts then left unexplained the reason why Mr Gebhardt had not attempted to take the corner, brake or otherwise take evasive action. If Mr Gebhardt did not intend to harm his son and/or himself by such actions, then his conduct in intentionally crashing is very difficult to understand and can fairly categorised as bizarre. There were also other aspects of the summary that can be read as inconsistent with a deliberate attempt to crash the vehicle, including that he had swerved to avoid another car a very short time before the crash, and his immediate statements of concern about his son and his desire to swap with him after the accident.

[51] Given this background, we do not consider it was appropriate for the issue concerning Mr Gebhardt's intentions, or lack of them, to be left unspecified in the summary of facts and for that question to be left to a question of inference to be drawn by the Judge. If the prosecution wished to continue with its allegation that Mr Gebhardt deliberately crashed the vehicle, then this should have been specified in the summary of facts.

[52] Mr Gebhardt must be taken to have understood that inferences could be drawn from the summary. No challenge was advanced to the Crown's submissions about intent other than counsel arguing that he did not intend to harm his son. There was no application, or suggestion, that there was a need to have a disputed facts hearing. Moreover, given the explanation from Mr Gebhardt that he could not remember what had happened, a disputed facts hearing may not have advanced matters.

[53] We accept, however, that a conclusion might have been reached that the Crown could not prove beyond reasonable doubt that Mr Gebhardt intentionally crashed the vehicle as required by s 24(2)(c) of the Sentencing Act. We accordingly accept that the background circumstances mean that there was potential unfairness to Mr Gebhardt arising from the Judge proceeding on the basis that he deliberately

crashed the vehicle causing the death of his son when this was not squarely set out in the summary of facts. For that reason, it may have been unfair to Mr Gebhardt to treat this case in the same category as manslaughter cases where the defendant deliberately used a vehicle to cause harm to the victim.[38]

[54] That is also true of the Judge's related findings, such as Mr Gebhardt's lack of intoxication being an aggravating factor. We understand the Judge's view that this was an aggravating factor to be associated with the conclusion that the accident was intentional — that he was clear headed when deciding to crash the vehicle. We consider it unfair to Mr Gebhardt to treat his lack of intoxication as aggravating in this way.

[55] But the summary of facts also recorded the nature of Mr Gebhardt's driving that is not disputed. This included not only the dangerous driving involving the overtaking manoeuvre that he engaged in prior to the vehicle approaching the corner, but also that at the time he approached that corner he was travelling at a speed of approximately 125 kilometres per hour (plus/minus eight kilometres per hour) when the speed advisory for the corner was 25 kilometres per hour. The sentencing legitimately proceeded on the basis that he was intentionally driving the vehicle at this speed approaching the corner. The vehicle then did not take the corner leading to the accident and the death of Lachlan with no explanation provided for this behaviour.

[56] In the end, therefore, notwithstanding the decided lack of clarity created by the revised summary of facts, Mr Gebhardt can only succeed with this appeal if the sentence imposed can be demonstrated to be manifestly excessive given the aspects of the description of his driving that are not in dispute. That involves a comparison with other cases involving similar conduct to identify whether the final sentence was outside the available range.

[57] In that regard, we consider the decisions in *Anderson*, *Taiapa* and *Worthy Redeemed*, which are relied on by the Crown, to be of little assistance. If it is not

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[38] *R v Grey* (1992) 8 CRNZ 523 (CA); *Anderson v R*, above n 33; and *Taiapa v R*, above n 33.

established that he deliberately crashed the car, Mr Gebhardt's offending was significantly less culpable than the actions of the drivers in these decisions.[39]

[58] The only decisions of this Court that were referred to by counsel and which have some similarities with Mr Gebhardt's actions are *Gacitua v R* and *Millar v R*, in which starting points of five and six and a half years were upheld.[40]

[59] *Gacitua* involved driving for over 10 minutes in excess of 100 kilometres per hour on roads where the speed limit was 80 kilometres per hour and included passing other cars on more than one occasion, at least once by crossing over yellow no passing lines, and high speed, competitive driving with another vehicle. The car driven by Mr Gacitua collided with another vehicle, which had right of way and which Mr Gacitua had not seen. The passenger in Mr Gacitua's vehicle sustained multiple injuries and died at the scene. The passenger in the other vehicle was treated for severe seatbelt burns and severe bruising.[41]

[60] This Court considered that the offending involved three of the factors identified in *R v Cooksley*: greatly excessive speed, which included a sustained bout of high-speed competitive driving; a prolonged, persistent and deliberate course of very bad driving; and aggressive driving.[42] However, because there was a significant overlap in those factors, the Court considered that Mr Gacitua's culpability should be

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39 In *Anderson v R*, above n 33, at [15], this Court agreed with the sentencing Judge that the principal aggravating feature of the offending was that, after twice hitting the victim's car from behind, the appellant had closely pursued the victim as she sought to escape and the victim had been terrified to the point of driving at a speed at which she lost control, which caused her death. The Court said these actions must be assessed as conscious and deliberate.
In *R v Taiapa* [2018] NZHC 1815 at [20]–[22], when setting the starting point, which was not challenged on appeal, see *Taiapa v R*, above n 33, the sentencing Judge held that the actions of driving a car into the back of a motorcycle ridden by a member of a rival gang had been deliberate and unprovoked, that the defendant must have known there was a substantial risk the rider would suffer serious injury and the actions had continued for some time. The fact the offending had occurred as a result of gang tensions was held to be a seriously aggravating factor.
In *Worthy Redeemed (aka Lee Errol James Silvester) v R*, above n 33, at [49], this Court agreed with the sentencing Judge that the case was in a class of its own. It involved a front seat passenger, who had been drinking, deliberately grabbing the steering wheel as a bus approached from the other direction and jerking the car into the path of the bus so that the car crashed into the bus and the three rear seat passengers were killed.

40 *Gacitua v R*, above n 5; and *Millar v R* [2019] NZCA 570.

41 *Gacitua v R*, above n 5, at [8]–[11].

42 At [42], citing *R v Cooksley*, above n 5, at [15].

assessed as high but not at the most serious level and that a starting point in the four to five year range was appropriate.[43]

[61] In *Millar*, the driver, who had consumed a large quantity of alcohol at a party and had offered a lift home to two others, went on what the sentencing Judge described as an "unnecessary joy-ride".[44] This included: entering a T-intersection in a 50 kilometres per hour area at a speed of between 80 and 120 kilometres per hour; losing control of the vehicle, which hit the curb and went up onto the footpath; speeding off at over 100 kilometres per hour; refusing to accede to the requests of the passengers to slow down; reaching a speed of at least 180 kilometres per hour; performing drifts and doughnuts at various places; and, when attempting another drift, sliding off the road and down a steep bank where the car collided with a large tree.[45] One passenger was killed instantly.[46] Around four hours after the crash, the driver was found to have 142 milligrams of alcohol per 100 millilitres of blood.[47]

[62] In the High Court, the sentencing Judge observed that there was nothing that could be said that mitigated just how bad this driving was and identified the following aggravating features: unilaterally taking off with passengers who were expecting to be taken home, one kilometre away; the consumption of alcohol; grossly excessive speed and prolonged bad driving; and continuing to drive dangerously and recklessly after an initial crash where the vehicle was out of control and hit the curb.[48] The Judge noted that Crown and defence counsel had agreed that a starting point of six and a half years would be appropriate but said he considered the upper limit of that range could be higher.[49] The Judge then adopted a starting point of six and a half years, at the top of the range suggested by the Crown.[50] No issue was taken with the starting point on appeal.

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43 *Gacitua v R*, above n 5, at [43].
44 *Millar v R*, above n 40, at [3], citing *R v Millar* [2018] NZHC 625 at [10].
45 *Millar v R,* above n 40, at [3]–[4].
46 At [5].
47 At [6].
48 *R v Millar*, above n 44, at [21]–[22].
49 At [23].
50 At [26].

[63] We consider Mr Gebhardt's offending to be somewhat more culpable than that in *Gacitua*. While the offending took place over a shorter period and did not involve as many dangerous manoeuvres or competitive driving, the victim was more vulnerable than the victim in *Gacitua* and Mr Gebhardt's driving was a gross breach of trust towards his son. We accept, however, that the offending in *Millar* was of greater culpability than Mr Gebhardt's offending. It was of a much longer duration and involved more instances of dangerous and reckless driving. It also involved a breach of trust towards the innocent passengers, even if the breach and the victims' vulnerability were of a lesser order than that which applied in Mr Gebhardt's case. It also involved excessive consumption of alcohol. We agree that the starting point could well have been higher than the six and a half years adopted in that case.

[64] Ms Vear refers us to a number of High Court decisions imposing sentences for motor manslaughter that involved aggressive driving where dependent children were in the vehicle. These include:

(a) *R v Connon*, where a starting point of three to four years' imprisonment was adopted for sustained dangerous driving at very high speed by a woman with three young children in her car that resulted in the car crashing, becoming airborne, and rolling on impact. The inadequately restrained four-year-old child was killed when thrown from the vehicle when it crashed.[51]

(b) *R v Makoare*, where a starting point of seven years' imprisonment was adopted when sentencing an unlicensed driver, who had consumed methamphetamine the night before and the morning of the trip. The driver, in a car containing three adults, a three-year-old girl, a three-year-old boy, and the driver's unrestrained six-month-old child, overtook a truck and trailer unit on a blind corner, despite his partner's warning not to do so, and collided head-on with an oncoming car containing a family of four, injuring all the occupants of the two

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[51] *R v Connon* HC Wellington CRI-2008-035-1330, 24 September 2009.

vehicles, killing the six-month-old son and permanently paralysing a two-year-old in the other vehicle.[52]

[65] We accept that Mr Gebhardt's offending is arguably less culpable than that in *Connon*. However, we do not consider that decision to be a useful comparator because it pre-dated this Court's decision in *Gacitua*, which has become a reference point for sentencing for this kind of offending. We accept that Mr Gebhardt's offending is less culpable than that in *Makoare*.

[66] We also consider that Mr Gebhardt's offending is less culpable than the offending considered in a recent High Court decision, *R v Taylor*, where a starting point of seven years' imprisonment was adopted for motor manslaughter that involved: the significant consumption of alcohol before driving; aggressive and reckless driving away from a burglary in a stolen vehicle with the car headlights off; grossly excessive speeds for the roads being driven on; failing to observe give way and stop signs; failing to stop for the police; losing control of the vehicle which crashed, resulting in the death of one passenger, serious injury to another and significant lacerations to the face of a third; and fleeing the scene without checking on the passengers.[53]

[67] Having regard to all these decisions, we are satisfied that the starting point of seven years and six months' imprisonment adopted by the Judge in the present case was too high and resulted in a sentence that was manifestly excessive. We consider that a starting point of six years and six months' imprisonment is appropriate, once the factor of deliberately crashing the vehicle, which was common to two of the five aggravating factors identified by the Judge, is excluded from consideration.

Insufficient discounts for personal mitigating factors?

Submissions for Mr Gebhardt

[68] Ms Vear submits that insufficient credit was provided for the mitigating factors of good driving record, absence of previous convictions, genuine shock or remorse, and serious harm to the driver arising from his driving. She says Mr Gebhardt's

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52 *R v Makoare* [2020] NZHC 2289.
53 *R v Taylor* [2024] NZHC 1612 at [13].

extensive burn injuries and traumatic brain injury will have lifelong effects. She also says his diagnosis of complicated grief shows no sign of remitting and could prove to be long-term.

[69] Ms Vear submits that Mr Gebhardt's extreme guilt, remorse and grief are so significant that they have manifested as a psychological condition. She says that condition, along with his complicated grief, evidence remorse and ought to have resulted in a discount beyond that provided by the Judge.

Submissions for the Crown

[70] Ms Ewing submits the Judge properly recognised the relevant mitigating factors and Mr Gebhardt has not demonstrated that the sentence was manifestly excessive. She says the Judge's 10 per cent discount encompassed Mr Gebhardt's significant physical injuries and an allowance for Mr Gebhardt's diagnosis of complicated grief. Ms Ewing also says that Mr Gebhardt did not show any remorse or insight at sentencing. She notes that, while Mr Gebhardt says he feels guilty for his son's death, he now maintains he did nothing wrong.

Analysis

[71] We are not persuaded that the Judge erred in awarding a discount of 10 per cent for Mr Gebhardt's psychiatric condition, grief, burn injuries and brain injury. Given that these are all the consequences of Mr Gebhardt's offending, any discount for these factors would necessarily be limited.

[72] Moreover, once the starting point has been adjusted as discussed above and the other discounts for Mr Gebhardt's guilty plea and good character are taken into consideration, we are satisfied that an end sentence of four years and three months' imprisonment is not manifestly excessive.

An excessive disqualification period?

Submissions for Mr Gebhardt

[73] Ms Vear submits the lengthy driving disqualification period imposed by the Judge was unjustified, out of kilter with the case law, and will further isolate Mr Gebhardt, prevent him from obtaining employment on his release from prison, and impair his rehabilitation and recovery.

[74] Ms Vear refers to the decision of this Court in *Taiapa v R*, which considered the approach to be taken to disqualification in cases of motor manslaughter.[54] In reliance on that case, she submits that the sentencing objectives of deterrence and denunciation are already met by a long period of imprisonment, and that lengthy periods of disqualification extending beyond release are inconsistent with the purposes of rehabilitation and reintegration.

[75] Ms Vear submits Mr Gebhardt exhibited a short period of bad driving with tragic consequences, with an otherwise clean driving record. She says any lack of insight arises from his traumatic brain injury and complicated grief, and that these do not result in a high risk to the public.

Submissions for the Crown

[76] Ms Ewing submits the Judge had a wide discretion as to the length of any disqualification and an order has both punitive and protective purposes. She notes the Judge concluded Mr Gebhardt's lack of insight made him a high risk to the public. Ms Ewing says Mr Gebhardt's driving was both inexplicable and deliberate and a seven-year disqualification was an available response to the Judge.

Analysis

[77] As Ms Ewing notes, the Judge has a wide discretion under ss 124 and 125(2) of the Sentencing Act when deciding what period of disqualification to impose. However, we have some difficulty in understanding the Judge's rationale for imposing

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[54] *Taiapa v R*, above n 33, at [22]–[35].

a seven-year period of disqualification. Given that Mr Gebhardt has no recollection of what happened after he began driving on Lehmans Road, it seems unlikely that he will ever gain any insight into what caused him to drive in such a thoroughly reckless manner with his young son in the rear seat. There is no doubt, however, that he has suffered severe grief because of the consequences of his actions and that grief will continue for the rest of his life. We consider it is unlikely that Mr Gebhardt will drive in that manner again, particularly when he has no previous record of dangerous driving.

[78] In these circumstances, we consider a seven-year, post-release period of disqualification is disproportionate and is manifestly excessive. We consider a period of 18 months' disqualification, post release, is sufficient. That will ensure that Mr Gebhardt will have to re-sit his licence before he can drive again.

Result

[79] The application for an extension of time to appeal is granted.

[80] The appeal is allowed.

[81] The sentence of five year's imprisonment and disqualification from driving for seven years from the date of release from prison is quashed.

[82] We substitute a sentence of four years and three months' imprisonment and order that the appellant is disqualified from driving for one year and six months from the date of release from prison.

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