

DISTRICT COURT OF QUEENSLAND

CITATION: *R v Brisbane Auto Recycling Pty Ltd & Ors* [2020] QDC 113

PARTIES: **THE QUEEN**

v

BRISBANE AUTO RECYCLING PTY LTD

and

HUSSAINI, Asadullah

and

KARIMI, Mohammad Ali Jan

FILE NO/S: Indictment No. 697/20

PROCEEDING: Sentence

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 11 June 2020

DELIVERED AT: Brisbane

HEARING DATES: 27 and 28 May 2020

JUDGE: Judge A J Rafter SC

SENTENCES: **Brisbane Auto Recycling Pty Ltd**

In respect of Count 1:

- 1. Conviction recorded.**
- 2. Order that the defendant be fined the sum of \$3 million.**

Asadulla Hussaini

In respect of Count 2:

- 1. Conviction recorded.**
- 2. Sentenced to 10 months imprisonment. Order that the whole of the term of imprisonment be suspended forthwith. The operational period is 20 months. The defendant must not commit another offence punishable by imprisonment within the period of 20 months if the defendant is to avoid being dealt with for the suspended term of imprisonment.**

Mohammad Ali Jan Karimi**In respect of Count 3:**

- 1. Conviction recorded.**
- 2. Sentenced to 10 months imprisonment. Order that the whole of the term of imprisonment be suspended forthwith. The operational period is 20 months. The defendant must not commit another offence punishable by imprisonment within the period of 20 months if the defendant is to avoid being dealt with for the suspended term of imprisonment.**

CATCHWORDS: WORK HEALTH AND SAFETY – SENTENCE – where a workplace injury involving a forklift accident resulted in death – where the injury resulting in death occurred at the business conducted by Brisbane Auto Recycling Pty Ltd – where the company pleaded guilty to industrial manslaughter – where the directors pleaded guilty to reckless conduct – category 1

Anderton (VWA) v Jackson, Unreported, Magistrates Court, Victoria at La Trobe Valley, 19 December 2018

Barbaro v The Queen (2014) 253 CLR 58

Bulga Underground Operations Pty Ltd v Nash (2016) 93 NSWLR 338

Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors (No 2) [2006] QSC 040

Elias v The Queen (2013) 248 CLR 483

Hili v The Queen (2010) 242 CLR 520

Markarian v The Queen (2005) 228 CLR 357

Nash v Silver City Drilling (NSW) Pty Ltd; Attorney-General for New South Wales v Silver City Drilling (NSW) Pty Ltd [2017] NSWCCA 96

Orr v Cudal Lime Products Pty Ltd; Orr v Shannon [2018] NSWDC 27

Ryan v The Queen (2001) 206 CLR 267

R v ABE [2019] QCA 83

R v Ahmetaj [2015] QCA 248

R v Edwards [2011] QCA 331

R v GBD [2018] QCA 340

R v Goodwin; Ex parte Attorney-General (Qld) (2014) 247 A Crim R 582

R v Irvine (2009) 25 VR 75

R v Lavin [2019] QCA 109

R v Le [1996] 2 Qd R 516

R v Levi, Unreported; Court of Criminal Appeal (NSW); 15 May 1997

R v Norris; ex-parte Attorney-General [2018] 3 Qd R 420

R v Ryan and Vosmaer, ex parte Attorney-General [1989] 1 Qd R 188

R v Soloman [2006] QCA 244
R v Tout [2012] QCA 296
R v UE [2016] QCA 58
R v Verdins (2007) 16 VR 269
R v Watts [2020] ACTSC 91
Wong v The Queen (2001) 207 CLR 584
R v Yarwood [2011] QCA 367

Migration Act 1958 (Cth), s 501
Penalties and Sentences Act 1992 (Qld), s 5, s 9, s 11, s 48, s 144
Work Health and Safety Act 2011 (Qld), s 3, s 9, s 18, s 19, s 27, s 31, s 34, s 179I, s 179M, s 244

COUNSEL: A J Guilfoyle for the Crown
 N V Weston for the defendants

SOLICITORS: Office of the Work Health and Safety Prosecutor for the Crown
 Mills Oakley for the defendants

The charges

- [1] On 3 April 2020 an indictment was presented charging the defendants with the following offences.
- [2] Brisbane Auto Recycling Pty Ltd is charged in Count 1 with industrial manslaughter contrary to s 34C *Work Health and Safety Act 2011* (Qld). The charge is as follows:
 “On or about the 17th day of May 2019 at Rocklea in the State of Queensland, Brisbane Auto Recycling Pty Ltd was conducting a business or undertaking, and a worker, namely Barry James Willis, was injured in the course of carrying out work for the business or undertaking and later died, and the conduct of Brisbane Auto Recycling Pty Ltd caused the death of the worker, and Brisbane Auto Recycling Pty Ltd was negligent about causing the death of the worker by the said conduct.”
- [3] Mr Hussaini is charged in Count 2 with reckless conduct – category 1 contrary to s 31 *Work Health and Safety Act 2011* (Qld). The charge is that:
 “Between about the 1st day of January 2018 and the 17th day of May 2019 at Rocklea in the State of Queensland, Asadulla Hussaini had a health and safety duty pursuant to s 27 of the *Work Health and Safety Act 2011* to exercise due diligence to ensure Brisbane Auto Recycling Pty Ltd complied with its duty pursuant to s 19(1) of the *Work Health and Safety Act 2011*, and, without reasonable excuse, engaged in conduct that exposed an individual, to whom that duty was owed, to a risk of death or serious injury or illness, and was reckless as to the risk to an individual of death or serious injury or illness.”

- [4] Mr Karimi is charged in Count 3 with reckless conduct – category 1 contrary to s 31 *Work Health and Safety Act 2011* (Qld). The charge is that:

“Between about the 1st day of January 2018 and the 17th day of May 2019 at Rocklea in the State of Queensland, Mohammad Ali Jan Karimi had a health and safety duty pursuant to s 27 of the *Work Health and Safety Act 2011* to exercise due diligence to ensure Brisbane Auto Recycling Pty Ltd complied with its duty pursuant to s 19(1) of the *Work Health and Safety Act 2011*, and, without reasonable excuse, engaged in conduct that exposed an individual, to whom that duty was owed, to a risk of death or serious injury or illness, and was reckless as to the risk to an individual of death or serious injury or illness.”

- [5] The defendants pleaded guilty upon presentation of the indictment.

The antecedents of the defendants

- [6] Brisbane Auto Recycling Pty Ltd is registered as a proprietary company limited by shares. It was registered on 9 March 2016. It has no previous convictions.
- [7] Mr Hussaini is 25 years of age. He was aged between 22 and 24 years at the time of the offending. He is an Afghani national and a permanent Australian resident. He is married with one dependent child aged about five months. He was married in Pakistan in 2013. His wife and son live in Afghanistan. He has no criminal history.
- [8] Mr Karimi is 23 years of age.¹ He was aged between 21 to 22 years at the time of the offending. He is an Afghani national and a permanent Australian resident. He is married with two dependent children. He was married in Pakistan in 2015. The older child is about three years of age and the younger child is about one month old. His wife and daughters live in Afghanistan. Mr Karimi has no previous convictions.

The maximum penalties

- [9] The maximum penalty for an offence of industrial manslaughter committed by a body corporate is a fine of \$10 million.²
- [10] The maximum penalty for a reckless conduct – category 1 offence committed by an individual as an officer of a person conducting a business or undertaking, is a fine of \$600,000 (6,000 penalty units) or 5 years imprisonment.

The circumstances of the offences

- [11] The offending relates to a fatality at the auto wrecking business conducted by Brisbane Auto Recycling Pty Ltd at 167 Marshall Road, Rocklea. On 17 May 2019 a worker engaged by Brisbane Auto Recycling Pty Ltd, Barry Willis, was struck by a forklift which was being reversed by another worker, Mohammad Yaqubi. On 25 May 2019, Mr Willis died from the injuries he sustained. The incident, and the conduct of those present at the site before and after the incident was captured by four

¹ Mr Karimi’s exact date of birth is not known. His age is based on an arbitrary date of birth chosen by migration lawyers: Affidavit of Mohammad Ali Jan Karimi at para 3.

² The maximum penalty stated in s 34C *Work Health and Safety Act 2011* (Qld) is 100,000 penalty units for a body corporate. The value of a penalty unit for the *Work Health and Safety Act 2011* (Qld) is \$100: *Penalties and Sentences Act 1992* (Qld), s 5(1)(d).

closed circuit cameras.³ I have viewed the CCTV footage. It is incredibly distressing to see Mr Willis crushed by the force of the forklift.

- [12] The business operated by Brisbane Auto Recycling Pty Ltd included the purchase of used motor vehicles for resale, recycling and parts. The company was registered on 9 March 2016. There were two directors, Mr Hussaini and Mr Karimi, who held an equal shareholding. Both directors supervised work activities at the Marshall Road workplace.
- [13] Brisbane Auto Recycling Pty Ltd engaged workers including Mr Willis, Mr Yaqubi and Nasrullah Hussaini.⁴ Mr Willis was engaged on a casual contract basis to collect motor vehicles from customers and deliver them to the Marshall Road workplace. He was engaged to collect motor vehicles using a single cab Hino tilt tray truck which was owned by Brisbane Auto Recycling Pty Ltd.
- [14] On Friday 17 May 2019 at about 8.14am, Mr Willis drove the tilt tray truck out of the Marshall Road workplace to collect a motor vehicle. At 9.11am, a gas cylinder delivery truck reversed into the main delivery area of the Marshall Road workplace and continued to reverse to an area just outside the workshop shed entrance.
- [15] At about 9.19am Mr Willis returned to the workplace, having collected a white van which was secured on the tray of the truck. He drove the vehicle to the delivery area outside the entrance to the workshop shed and parked next to the gas cylinder delivery truck that had arrived several minutes earlier. He alighted from the tilt tray and commenced removing the restraints which were securing the white van.
- [16] Mr Willis walked from where the tilt tray was parked, across the delivery area to the main office area. The gas cylinder delivery truck driver moved three more gas bottles into the workshop shed.
- [17] At about 9.26am, Mr Yaqubi drove a forklift from the workshop shed to the delivery area, and manoeuvred a partial car body adjacent to the driver's side front corner of the tilt tray and driver's side rear of the gas cylinder truck. Mr Yaqubi returned the forklift to the workshop shed and started sweeping an area inside the shed.
- [18] There were three Mitsubishi forklifts in use at the workplace. Brisbane Auto Recycling Pty Ltd purchased its first forklift in 2016 and the others between 1 January 2017 and September 2017.
- [19] At about 9.28am Nasrullah used a separate forklift to reposition a partial car body in the main delivery area before removing the white van from the tilt tray driven by Mr Willis. The gas cylinder truck had been moved from adjacent to the tilt tray towards the front gate, away from the tilt tray, only moments earlier, to permit access to the tilt tray. It left the premises shortly after it was moved. Nasrullah positioned the white van on the ground approximately four metres from the driver's side front corner of the tilt tray, and returned the forklift to the workshop shed.
- [20] Over the next minute or so, Mr Willis moved four tyres from the outside wall of the workshop shed, placing them on the tray of the truck, towards the cabin.

³ Exhibit 2.

⁴ Referred to as Nasrullah to avoid confusion with the defendant Asadullah Hussaini.

- [21] At about 9.30am Mr Yaqubi drove a forklift from the workshop shed into the delivery area. Mr Willis commenced strapping down the four tyres while he was standing on the driver's side of the tilt tray. Mr Yaqubi repositioned the white van that was previously on the tilt tray.
- [22] Over the course of just over one minute from 9.31am to 9.32am, the following events occurred. Mr Willis moved from the driver's side of the tilt tray to the passenger side. Mr Yaqubi picked up a partial car body with the forklift approximately seven to eight metres from the front driver's side front corner of the tilt tray. Mr Willis moved from the passenger side of the tilt tray to the front of the tilt tray. Mr Yaqubi reversed with the partial car body to within approximately three to four metres from the driver's side of the tilt tray. Mr Willis moved back to the passenger side of the tilt tray. Mr Yaqubi attempted to reposition the forklift forks underneath the partial car body. Mr Willis moved around the front of the tilt tray to the driver's side front corner. Mr Yaqubi lifted the partial car body in the air. Mr Willis moved to the driver's side of the tilt tray and continued securing the tyres on the tray. Mr Yaqubi moved forward with the suspended partial car body and attempted to place it on top of another car body, lowering the forks of the forklift.
- [23] Inside the workshop shed, Nasrullah, with a car body suspended by only one forklift tine, drove out of the workshop shed towards the delivery area. Mr Yaqubi commenced to remove the forks from between the partial car body and it fell uncontrolled to the ground. Mr Yaqubi reversed the forklift to allow Nasrullah to drive past him, turning the forklift toward the tilt tray where Mr Willis was standing. The forklift driven by Mr Yaqubi struck Mr Willis, crushing him between the back of the forklift and the tilt tray, and moving the body of the tilt tray in a jolting manner. Mr Yaqubi had reversed the forklift whilst looking forwards, turning to look behind him only at about the point in time at which Mr Willis was struck. Nasrullah continued to drive towards the front of the forklift driven by Mr Yaqubi. Mr Yaqubi drove forward and Mr Willis fell to the ground.
- [24] Mr Hussaini and two other workers ran to Mr Willis to render assistance. Mr Hussaini went back towards the office entrance and returned with a mobile phone and called the ambulance. He informed the operator that Mr Willis had fallen a distance of approximately one metre from the back of the truck. At about 9.38am a Queensland Ambulance Service vehicle arrived and paramedics provided assistance to Mr Willis. At about 10.07am Mr Willis was taken by ambulance to the Princess Alexandra Hospital. He died from the injuries sustained eight days later on 25 May 2019.

The investigation

- [25] The investigation was conducted by Queensland Police and Workplace Health and Safety Queensland (WHSQ).
- [26] Before Mr Willis was taken to hospital, Mr Hussaini stated to a treating Queensland Ambulance Service paramedic that Mr Willis had fallen from the truck.
- [27] Approximately one or two hours after the incident on 17 May 2019 Mr Hussaini became aware of the precise mechanism of the injury to Mr Willis, but he did not advise the Queensland Ambulance Service or treating doctors of that fact.
- [28] On the evening of 17 May 2019 Mr Hussaini and Mr Karimi attended the Princess Alexandra Hospital where Mr Willis was being treated. Mr Willis' daughter,

- Josephine Cleeland was present at the hospital. Mr Karimi advised her that Mr Willis had fallen from his truck.
- [29] On the morning of 18 May 2019, an extract of CCTV footage showing the incident was provided to the partner of Laura Willis. Ms Willis contacted Ms Cleeland and told her that Mr Willis had not fallen from the truck.
- [30] On 18 May 2019 Mr Hussaini and Mr Karimi attended the Princess Alexandra Hospital. Mr Karimi spoke with Ms Cleeland. She requested that Mr Karimi advise her how Mr Willis was injured and to provide her with a copy of the CCTV footage of the incident. Mr Karimi suggested that the CCTV footage might not be required. He proposed that a version of the incident could be put, that Mr Willis did not winch a car properly and that it rolled back on to him. Ms Cleeland refused to agree to the proposal and Mr Karimi said that he did not wish to get Mr Willis into trouble. Mr Hussaini did not hear this conversation.
- [31] Mr Karimi agreed on 18 May 2019 to provide a copy of the CCTV footage to Ms Cleeland the following day. On 19 May 2019, Ms Cleeland contacted Mr Karimi by telephone and requested the copy of the CCTV footage. Mr Karimi advised that he had not been to the yard and would provide the footage on 20 May 2019.
- [32] On 20 May 2019 Ms Cleeland contacted Mr Karimi by telephone and requested the copy of the CCTV footage. Mr Karimi agreed to provide the footage.
- [33] On 21 May 2019 Ms Cleeland spoke with Mr Karimi who explained that he did not wish to give Ms Cleeland a copy of the CCTV footage as he did not want her to see it due to its distressing nature, and that it would need to be sent off to "IT" to download, which would take another three days.
- [34] Ms Cleeland arranged for a family friend to attend the Brisbane Auto Recycling Pty Ltd workplace on 21 May 2019 to obtain a copy of the CCTV footage. Mr Karimi initially refused, but ultimately permitted the footage to be viewed and recorded. After Ms Cleeland viewed the footage of Mr Willis being crushed by the forklift driven by Mr Yaqubi, she notified the police.
- [35] On 21 May 2019 a police constable stationed at the Princess Alexandra Hospital was approached by a treating doctor of Mr Willis. The doctor informed the police constable that Mr Willis' injuries were not consistent with the Queensland Ambulance Service report that he had fallen from a tow truck. The police constable was informed that Mr Willis had vascular injuries as a result of trauma to the pelvic region and may have been involved in a high impact incident, such as being hit by an object or vehicle. The police constable attended the workplace to investigate the matter and make enquiries, in the course of which he spoke to Ms Cleeland.
- [36] On 21 May 2019, police notified WHSQ of the incident. Queensland Police and WHSQ investigators attended the workplace the same day and the investigation commenced.
- [37] Mr Hussaini provided a statement to police on 21 May 2019. He said that he commenced work on 17 May 2019 at 7.00am. At approximately 9.00am he heard someone call out. He then approached Mr Willis who was lying down and conscious, but not talking. He called 000 immediately. Mr Hussaini said that he told the ambulance officers that someone had fallen from the truck. About one or two hours

later he checked the CCTV footage to see what had occurred and observed a forklift reverse into Mr Willis. He said that he believed after watching the CCTV footage and speaking to Mr Karimi that the driver of the forklift was Sayed Ali Jan Athar. He said he spoke to Mr Athar and asked him what happened and he replied, "I was putting a car body there and the ground was slippery, when I reversed it I couldn't control it and it slipped out".

- [38] On 22 May 2019 Mr Hussaini was interviewed by a WHSQ investigator. He made admissions to the effect that there were no written safety policies or procedures within the workplace. He said that he had seen Mr Willis on the ground and made a quick enquiry and assumed that he had fallen off the truck. He said that he did not immediately report the matter to Work Health and Safety Queensland because he didn't really know about such matters. When asked who managed the safety of workers, he said that he advises them verbally to be safe and to look after themselves. He said that forklift operators are required to be licensed, although he had not seen the workers' licences and simply relied on what he was told. He maintained that Mr Athar was operating the forklift which struck Mr Willis. He said that they did not have a WorkCover policy because he was not aware of the requirement to have one. He said that they had public liability and business insurance.
- [39] Mr Karimi provided a statement to police on 30 May 2019. He said that on the day of the incident he left home at around 9.00am and drove to another business in which he had an interest, Blue Sky Auto Scrap Metal. At about 9.30am he received a call from Mr Hussaini about the incident and then travelled to Brisbane Auto Recycling Pty Ltd, arriving at about the time the ambulance was preparing to leave. He said that he viewed the CCTV footage of the incident on 22 May 2019 and identified the driver of the forklift as Mr Yaqubi. He said that the other forklift in the vicinity of the incident was being driven by Nasrullah.
- [40] Mr Hussaini provided a further statement to police on 7 November 2019 in which he said that although Mr Athar did not say that he was the forklift driver involved in the incident, the words he used led him to assume that he was the operator. He said that at a meeting on 22 May 2019 Mr Yaqubi told him that he was the driver of the forklift, and he then made an addendum statement to the police to that effect on 22 May 2019.
- [41] The investigation revealed that Brisbane Auto Recycling Pty Ltd had no safety systems in place. In particular, there was no traffic management plan at the worksite, across which a number of forklifts operated constantly in close proximity to workers and members of the public.
- [42] The investigation also disclosed that Mr Yaqubi did not hold a high risk work licence to operate a forklift. Brisbane Auto Recycling Pty Ltd had made no sufficient enquiries to confirm whether he held one. Mr Yaqubi was inexperienced, and there was no sufficient assessment of his competency to operate a forklift.
- [43] Mr Yaqubi has been charged with dangerous operation of a motor vehicle causing death.

The statutory regime

- [44] The *Work Health and Safety Act 2011* (Qld) commenced operation on 1 January 2012. One of the main objects of the Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by

protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from particular types of substances or plant.⁵ A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of workers at the workplace.⁶ Officers of corporations and unincorporated bodies have a duty to exercise due diligence to ensure that the person conducting the business or undertaking meets its work, health and safety obligations.⁷

- [45] Compliance with all duties under the *Work Health and Safety Act 2011* (Qld) must be to the extent that compliance is reasonably practicable. Reasonably practicable means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including –
- (a) the likelihood of the hazard or the risk concerned occurring; and
 - (b) the degree of harm that might result from the hazard or the risk; and
 - (c) what the person concerned knows, or ought reasonably to know, about
 - (i) the hazard or the risk; and
 - (ii) ways of eliminating or minimising the risk; and
 - (d) the availability and suitability of ways to eliminate or minimise the risk; and
 - (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.⁸
- [46] The offence of industrial manslaughter contained in Part 2A *Work Health and Safety Act 2011* (Qld) was inserted by the *Work Health and Safety and Other Legislation Amendment Act 2017*. The provisions commenced on 23 October 2017.
- [47] Brisbane Auto Recycling Pty Ltd pleaded guilty to the offence of industrial manslaughter in s 34C which provides:
- “34C Industrial manslaughter—person conducting business or undertaking**
- (1) A person conducting a business or undertaking commits an offence if—
 - (a) a worker—
 - (i) dies in the course of carrying out work for the business or undertaking; or
 - (ii) is injured in the course of carrying out work for the business or undertaking and later dies; and
 - (b) the person’s conduct causes the death of the worker; and
 - (c) the person is negligent about causing the death of the worker by the conduct.

Maximum penalty—

 - (a) for an individual—20 years imprisonment; or
 - (b) for a body corporate—100,000 penalty units.

⁵ *Work Health and Safety Act 2011* (Qld), s 3(1)(a).

⁶ *Work Health and Safety Act 2011* (Qld), s 19.

⁷ *Work Health and Safety Act 2011* (Qld), s 27.

⁸ *Work Health and Safety Act 2011* (Qld), s 18.

Note—

See section 244 or 251 in relation to imputing to a body corporate or public authority particular conduct of employees, agents or officers of the body corporate or public authority.

(2) An offence against subsection (1) is a crime.”

[48] Mr Hussaini and Mr Karimi pleaded guilty to reckless conduct – category 1, contrary to s 31 which provides:

“31 Reckless conduct—category 1

- (1) A person commits a *category 1 offence* if—
- (a) the person has a health and safety duty; and
 - (b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
 - (c) the person is reckless as to the risk to an individual of death or serious injury or illness.”

Sentencing principles

[49] The purposes of sentencing set out in s 9(1) *Penalties and Sentences Act 1992* (Qld) are:

“9 Sentencing guidelines

- (1) The only purposes for which sentences may be imposed on an offender are—
- (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
 - (b) to provide conditions in the court’s order that the court considers will help the offender to be rehabilitated; or
 - (c) to deter the offender or other persons from committing the same or a similar offence; or
 - (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
 - (e) to protect the Queensland community from the offender; or
 - (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).”

[50] In sentencing for offences against the *Work Health and Safety Act 2011* (Qld) the court must have regard to the matters in s 9(2) *Penalties and Sentences Act 1992*. The prosecution accepts that the principles in s 9(2)(a) that a sentence of imprisonment should only be imposed as a last resort, and that a sentence that allows the offender to stay in the community is preferable, apply to the sentencing of Mr Hussaini and Mr Karimi. Those principles do not apply to the sentencing of an offender for an offence that resulted in physical harm to another person.⁹ The prosecution does not allege that the offending by Mr Hussaini and Mr Karimi caused the death of Mr Willis.¹⁰ In those circumstances, the Crown does not allege that their offending

⁹ *Penalties and Sentences Act 1992* (Qld), s 9(2A)(b).

¹⁰ Crown submissions on sentence at para 24.

resulted in physical harm to Mr Willis. Therefore the principles in s 9(2)(a) that a sentence of imprisonment should only be imposed as a last resort, and that a sentence that allows the offender to stay in the community is preferable, are applicable.

- [51] In *Nash v Silver City Drilling (NSW) Pty Ltd; Attorney-General for New South Wales v Silver City Drilling (NSW) Pty Ltd*,¹¹ the New South Wales Court of Criminal Appeal considered the relevant principles for sentencing under the equivalent New South Wales legislation. Basten JA, with whom Hoeben CJ at CL and Walton J agreed said:

“[34] The sentencing judge commenced his consideration with the proposition that ‘[g]reater culpability attaches to the failure to guard against an event the occurrence of which is probable rather than an event the occurrence of which is extremely unlikely.’ However, the truth of that proposition depends upon other considerations, including (a) the potential consequences of the risk, which may be mild or catastrophic, (b) the availability of steps to lessen, minimise or remove the risk and (c) whether such steps are complex and burdensome or only mildly inconvenient. Relative culpability depends upon an assessment of all those factors.

...

[41] Broadly speaking, the degree of culpability of the respondent may properly be assessed by reference to the risk against which steps falling within the definition of what is ‘reasonably practicable’ are to be taken.

...

[42] The culpability of the respondent is not necessarily to be determined by the remoteness of the risk occurring, nor by a step-by-step assessment of the various elements. Culpability will turn upon an overall evaluation of various factors, which may pull in different directions. Culpability in this case is reasonably high because, even if the pressure event of the force which occurred might not be expected to occur often, the seriousness of the foreseeable resultant harm is extreme and the steps to be taken to avoid it, which were not even assessed, were straightforward and involved only minor inconvenience and little, if any, cost. That assessment will involve both objective considerations and a consideration of what the respondent’s responsible officers knew or ought to have known.”

- [52] The factors to which a sentencing court must have regard include the maximum penalty;¹² the nature of the offence and how serious the offence was, including any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under s 179K;¹³ the extent to which the offender is to blame for the offence;¹⁴ the offender’s character, age and intellectual capacity;¹⁵ the presence of any aggravating or mitigating factor

¹¹ [2017] NSWCCA 96.

¹² *Penalties and Sentences Act 1992* (Qld), s 9(2)(b).

¹³ *Penalties and Sentences Act 1992* (Qld), s 9(2)(c).

¹⁴ *Penalties and Sentences Act 1992* (Qld), s 9(2)(d).

¹⁵ *Penalties and Sentences Act 1992* (Qld), s 9(2)(f).

concerning the offender;¹⁶ the prevalence of the offence;¹⁷ how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences;¹⁸ and any other relevant circumstance.¹⁹

- [53] In the present case other relevant circumstances to be taken into account pursuant to s 9(2)(r) *Penalties and Sentences Act 1992* (Qld) are the risk of deportation of Mr Hussaini and Mr Karimi, and the impact of any sentences upon their dependants. In Mr Hussaini's case it is also necessary to have regard to the psychiatric and psychological reports tendered on his behalf.
- [54] The pleas of guilty by the defendants must be taken into account, and may result in a reduction in sentence.²⁰
- [55] In *Elias v The Queen*,²¹ French CJ, Hayne, Kiefel, Bell and Keane JJ said:
 “As this Court has explained on more than one occasion, the factors bearing on the determination of sentence will frequently pull in different directions. It is the duty of the judge to balance often incommensurable factors and to arrive at sentence that is just in all of the circumstances.”
- [56] The balancing of all relevant factors in order to determine a sentence that is just in all the circumstances is arrived at by the process of instinctive synthesis, as explained by the High Court in *Wong v The Queen*:²²
 “[T]he task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an ‘instinctive synthesis’. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.”

The nature and seriousness of the offences

- [57] Mr Hussaini admitted that there were no safety systems in place. Whether the inaction by the defendants was due to expedience for commercial gain or complacency, or both, the moral culpability of each is high. The defendants knew of the potential consequences of the risk, which were catastrophic. Steps to lessen, minimise or remove the risk posed by mobile plant were available. Those steps were neither complex nor overly burdensome. After the incident, Brisbane Auto Recycling Pty Ltd engaged Geoff Gallagher of RiskMan Group to develop a risk management system to ensure it complied with its duties and any notices issued under the *Work Health and Safety Act 2011* (Qld). The report indicates that apart from a system of supervision, the measures consisted of little more than the installation of signage, plastic bollards and marked exclusion zones. The cost of implementing such measures was quite modest.

¹⁶ *Penalties and Sentences Act 1992* (Qld), s 9(2)(g).

¹⁷ *Penalties and Sentences Act 1992* (Qld), s 9(2)(h).

¹⁸ *Penalties and Sentences Act 1992* (Qld), s 9(2)(i).

¹⁹ *Penalties and Sentences Act 1992* (Qld), s 9(2)(r).

²⁰ *Penalties and Sentences Act 1992* (Qld), s 13(1).

²¹ (2013) 248 CLR 483 at 494 [27] (footnote references omitted).

²² (2001) 207 CLR 584 at 611 [75] per Gaudron, Gummow and Hayne JJ

[58] The failure by the defendants to control the risk posed by mobile plant was consistent with their attitude to safety at the workplace. By their pleas of guilty Mr Hussaini and Mr Karimi accept that they knew of the risk to the safety of their workers, but consciously disregarded that risk. The offending by Mr Hussaini and Mr Karimi was not a momentary or isolated breach. The business commenced operation in 2016. By the commencement of 2018, it had grown in size, in terms of employees, turnover and the presence of mobile plant, to the point where the conduct of Mr Hussaini and Mr Karimi, in not taking steps to ensure the risk posed to workers was controlled, amounted to recklessness. The period of offending alleged in counts 2 and 3 is between 1 January 2018 and 17 May 2019.

[59] Brisbane Auto Recycling Pty Ltd accepts by its plea of guilty to industrial manslaughter that it caused the death of Mr Willis. The conduct of employees and officers is imputed to a body corporate by s 244 *Work Health and Safety Act 2011* (Qld) which provides:

“244 Imputing conduct to bodies corporate

(1) For this Act, any conduct engaged in on behalf of a body corporate by an employee, agent or officer of the body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is conduct also engaged in by the body corporate.”

[60] The extended period of time over which workers were placed at risk is relevant to an assessment of the criminality of Brisbane Auto Recycling Pty Ltd.

[61] The imputed conduct of Mr Hussaini and Mr Karimi led to the death of Mr Willis, as did the conduct of the forklift driver, Mr Yaqubi which flowed from the prolonged failures.

[62] There was no real attempt to assess or control the risks posed by mobile plant.

The harm done to the victims²³

[63] The Willis family have suffered a profound loss. A victim impact statement was written by his eldest child, Josephine Cleeland.²⁴ The victim impact statement was read out by the prosecutor.²⁵

[64] Mr Willis was the father of four children. He had six grandchildren aged between 3 and 11. Although he had separated from his wife 20 years ago, they were still married and remained close friends.

[65] The family have struggled with the loss of Mr Willis. They have suffered emotionally. Ms Cleeland concluded her victim impact statement by saying, “We were all robbed of a relationship so dear to each and every single one of us and we are all suffering because of it.”

²³ A victim includes a person who has suffered harm – (a) because a crime is committed against the person; or (b) because the person is a family member or dependent of a person who has died because a crime is committed against that person: *Penalties and Sentences Act 1992* (Qld), s 179I; *Victims of Crime Assistance Act 2009* (Qld), s 5(1).

²⁴ Exhibit 16.

²⁵ *Penalties and Sentences Act 1992* (Qld), s 179M(2)(b).

The maximum penalties

[66] In sentencing an offender the court must have regard to the applicable maximum penalties.²⁶

[67] In *Markarian v The Queen*²⁷ the plurality said:
 “[C]areful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.”

[68] However, it is not appropriate to “look first to a maximum penalty, and to proceed by making a proportional deduction from it.”²⁸

Character, age and mitigating factors

[69] Brisbane Auto Recycling Pty Ltd has no previous convictions.

[70] In *Ryan v The Queen*²⁹ McHugh J referred to the observations of Gleeson CJ in *R v Levi*:³⁰

“[T]here is a certain ambiguity about the expression ‘good character’ [in the sentencing context]. Sometimes it refers only to an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving or including a history of previous good works and contribution to the community.”

[71] A lack of previous convictions may reveal very little about the character of a person: *R v Soloman*.³¹ In *Ryan v The Queen*³² McHugh J explained that:

“In the sentencing context, however, being of otherwise good character may in some circumstances suggest that the prisoner’s actions in committing the offence for which he or she is being sentenced were ‘out of character’ and that he or she is unlikely to re-offend. For that purpose, the absence of previous convictions is usually regarded as evidence of good character.”

[72] A body corporate may be a good corporate citizen by involvement in community and charitable work: see for example, *Orr v Cudal Line Products Pty Ltd; Orr v Shannon*.³³

[73] The prosecution pointed out that according to the forensic accountant’s report, Brisbane Auto Recycling Pty Ltd was behind in superannuation liabilities.³⁴ Further, it did not hold a WorkCover policy.

²⁶ *Penalties and Sentences Act* 1992 (Qld), s 9(2)(b).

²⁷ (2005) 228 CLR 357 at 372 [31].

²⁸ *Markarian v The Queen* (2005) 228 CLR 357 at 372 [31].

²⁹ (2001) 206 CLR 267 at 276 [27].

³⁰ Unreported; Court of Criminal Appeal (NSW); 15 May 1997 at 5.

³¹ [2006] QCA 244 at [24].

³² (2001) 206 CLR 267 at 276 [29].

³³ [2018] NSWDC 27 at [151].

³⁴ Exhibit 9 at 5.10 to 5.13.

- [74] However the forensic accountant's report states that from May 2019 to the date of the report on 30 April 2020, the company had incurred \$47,430 on health and safety remediation, with a further \$3,485 yet to be conclusively verified.³⁵
- [75] The absence of previous convictions is a relevant matter to be taken into consideration.
- [76] Mr Hussaini is 25 years of age. He has no previous convictions.
- [77] Mr Karimi is 23 years of age. He has no previous convictions.
- [78] In determining the character of an offender a court may consider any significant contributions made to the community by the offender and such other matters that the court considers relevant.³⁶
- [79] Mr Hussaini swore an affidavit setting out his background, personal circumstances, community involvement and other matters.³⁷ Mr Karimi swore an affidavit setting out his personal circumstances, background and contribution to the community.³⁸
- [80] Mr Hussaini and Mr Karimi are both young men who were exposed to extreme violence in Afghanistan. At the age of 16, Mr Hussaini was abducted, assaulted and held captive by men who claimed to have killed his father.³⁹ When Mr Karimi was a teenager he was kidnapped and held prisoner for two weeks.⁴⁰
- [81] At the instigation of their families Mr Hussaini and Mr Karimi fled Afghanistan as teenage refugees.
- [82] Mr Hussaini and Mr Karimi have worked exceptionally hard and built up a successful business with a turnover in excess of \$2.5 million a year. The business provides employment for up to eight persons, predominantly also former refugees. A considerable amount of the income from the business is derived from exports to the Middle East.
- [83] Mr Hussaini and Mr Karimi are permanent residents.
- [84] Mr Hussaini's wife and child live in Afghanistan, and are awaiting processing of their spousal visa application. Mr Karimi's wife and children also reside in Afghanistan and are awaiting processing of their spousal visa application. In the case of both defendants, they are the sole source of financial support for their families.
- [85] Mr Hussaini and Mr Karimi are well regarded within the community. Members of the community as well as employees have provided character references as to their general good character, kindness and industry.⁴¹
- [86] Mr Hussaini and Mr Karimi have made contingency plans in the event that Brisbane Auto Recycling Pty Ltd becomes insolvent as the result of the imposition of a

³⁵ Exhibit 9 at 2.8.

³⁶ *Penalties and Sentences Act 1992* (Qld), s 11(b) and (c).

³⁷ Exhibit 6.

³⁸ Exhibit 4.

³⁹ Affidavit of Asadullah Hussaini at paras 14 to 38 (Exhibit 6).

⁴⁰ Affidavit of Mohammad Ali Jan Karimi at paras 21 to 41 (Exhibit 4).

⁴¹ Exhibit 13.

substantial fine.⁴² Mr Hussaini and Mr Karimi had a meeting with 21 members of the Hazara community in Brisbane on 17 May 2020. The purpose of the meeting was to ascertain whether any members of the community would be willing to invest or lend money towards the establishment of a new business in the event that Brisbane Auto Recycling Pty Ltd is placed into liquidation. As a result of the discussions, Mr Hussaini and Mr Karimi are confident that they will be able to raise sufficient funds to establish a new business. They say they will be very careful to observe all health and safety obligations.

Psychiatric and psychological reports in relation to Mr Hussaini

- [87] Mr Hussaini was referred by his general practitioner to Dr Mohsen Goki, psychiatrist because of concerns about the deterioration in his mental state associated with the incident. Dr Goki saw Mr Hussaini on 22 June 2019 and on 11 subsequent occasions. In his report dated 21 April 2020,⁴³ Dr Goki says that Mr Hussaini is remorseful. According to Dr Goki, the defendant has intense nightmares and flashbacks which persist to the present time. Mr Hussaini described that as a result of the incident, he began to experience the re-activation of nightmares and flashbacks of the trauma he endured in Afghanistan. Dr Goki is of the opinion that Mr Hussaini had undiagnosed post-traumatic stress disorder because of his previous exposure to violence. Mr Hussaini's present symptoms meet the diagnostic criteria for post-traumatic stress disorder. He is being treated with medication for anxiety and insomnia, as well as nightmares and flashbacks. Mr Hussaini has been receiving psychotherapy focusing on distress tolerance and emotional regulation. Dr Goki is of the opinion that it is highly likely that incarceration would exacerbate Mr Hussaini's post-traumatic stress disorder. He considers that it is highly doubtful that Mr Hussaini could endure a term of imprisonment and return to normal function, making his prognosis most likely to be poor.
- [88] Mr Hussaini was assessed by Dr Luke Hatzipetrou, psychologist on 30 March 2020. Dr Hatzipetrou says that Mr Hussaini was visibly distressed when discussing the incident. He considers that Mr Hussaini is a very low risk of reoffending. Dr Hatzipetrou considers that the result of imprisonment would be that Mr Hussaini would be re-traumatised and suffer a greater risk of further decline in his mental state. Mr Hussaini also has persistent fears of being deported and returned to Afghanistan.
- [89] In *R v Yarwood*⁴⁴ the Court of Appeal explained the relevance of an offender's psychiatric condition, adopting the propositions stated by the Victorian Court of Appeal in *R v Verdins*:⁴⁵

“Impaired mental functioning, whether temporary or permanent (‘the condition’), is relevant to sentencing in at least the following six ways:

- (a) The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.

⁴² Affidavit of Asadullah Hussaini at paras 157-167 (Exhibit 6); Affidavit of Mohammad Ali Jan Karimi at paras 125-135 (Exhibit 4).

⁴³ Exhibit 8.

⁴⁴ [2011] QCA 367 at [24].

⁴⁵ (2007) 16 VR 269.

- (b) The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
- (c) Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
- (d) Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.
- (e) The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
- (f) Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment."

[90] It was not suggested that Mr Hussaini's mental condition reduced his moral culpability for the offending. The consideration of general deterrence is not necessarily eliminated by an offender's impaired mental functioning, as explained in *R v Ahmetaj*⁴⁶ by Morrison JA:

"Deterrence is moderated, not eliminated, by consideration of the mental impairment. However, as was said by Hunt CJ at CL in *R v Wright*:

"The full understanding of the authority and requirements of the law which is attributed to the ordinary individual of adult intellectual capacities cannot be expected of a person whose intellectual function is insufficient to have that understanding. The means by which the courts give effect to that principle (as an instrument of social administration) is to moderate the consideration of general deterrence to the circumstances of the particular case. *But, if the offender acts with knowledge of what he is doing and with knowledge of the gravity of his actions, the moderation need not be great.*"

[91] The opinions expressed by Dr Goki and Dr Hatzipetrou were not challenged by the prosecution. Where the offender's mental condition is caused or contributed to by the offending itself, the factor may not attract significant weight. Mr Hussaini's present condition is that he is experiencing recurrent, involuntary and distressing memories of the incident. Although Dr Goki said that as a result of the incident, Mr Hussaini started to experience the reactivation of the trauma endured in Afghanistan, all of his present symptoms relate to the workplace incident.

[92] In the circumstances, although the impact of imprisonment on Mr Hussaini's mental condition is a relevant factor, it should not be given significant weight.

⁴⁶ [2015] QCA 248 at [53]

The prevalence of the offences

- [93] The prosecution does not contend that the offences can be characterised as prevalent, although it is pointed out that the offence of industrial manslaughter was only enacted 18 months prior to the commission of the offence by Brisbane Auto Recycling Pty Ltd.
- [94] However, the prosecution contends that the incidence of workplace deaths in Queensland is prevalent as illustrated in the following table:

Queensland Workplace Fatalities

Year	Total number of Workplace, Work Related Deaths	Forklift related Workplace Deaths
2017	44	1
2018	39	1
2019	28	2

- [95] The court is required by s 9(2)(h) *Penalties and Sentences Act* 1992 (Qld) to have regard to the prevalence of the offence, rather than the prevalence of workplace incidents. The increasing prevalence of a particular offence may be an important factor to be taken into account in the sentencing process.⁴⁷

General and specific deterrence

- [96] The prosecution accept that having regard to the post-incident measures taken by the defendants and their lack of criminal history, there is little need for an element of specific deterrence in the penalties to be imposed.
- [97] It was submitted that the nature of the offending was such that general deterrence is a paramount sentencing consideration.
- [98] In *Bulga Underground Operations Pty Ltd v Nash*⁴⁸ the New South Wales Court of Criminal Appeal cited with approval the following observations of the Victorian Court of Appeal in *R v Irvine*⁴⁹:

“Workplace safety requires employers to take the obligations imposed by the Act very seriously. The community is entitled to expect that both small and large employers will comply with safety requirements. General deterrence is therefore a significant sentencing factor when safety obligations are breached.”

- [99] The sentences imposed should make it clear to persons conducting a business or undertaking, and officers, that a failure to comply with obligations under the *Work Health and Safety Act* 2011(Qld) leading to workplace fatalities will result in severe penalties.

⁴⁷ *R v Ryan and Vosmaer, ex parte Attorney-General* [1989] 1 Qd R 188 at 193.

⁴⁸ (2016) 93 NSWLR 338 at 373, [180].

⁴⁹ (2009) 25 VR 75 at 85, [52].

Assistance to law enforcement agencies in the investigation of the offence or other offences

- [100] Mr Hussaini participated in an interview, in which he admitted that Brisbane Auto Recycling Pty Ltd had no safety systems, beyond in effect telling the workers to ensure their own safety. However, he misled investigators as to the identity of the worker who was driving the forklift. He did so in a written statement to police and in an interview with WHSQ investigators. He had viewed the CCTV footage shortly after the incident, so the only reasonable inference is that he deliberately misled the investigators. He provided an implausible account that Mr Athar was driving the forklift.
- [101] Both defendants subsequently provided statements to the police identifying Mr Yaqubi as the driver of the forklift. They cooperated fully with the investigation conducted by Workplace Health and Safety Queensland.

Pleas of guilty

- [102] All defendants entered pleas of guilty at an early stage of the proceeding. The charges were laid by complaint made on 24 October 2019, which was first returnable on 1 November 2019. All defendants had indicated on 17 October 2019, prior to being charged, that they proposed to plead guilty.
- [103] On 29 November 2019, Brisbane Auto Recycling Pty Ltd was committed to the District Court for sentence. Mr Hussaini and Mr Karimi were committed for trial by way of registry committals.
- [104] An indictment was presented on 20 February 2020. A substituted indictment was presented on 3 April 2020, and all defendants pleaded guilty on that date. The matter was adjourned for sentence to 28 May 2020.
- [105] The pleas of guilty entered by the defendants have facilitated the administration of justice and together with other materials, provide a basis for concluding that they are remorseful.

The prospect of deportation

- [106] The prosecution accepts that Mr Hussaini and Mr Karimi face the prospect of deportation by virtue of the operation of s 501 *Migration Act* 1958 (Cth).
- [107] The *Migration Act* 1958 (Cth) provides in s 501(3) that the Minister **may** cancel a visa if the Minister reasonably suspects that the person does not pass the character test⁵⁰ and the Minister is satisfied that cancellation is in the national interest. By s 501(3A) the Minister **must** cancel a visa if the Minister is satisfied that the person does not pass the character test and the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, or a State or Territory.
- [108] The prospect of deportation is a proper matter for consideration in determining the appropriate sentence, although a sentence should not be imposed solely for the

⁵⁰ The *Migration Act* 1958 (Cth), s 501(6)(a) states that a person does not pass the character test if the person has a substantial criminal record, as defined in s 501(7). A person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more: s 501(7)(c).

purpose of circumventing the possibility of deportation: *R v Norris; ex-parte Attorney-General*.⁵¹ In *R v GBD*⁵² Fraser JA, with whom Sofronoff P and Mullins J agreed, summarised the principles in *R v Norris; ex-parte Attorney-General (Qld)* as follows:

“[52] *R v Norris; Ex-Parte Attorney-General (Qld)* is authority for the following conclusions:

- (a) The legislative intent underlying the *Migration Act* and reflected in s 501CA(6) is that a person who fails the character test and is released from criminal custody would remain in immigration detention whilst revocation of a decision by the Minister to cancel the person’s visa is pursued.
- (b) Street CJ’s conclusion in *R v Chi Sun Tsui* that ‘the prospect of deportation is not a relevant matter for consideration by a sentencing judge, in that it is the product of an entirely separate legislative and policy area of the regulation of our society’ is ‘explained by, and limited to, the statutory context in which it arose and the particular issue which the court was addressing – that of the fixing of a non-parole period’ under the New South Wales law applicable in that case.
- (c) The prospect of deportation may be a relevant factor to be considered in mitigation of a sentence where it makes the period of incarceration more onerous and also where, upon release, the fact of imprisonment will deprive the offender of the opportunity of permanently residing in Australia, providing that the prospect of deportation or its impacts are not merely speculative.
- (d) Even if the evidence before the sentencing judge does not justify a finding that deportation would harm the offender in either of those two ways, a sentencing judge should take into account when imposing a sentence the relevance of likely deportation on the efficacy of court ordered parole and the potential consequences of that for the offender.
- (e) A sentencing judge should not adjust a sentence or impose a lesser sentence for the purpose of defeating, avoiding or circumventing the operation of the provisions in the *Migration Act*.
- (f) That principle is not infringed by the adjustment of a sentence to take into account the risk of interruption to an offender’s rehabilitation that immigration detention beyond a fixed release date would entail.”

[109] The automatic cancellation of the defendants’ residency visas would result in them being placed in refugee detention for an indefinite period of time before having any prospect of being resettled in a third country. The principle of non-refoulement means that it is unlikely that they would be returned to Afghanistan.

⁵¹ [2018] 3 Qd R 420.

⁵² [2018] QCA 340 at [52] (footnote references omitted).

- [110] In the circumstances it is appropriate to have regard to the fact that the burden of imprisonment will be greater for Mr Hussaini and Mr Karimi than for someone who does not face the risk of deportation. The fact that they may lose the opportunity of settling permanently in Australia is also relevant.⁵³

Impact on dependants

- [111] Mr Hussaini and Mr Karimi are the sole source of financial support for their families. Their wives are living in Afghanistan in a conflict zone with young children to care for. A sentence of imprisonment may impact on their ability to continue to support their families.
- [112] The hardship to an offender's family resulting from imprisonment can be relevant, although it cannot overwhelm other factors such as retribution and general deterrence.⁵⁴
- [113] Hardship to an offender's family cannot be a basis for imposing a non-custodial sentence unless the hardship is of an exceptional character.⁵⁵
- [114] The forensic accountant's reports in relation to Mr Hussaini and Mr Karimi⁵⁶ indicate that they have sufficient financial resources to support their families for at least a short period of time. However, I accept the submission made by Mr Weston on behalf of Mr Hussaini and Mr Karimi that even a short term of actual imprisonment would be exceptionally disruptive to their prospects of re-establishing their business. This would certainly impact on their ability to provide financial support to their families.
- [115] I conclude that the impact of a sentence of actual imprisonment upon the dependants of Mr Hussaini and Mr Karimi is a relevant factor to be considered.

Comparable cases

- [116] There are no comparable sentences for industrial manslaughter.
- [117] Comparable sentences assist in promoting consistency in the application of sentencing principles as they provide guidance and stand "as a yardstick against which to examine a proposed sentence": *Hili v The Queen*.⁵⁷ In *R v Goodwin; Ex parte Attorney-General (Qld)*⁵⁸ Mullins J made observations on the task of sentencing in the absence of comparable cases:

"[37] The lack of comparable sentences may deprive the sentencing judge of the assistance of 'the yardstick' for testing the proposed sentence, but it does not preclude the sentencing judge from otherwise finding the relevant facts for the purpose of the sentencing, weighing up the relevant factors relating to the offence and the offender, and applying the principles of sentencing found in the relevant legislation and the common law, in order to reach the appropriate sentence for that offending. The sentencing judge may very well find

⁵³ *R v UE* [2016] QCA 58 at [13].

⁵⁴ *R v Le* [1996] 2 Qd R 516 at 522; *R v Tout* [2012] QCA 296 at [19].

⁵⁵ *R v ABE* [2019] QCA 83 at [39]; *R v Edwards* [2011] QCA 331 at [69].

⁵⁶ Exhibit 10 and 11.

⁵⁷ (2010) 242 CLR 520 at 537 [53]-[54].

⁵⁸ (2014) 247 A Crim R 582 at 590 [37].

the exercise of the discretion to be more difficult, in the absence of, and without the usual assistance afforded by, comparable sentences, but as a matter of principle the sentencing judge will have available sufficient material from the evidence adduced on the sentence and the relevant law to undertake the well-defined process of sentencing.”

- [118] The prosecution cited three cases of reckless conduct involving fatalities. However it was submitted that none of the cases were particularly useful as yardsticks because of factual differences with the present matters.
- [119] In *Orr v Cudal Lime Products Pty Ltd; Orr v Shannon*,⁵⁹ Cudal Lime Products Pty Ltd (CLP) pleaded guilty to an offence that being a person who had a health and safety duty pursuant to s 19(2) *Work Health and Safety Act* 2011 (NSW), without reasonable excuse engaged in conduct that exposed a person to a risk of death or serious injury and was reckless as to the risk. The maximum penalty was a fine of \$3 million. Mr Shannon pleaded guilty to an offence that being a person who had a health and safety duty pursuant to s 28 of the *Act*, failed to comply with that duty and thereby exposed a person to a risk of death or serious injury. The maximum penalty was \$150,000. The circumstances of the offences were that CLP operated an open cut limestone quarry. Mr Shannon was a worker for the company. At the direction of CLP Mr Shannon conducted electrical work on a switchboard as part of its installation at the quarry in the absence of a qualified electrician or electrical engineer. Mr Shannon was acting within the scope of his employment, but was not a qualified electrician nor electrical engineer. The electrical installation supply was also connected to a residence on the quarry grounds. An occupant of a residence was electrocuted when a fault originating from a combination of earthing, cabling and switchboard failures energised a metallic shower hose and the other metallic fittings. CLP was fined \$900,000. Mr Shannon was fined \$150,000.
- [120] In *R v Watts*,⁶⁰ the offender pleaded guilty to an offence that he was a person with a health and safety duty and, without reasonable excuse, engaged in reckless conduct that exposed an individual to whom that duty was owed to a risk of death or serious injury, and was reckless as to that risk. The maximum penalty for an offence committed by an individual was a fine of \$300,000 or five years imprisonment, or both. The offender was operating a non-slewing “pick and carry” crane beyond its carrying capacity, and on significantly sloped ground. He was moving a large generator in darkness with poor artificial lighting. The crane overturned, killing another co-worker who was assisting with guiding the crane operation. The offender was sentenced to 12 months imprisonment wholly suspended upon the offender entering into a good behaviour order for 12 months.
- [121] In *Anderton (VWA) v Jackson*,⁶¹ the offender pleaded guilty to an offence contrary to s 32 *Occupational Health and Safety Act* 2004 (Vic) of having a duty not to recklessly endanger persons at workplaces. The offender was a business owner who was lifting a large industrial bin containing scrap metal utilising a forklift. An employee was located inside the bin. The bin was being balanced on the tines of the forklift and was being lifted up in the air with the worker inside, to enable him to throw scrap metal from the bin into a larger bin. The bin fell from the forklift tines. The worker’s head

⁵⁹ [2018] NSWDC 27.

⁶⁰ [2020] ACTSC 91.

⁶¹ Unreported, Magistrates Court, Victoria at La Trobe Valley, 19 December 2018.

was crushed by the corner of the bin resulting in fatal injuries. The business owner was not the holder of a forklift licence. The sentence imposed was six months imprisonment.

- [122] In *R v Lavin*,⁶² the appellant was convicted by a jury of an offence against s 31 *Work Health and Safety Act 2011* (Qld). He was sentenced to 12 months imprisonment, suspended after the appellant had served 4 months. The conviction was set aside on appeal because of errors in the directions to the jury. The Court of Appeal ordered that there be a new trial. The appellant's company had been subcontracted to perform roofing work at a factory that was being refurbished. The quote included the supply and installation of a safety rail. However a safety rail was not installed and instead a plan was adopted whereby workers used harnesses which were attached to ropes secured to the ground and then secured to fixing points on the roof. It was not contemplated that all workers on the roof would use harnesses. The workers undertaking work away from the edge would not wear a harness as they were not in danger of falling from the roof. A worker who was working away from the edge and therefore not wearing a harness approached the edge at some stage and tripped in a gutter and fell off the roof. The worker fell a distance of almost six metres. The ground below the roof edge was covered in places by a concrete slab and in other places by hard rubble. The worker suffered fatal injuries.

Submissions on sentence

- [123] In *Barbaro v The Queen*⁶³, the High Court held that a submission as to the bounds of the available range of sentences was a statement of opinion and not a submission of law.⁶⁴ It was therefore held that a sentencing judge need not, and should not, take into account a statement of opinion as to the range of available sentences.⁶⁵ The position in Queensland has been altered by s 15(1) *Penalties and Sentences Act 1992* (Qld) which provides that a court may receive "a sentencing submission made by a party to the proceedings, that it considers appropriate to enable it to impose the proper sentence." The term "sentencing submission" is defined in s 15(3):

"(3) In this section—

sentencing submission, made by a party, means a submission stating the sentence, or range of sentences, the party considers appropriate for the court to impose."

- [124] Accordingly, the parties made submissions in relation to the appropriate penalties to be imposed.
- [125] Mr Guilfoyle for the Crown submitted that in respect of Brisbane Auto Recycling Pty Ltd, a fine in the vicinity of \$3 million should be imposed. In written submissions Mr Weston accepted that a substantial fine should be imposed but submitted that it should be somewhat less than \$3 million. However, in oral submissions that contention was not maintained.
- [126] In respect of Mr Hussaini and Mr Karimi, it was submitted by Mr Guilfoyle for the Crown that the appropriate range of sentence was between 9 and 15 months

⁶² [2019] QCA 109.

⁶³ (2014) 253 CLR 58.

⁶⁴ (2014) 253 CLR 58 at 75 [42].

⁶⁵ (2014) 253 CLR 58 at 76 [49].

imprisonment with an actual period in custody of no less than one third of the head sentence.

- [127] Mr Weston for Mr Hussaini and Mr Karimi accepted that they were equally responsible for the offending and there was no material distinction to be drawn between them.⁶⁶ Mr Weston submitted that in each case sentences of imprisonment of less than 12 months should be imposed, and that the sentences should be wholly suspended or served by way of an intensive correction order.

Conclusions

- [128] The gravity of the offending and the moral culpability of each defendant is high.
- [129] The conduct of Brisbane Auto Recycling Pty Ltd caused the death of Mr Willis because it failed to control the interaction of mobile plant and workers at the workplace, failed to effectively separate pedestrian workers and mobile plant, and failed to effectively supervise operators of moving plant and workers.
- [130] Mr Hussaini and Mr Karimi were reckless as to the risk to workers and members of the public who had access to the workplace. They failed to ensure that Brisbane Auto Recycling Pty Ltd controlled the interaction of mobile plant and pedestrians, failed to ensure that Brisbane Auto Recycling Pty Ltd effectively separated pedestrians and mobile plant, and failed to ensure that Brisbane Auto Recycling Pty Ltd effectively supervised operators of moving plant.
- [131] There are significant mitigating factors to be taken into account in each case.
- [132] In respect of Brisbane Auto Recycling Pty Ltd, I have concluded that a fine of \$3 million is appropriate. A fine of that magnitude, which is less than one third of the available maximum penalty, is appropriate. A lesser penalty would not adequately punish Brisbane Auto Recycling Pty Ltd or serve to adequately deter others. When imposing a fine, it is necessary to have regard to the financial circumstances of the offender, and the nature of the burden that payment of the fine will be on the offender.⁶⁷ The forensic accounting report in relation to Brisbane Auto Recycling Pty Ltd indicates that it does not have the capacity to pay a fine of that magnitude or any substantial fine. However, that does not preclude the imposition of an appropriate fine in the circumstances.⁶⁸
- [133] Mr Hussaini and Mr Karimi engaged in conduct that was designed to deflect responsibility for the incident. Mr Hussaini deliberately named Mr Athar as the driver of the forklift when he must have known that that was not the case. Mr Karimi initially told Mr Willis' daughter that he had fallen from the truck. Mr Karimi suggested to Mr Willis' daughter that CCTV footage might not be required and proposed a version of the incident that placed responsibility for it on Mr Willis. That was disgraceful behaviour occurring as it did at a time when Mr Willis' daughter would have been incredibly distressed.
- [134] However, despite having initially attempted to deflect responsibility in a somewhat inept manner Mr Hussaini and Mr Karimi have cooperated with the investigators,

⁶⁶ Outline of Submission for Asadullah Hussaini and Mohammad Ali Jan Karimi at para 4.

⁶⁷ *Penalties and Sentences Act 1992* (Qld), s 48(1).

⁶⁸ *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors (No 2)* [2006] QSC 040 at [17]-[22].

entered early pleas of guilty and they are clearly remorseful. The cooperation included providing statements identifying Mr Yaqubi as the driver of the forklift. They are both relatively young men with strong mitigating factors. Having regard to their personal circumstances including their upbringing in Afghanistan, the prospect of deportation and their prior good character, I consider that the appropriate sentence is 10 months imprisonment. The Crown submitted that the defendants should be required to serve a relatively short period of no less than one third of the head sentence. I am satisfied that having regard to the significant mitigating factors, it is appropriate that the sentences be wholly suspended for an operational period of 20 months.⁶⁹ The imposition of wholly suspended sentences is consistent with the principle in s 9(2)(a)(ii) *Penalties and Sentences Act 1992* (Qld) that a sentence that allows the offender to stay in the community is preferable.

[135] In the circumstances, I have concluded that wholly suspended sentences are appropriate.

Sentences

[136] Brisbane Auto Recycling Pty Ltd:

In respect of Count 1:

1. Conviction recorded.
2. Order that the defendant be fined the sum of \$3 million.

Asadullah Hussaini

In respect of Count 2:

1. Conviction recorded.
2. Sentenced to 10 months imprisonment. Order that the whole of the term of imprisonment be suspended forthwith. The operational period is 20 months. The defendant must not commit another offence punishable by imprisonment within the period of 20 months if the defendant is to avoid being dealt with for the suspended term of imprisonment.

Mohammad Ali Jan Karimi

In respect of Count 3:

1. Conviction recorded.
2. Sentenced to 10 months imprisonment. Order that the whole of the term of imprisonment be suspended forthwith. The operational period is 20 months. The defendant must not commit another offence punishable by imprisonment within the period of 20 months if the defendant is to avoid being dealt with for the suspended term of imprisonment.

⁶⁹ *Penalties and Sentences Act 1992* (Qld), s 144(2).