The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 22 of 2015

Between:

THE QUEEN

-v- Appellant

BRYAN DANIEL

Respondent

Before: **Baker, President**
Bernard, JA
Kawaley, JA (Acting)

Appearances: Mr. Loxly Ricketts and Ms. Victoria Greening, Department of Public Prosecutions, for the Appellant
Mr. Saul Froomkin QC, Beesmont Law Limited, for the Respondent

Date of Hearing: **3 June 2016**

Date of Judgment: **14 June 2016**

JUDGMENT

Causing death by dangerous driving – categories of gravity – aggravating and mitigating circumstances – manifestly inadequate sentence increased to 2 years

PRESIDENT

1. Shortly before 1:00 am on Saturday, 4 January 2014 the respondent, Bryan Daniel, was driving his Mitsubishi along Harrington Sound Road with Nikko Woodley ("the deceased") in the front passenger seat. He lost control of the vehicle on a slight downhill left hand bend at the Northern part of Tucker's Point Golf Course. The vehicle skidded, veered to the nearside, went down a grassy embankment and collided with a tree 5.23 metres from the edge of the road. It was extensively damaged. The deceased was able to free himself from the vehicle

but had severe injuries. He died on the way to the hospital. The respondent, also suffered severe injuries and remained trapped in the vehicle until he was extricated by the emergency services. He was taken to King Edward VII Memorial Hospital. There were no witnesses to the accident. The respondent, who was in a coma for three weeks, has no recollection of the accident or of the events for some time before it. There was no immediate explanation for the cause of the accident.

2. The vehicle was examined by a road traffic investigator who also attended the scene of the accident. His most significant conclusion was that the vehicle had been travelling in excess of 60mph i.e almost 100kmph. The speed limit was 35kmph so it was being driven at almost three times the speed limit.

3. On 26 October 2015 the respondent was convicted after a trial by a majority of 10-2 of causing the death of the deceased by dangerous driving. On 17 December 2015 he was sentenced to 6 months imprisonment and disqualified from driving for 5 years with 12 demerit points. The Crown, "the appellant", appeals against sentence with leave of the judge, Acting Justice Scott, on the ground that the sentence of 6 months' imprisonment was manifestly inadequate. There is no challenge to the disqualification or demerit points.

4. The prosecution's case at trial relied on the expert evidence of a road traffic investigator. His evidence was tested in cross-examination but not challenged by any defence expert. The respondent gave evidence that he had no recollection of the accident or of the events leading up to it. His amnesia was unchallenged and is unsurprising as he was in a coma for three weeks after the accident. His case was that he was a habitually careful driver who did not speed. There was an alternative count of causing death by careless driving but he did not accept that his driving was at fault in any way, a position that he maintains to this day.

5. Mr. Froomkin QC, who appeared for the respondent both in the Court below and before us, argued that the respondent was entitled, indeed obliged, to contest the case because of his lack of memory of what caused him to lose control of the vehicle. He was of course fully entitled, but not obliged, to contest the case. However, if he did so he risked, in the event of conviction, the loss of the mitigation and consequent reduction of sentence that a guilty plea would have occasioned. This was not a case in which the prosecution refused an offer of a

plea of causing death by careless driving. The appellant was contending he was not at fault.

6. The judge, in passing sentence, took a starting point of five years' imprisonment and it is difficult to see how, from a starting point of five years, she finally alighted on a sentence of six months. She did, however, mention among other things, the speed of the vehicle, the need to maintain respect for the law, the low risk of the respondent re-offending, his acceptance in the allocutus of his responsibility for the offence, the prevalence of the offence of dangerous driving, the fact that the vehicle had had a more powerful engine fitted (which together with the speed she appeared to have regarded as an aggravating circumstance). As to mitigating circumstances she mentioned the respondent's previous good character, his youth and stable background, assistance to the police and his medical condition.

7. It is necessary to refer to various matters that have been raised and their relevance to sentence in this case.

Remorse

8. When the respondent was asked whether he had anything to say before sentence was passed he replied as follows:

> "My Lady, I just wanted to say sorry to, um, Nikko's family, and especially sorry to Aunt Kathy. I'm sorry for taking away your only son, who we all loved. I hold myself completely responsible for that night, even though I still don't remember what happened. I just wish that deep down in your heart you could forgive me.
>
> My Lady, I'm ready to receive whatever punishment you see fit."

9. There is no doubt the respondent bitterly regrets that he caused the death of the deceased and the agony this has caused to his family. This reflects what was said in the social inquiry report. However, he still cannot accept that he was driving dangerously fast and that this was the cause of the accident. His remorse in these circumstances has to be distinguished from remorse accompanied by a plea of guilty which would have attracted a substantial discount on sentence. A

similar issue about remorse arose in *Wardman v The Queen* [2015] CA Crim (Bda) 15, a case in which the defendant had denied being the driver. See Kay JA at paragraph 34. However, the fact that by his driving he has killed someone who was very close to him is in my view a factor that is relevant to the level of sentence.

Replacement Engine

10. The engine in the vehicle was more powerful than that in the car as manufactured. The respondent had at some point replaced the original engine because it was worn out. The fact that the replacement was more powerful than the original engine adds nothing in my judgment to the excessive speed at which the vehicle was travelling which was the one aggravating feature of the offence.

The Respondent's Youth

11. The respondent was born on 16 September 1990 and was thus 23 at the time of the accident. His youthfulness does not constitute a mitigating factor. This is only so in cases where lack of driving experience has contributed to the commission of the offence. See *Cooksley and others v R* [2003] EWCA Crim 996 paragraph 15.

The Statement of Rashaun Robinson

12. In the early evening before the accident Rashaun Robinson, the deceased's cousin and the respondent's friend, was in the back of the car when it was being driving along North Shore Road by the respondent. Robinson said 'Don't speed because the roads are wet and I don't want to be the first fatality of 2014." The respondent replied: "Wherever I turn the wheel is where my car goes." Robinson's statement, which was read to the jury as agreed evidence without objection, also contained complimentary remarks about the general standard of the respondent's driving. The judge cannot be faulted for not treating this as an aggravating factor. It was a comment made on a different journey from that on which the accident occurred. The roads were wet at the time whereas they were dry at the time of the accident. Robinson was not in the car at the time of the accident.

Bald Tyres

13. When the vehicle was examined it was noticed that the thread on the inner half of both front tyres was completely worn down. Surprisingly it appears to have been the expert opinion that bald tyres provide better grip on a dry asphalt surface although they would have been a disadvantage once the vehicle had left the road and was on the grass. The judge did not refer to the tyres in her sentencing remarks. Tyres in this condition do not reflect well on the owner of the vehicle as regards maintaining it in a safe condition. With some hesitation I disregard the condition of the tyres as an aggravating factor in the present case. There is no evidence they contributed to the collision.

The Respondent's Injuries and Medical Condition

14. The respondent was very seriously injured in the accident. He sustained bilateral fractures of the femur, bilateral fractures of the tibia, fractures of the left humerus and a heel avulsion. Additionally he was in a coma for three weeks. He was in hospital for three months. Quite apart from the accident injuries he has had a kidney transplant as a result of chronic kidney disease and has to maintain a strict medication regime. His medical condition needs constant monitoring. In *R v Bernard* [1997] 1 Cr App R (S) 135 the Court of Appeal in England, after considering the authorities, derived four principles for determining the relevance of ill health to sentence. These are:

> "(i) a medical condition which may at some unidentified date affect either life expectancy or the prison authorities' ability to treat a prisoner satisfactorily may call into operation the Home Secretary's powers of release by reference to the Royal Prerogative of mercy or otherwise but is not a reason for this Court to interfere with an otherwise appropriate sentence;
>
> (ii) the fact that an offender is HIV positive, or has a reduced life expectancy, is not generally a reason which should affect sentence;
>
> (iii) a serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate;

> (iv) an offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate."

15. These principles were followed in *R v Qazi and Hussain* [2010] EWCA Crim 2579 in which the Court of Appeal, in the light of additional information not before the trial judge, made a further reduction on account of the appellant's medical condition. *Bernard* represents the present state of law. The issue of the respondent's condition was very much before the judge in the present case which Mr. Froomkin was submitting was a reason not to impose a prison sentence. The judge rightly rejected that submission but did not say what weight she attached in assessing the level of sentence. In my judgment the injuries sustained by the respondent in the accident case coupled with his previous medical condition are important mitigating factors.

The Authorities

16. There is no clear guidance on the appropriate level of sentence in Bermuda for causing death by dangerous driving. The maximum penalty was increased from 5 to 8 years in 2012 and little help is to be found in the level of sentences passed before then. The increase in maximum penalty reflects Parliament's concern that there were too many deaths on Bermuda's roads caused by criminally bad driving.

17. In *Taylor v Berkeley* [1999] Bda LR 16 a sentence of 12 months was increased to 3 years. The defendant had pleaded guilty. He was overtaking at about 65 mph and collided with a van. His passenger was killed and two people in the van injured. Sir James Astwood P said:

> "In our view, the case under consideration falls in the upper range of sentencing. The facts indicate a very serious case of dangerous driving where the respondent has shown a disregard for the safety of other road users."

18. Whilst the driving in that case was worse than in the present case, after a trial the sentence would have been 4 years or more and today probably at least 6 years if the case had been contested.

19. We were referred to *R v Steede* Criminal Jurisdiction No. 13 of 2007, *R v Douglas* Criminal Jurisdiction No. 34 of 2004 and *R v Richardson* Criminal Jurisdiction No. 40 of 2015, but there is little help to be gained from cases in which the report is of the sentence only and not the facts. Likewise I find little assistance from sentences passed for causing injury by dangerous driving or cases involving drink driving.

20. Much greater assistance is to be found in the judgment of the English Court of Appeal in *Cooksley*. I regard the principles in that case as applicable to Bermuda but the sentencing ranges have to be taken with the caveat that the maximum penalty in Bermuda is 8 years i.e. two years less than in England. The Court adopted a series of aggravating and mitigating factors set out in the Sentencing Advisory Panel's Advice, with the qualification that they should not be regarded as exhaustive and the significance of the factors can differ. The aggravating factors are divided into four categories. I set them out here for convenience:

> "*Highly culpable standard of driving at time of offence*
>
> (a) the consumption of drugs (including legal medication known to cause drowsiness) or of alcohol, ranging from a couple of drinks to a 'motorised pub crawl'
> (b) greatly excessive speed; racing; competitive driving against another vehicle; 'showing off'
> (c) disregard of warning from fellow passengers
> (d) a prolonged, persistent and deliberate course of very bad driving
> (e) aggressive driving (such as driving much too close to the vehicle in front, persistent inappropriate attempts to overtake, or cutting in after overtaking)
> (f) driving while the driver's attention is avoidably distracted, e.g. by reading or by use of a mobile phone (especially if hand-held)
> (g) driving when knowingly suffering from a medical condition which significantly impairs the offender's driving skills
> (h) driving when knowingly deprived of adequate sleep or rest

(i) driving a poorly maintained or dangerously loaded vehicle, especially where this had been motivated by commercial concerns

Driving habitually below acceptable standard

(j) other offences committed at the same time, such as driving without ever having held a licence driving while disqualified; driving without insurance; driving while a learner without supervision; taking a vehicle without consent; driving a stolen vehicle

(k) previous convictions for motoring offences, particularly offences which involve bad driving or the consumption of excessive alcohol before driving

Outcome of offence

(l) more than one person killed as a result of the offence (especially if the offender knowingly put more than one person at risk or the occurrence of multiple deaths was foreseeable)

(m) serious injury to one or more victims, in addition to the death(s)

Irresponsible behaviour at time of offence

(n) behaviour at the time of the offence, such as failing to stop, falsely claiming that one of the victims was responsible for the crash, or trying to throw the victim off the bonnet of the car by swerving in order to escape

(o) causing death in the course of dangerous driving in an attempt to avoid detection or apprehension

(p) offence committed while the offender was on bail."

21. There are six mitigating factors which I again set out:

"(a) a good driving record;

(b) the absence of previous convictions;

(c) a timely plea of guilty;

(d) genuine shock or remorse (which may be greater if the victim is either a close relation or a friend);

(e) the offender's age (but only in cases where lack of driving experience has contributed to the commission of the offence), and

(f) the fact that the offender has also been seriously injured as a result of the accident caused by the dangerous driving."

22. The Court went on in *Cooksley* to set out four starting points for sentence in death by dangerous driving cases emphasising that the sentencer had to avoid the trap of double accounting by taking aggravating circumstances to place the sentence in a higher category and then adding to it because of the very same aggravating features.

23. The four starting points are:

No aggravating Circumstances	12 - 18 months
Intermediate Culpability	2 – 3 years
Higher Culpability	4 – 5 years
Most Serious Culpability	6 years or over

24. Bearing in mind the higher maximum penalty of 10 rather than 8 years in England, these starting points are slightly on the high side for Bermuda. These starting points are, of course, for contested cases. The Court made clear that in setting its recommendation for starting points it had made allowances for the fact that those who commit offences of dangerous driving resulting in death are less likely, having served their sentence, to commit the same offence again. Apart from their involvement in the offence which resulted in death, they can be individuals who would not otherwise dream of committing a crime. They, unlike those who commit crimes of violence, also do not intend harm to their victims.

25. Mr. Froomkin drew the Court's attention to the following. The respondent is a first time offender. He obtained a degree in Automotive Technical Training at the Universal Technical Institute in Florida. He is single but engaged to be married. He is employed as a Gas Engine Mechanic in his father's business Auto Zone. He suffered severe injuries himself and is to undergo further surgery. He has had a kidney transplant and requires ongoing medical supervision. He is highly regarded in the community. We have read numerous references to this effect. He gave every assistance to the Police within the limit of his amnesia.

26. Mr. Froomkin argued that the sentence of six months was not manifestly inadequate but that if the Court did not accept his submission any increased sentence should be suspended. I cannot accept that this case is, or was in the lower court, one in which it would be appropriate to impose a suspended sentence. In the present case in my view the judge's starting point of 5 years was rather too high and 3 – 4 years would have been more appropriate. There was only one aggravating feature albeit a serious one in the grossly excessive speed at which the respondent was driving – almost three times the speed limit at night. The mitigating factors are his good character, the shock at having killed a close friend and his own injuries and medical condition. The fact of having his original sentence increased, sometimes referred to as 'double jeopardy' is also something that can be given some weight albeit greater weight when the person has been released having served the original sentence. It is essential that where short sentences are appealed by the Crown the appeal should be heard as soon as possible. This appeal could have been heard during the March session but the respondent's counsel declined the offer. The respondent cannot therefore claim the greater weight to which he would otherwise have been entitled.

27. I have no doubt that the sentence of six months was manifestly inadequate. It does not reflect society's abhorrence at the taking of a life by driving a vehicle at nearly three times the speed limit.

28. Taking all these matters into account, I would replace it with one of two years' imprisonment.

Baker, P

I agree

Bernard, JA

I agree

Kawaley, JA (Acting)