

**BARBADOS.**

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL**

**Criminal Appeal No. 6 of 2003**

**BETWEEN:**

**RANDOLPH ALLAMBY HOWARD**

**(Appellant)**

**AND**

**THE QUEEN**

**(Respondent)**

**Before: The Hon. Sir David Simmons, K.A., B.C.H., Chief Justice, the Hon. Colin Williams, Justice of Appeal, and the Hon. Peter Williams, Justice of Appeal**

**2003: October 29 and 30**

**2004: January 16**

**The Appellant in person**

**Ms. M. Renee for the Respondent**

**DECISION**

[1] SIMMONS CJ: This is an appeal against sentence. It invites discussion of the appropriate sentence for a conviction of causing death by dangerous driving.

[2] On 12 February 2003 the appellant was sentenced by Moore J to 6 years' imprisonment following his conviction on 18 January 2003 for causing the death of Gwendolyn Elmore by dangerous driving on St. Lawrence Main Road on 30 December 1998. At his trial, the appellant was represented by Mr. Latchman Kissoon, Attorney-at-Law, but at the hearing of the appeal, he represented himself.

[3] For the purpose of this appeal, the salient facts to be taken into account are these. The deceased, her husband John and daughter Christen were visitors to Barbados. It was about 6.00 p.m. in the evening of 30 December 1998. There were pedestrians along the St. Lawrence Main Road in the vicinity of Divi Southwinds Hotel. They had made inquiries about the address of the Plantation Restaurant and intended to cross the road from the area of Divi Southwinds to the Plantation Restaurant. The St. Lawrence Main Road, in that general area, is busy and built up with residential properties and tourist facilities on both sides of the road.

[4] The appellant, aged 47 at the time, was the driver of the route taxi, ZR 145. He was travelling east towards Oistins. Ahead of the appellant's vehicle was another route taxi which was travelling in the same direction as ZR 145, but it was slowing down to stop on its left side near the Plantation Restaurant. The prosecution's case was that the Elmore family was attempting to cross from the Divi Southwinds side of the road to the Plantation Restaurant side. The husband and daughter made it across the road, but the deceased did not.

[5] It was also the prosecution's case that the appellant was speeding, racing and attempting to overtake the other route taxi in a competition for passengers. In doing this manoeuvre at high speed, the appellant's route taxi went off its left and proper side and collided with the deceased. She suffered 23 dreadful injuries, of which any one of 6 could have been the cause of her death.

**Mitigation at the Trial**

[6] Counsel urged 5 factors upon the trial judge in mitigation of sentence. These were:

- (a) the appellant is a father of 3 children, two of whom were below the age of 12;
- (b) he was the sole breadwinner of the family, a musician and a regular churchgoer;
- (c) he was an industrious, itinerant coconut vendor in addition to being a "ZR" driver;

(d) he was a licensed driver for 32 years and although he had 17 traffic convictions recorded against him between 1988 and 2000, these were for relatively minor regulatory traffic infractions, such as picking up and setting down passengers at places other than at bus stops;

(e) he had stopped driving public service vehicles for almost 5 years between the date of the incident and the date of trial.

### Reasons for Sentence

[7] The learned trial judge was clear that the facts of the case merited an immediate custodial sentence. He was concerned that the 'horrendous injuries the woman suffered' were indicative of driving at a 'tremendous speed'. Having regard to the condition of the road and the area, the trial judge felt that the appellant's driving showed a total disregard for the presence of people on the road. For the trial judge, the 17 previous convictions suggested that the appellant was an indisciplined person who totally disregarded the rules enacted to ensure safety on the roads of Barbados. We think that the trial judge also, quite properly, took into account the trauma that would have been suffered by the husband and the young child who were witnesses to the deceased's violent death. The record also shows that the trial judge took into account the public interest and a judge's duty to maintain public confidence in the administration of justice.

[8] We are satisfied that, on the material before him, the trial judge's decision to impose a custodial sentence was entirely appropriate. The only real issue on the facts of this case, which has given us difficulty, was the length of the sentence. This difficulty arose because of the way in which the appellant has argued his appeal. We are satisfied that the time has come for this Court not only to review the sentence in this case but also to issue guidelines for the benefit of trial judges, the legal profession and the general public.

### The Submissions of the Appellant

[9] In this Court the appellant has been entirely frank, contrite and remorseful. He admitted that, upon reflection, he should have pleaded Guilty at the trial. He recognizes the grief which he caused to the family of the deceased and he acknowledged that, "I know that I have to pay in some way or other by going to jail." However, without being able to cite cases, the appellant submitted that it was not the practice of courts in this Island to impose custodial sentences for the offence of causing death by dangerous driving. Finally, he assured the Court (and this was verified by Counsel for the respondent) that the deceased's estate had been fully compensated in damages prior to the trial. None of these submissions was advanced before the trial judge.

### Sentencing for the Offence – Guidelines of the English Court of Appeal

[10] The offence of causing death by dangerous driving carries a maximum penalty of 10 years' imprisonment both in Barbados and in England. In England, Lord Lane CJ first enunciated sentencing guidelines for the offence of causing death by reckless driving in *R. v. Boswell* (1984) 6 Cr.App.R.(S.) 257 where he enumerated a series of factors which would aggravate or mitigate the offence: see pages 259-260.

At page 260 His Lordship said:

"The situation where there are no aggravating features present is that, so far as sentencing is concerned, a non-custodial penalty may well be appropriate, but where aggravating features, or an aggravating feature is present then a custodial sentence is generally necessary. At present, as already indicated, the statistics seem to show that the general maximum term is about 12 to 18 months as imposed by the Courts. It is not easy to see why this should be so. Drivers who for example indulge in racing on the highway and/or driving with reckless disregard for the safety of others after taking alcohol, should understand that in bad cases they will lose their liberty for two years or more. It will seldom be that a community service order, or a suspended or partly suspended sentence will be appropriate in a serious case. By the same token that type of driver should be removed from the road by a long period of disqualification."

[11] Although Lord Lane suggested that the range of a custodial sentence should be 2 years or more for the offence, when this matter was revisited by Lord Taylor CJ in 1994, it was recommended that the range should be increased to 5 years or more – see Attorney-General's References Nos. 14 and 24 of 1993 (*R. v. Shepherd*, *R. v. Wernet*) (1994) 15 Cr.App.R.(S.) 640. The change of tariff was in recognition of the change in the English legislation which increased the maximum penalty from 5 to 10 years. As Lord Taylor said at p.643, while reiterating the validity of the statements of principle in *Boswell*:

"These reforms show an intention by Parliament to strengthen the criminal law, to reduce deaths on the roads by increasing the punishment available to the courts...."

[12] In *R. v. Cooksley* [2003] 3 All ER 40, the Court of Appeal of England and Wales (per Lord Woolf CJ) took the opportunity to review and update the previous sentencing guidelines for the offence of causing death by dangerous driving. His Lordship endorsed the aggravating and mitigating factors identified by the Sentencing Advisory Panel. We reproduce those factors below:

#### Aggravating Factors

Highly culpable standard of driving at time of offence

- (a) the consumption of drugs (including legal medication known to cause drowsiness) or of alcohol;
- (b) greatly excessive speed; racing; competitive driving against another vehicle; "showing off";
- (c) disregard of warnings from fellow passengers;
- (d) a prolonged, persistent course of very bad driving;

(e) aggressive driving;

(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 driving skills;

(h) driving when knowingly deprived of adequate sleep or rest;

(i) driving a poorly maintained or dangerously loaded vehicle;

Driving habitually below acceptable standard

(j) committing other offences at the same time, such as driving without a licence; driving while disqualified or without insurance; driving while a learner without supervision; driving a stolen vehicle;

(k) having previous convictions for motoring offences – particularly offences involving bad driving or driving under the influence of alcohol;

Outcome of offence

(l) causing the deaths of more than one person;

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

Irresponsible behaviour at time of offence

(n) displaying irresponsible behaviour at the time of the offence e.g. failing to stop or falsely claiming that the victim was the cause of the collision;

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

(p) committing the offence while on bail.

Mitigating Factors

These include:

(i) a good driving record;

(ii) the absence of previous convictions;

(iii) a timely plea of guilty;

(iv) genuine shock or remorse;

(v) the age of the offender where lack of driving experience contributed to the commission of the offence;

(vi) the fact that the offender has also been seriously injured as a result of the collision.

Sentencing Practice and the Statutory Framework

[13] On the question of the length of sentence, this Court has examined 14 cases submitted by Ms. Renee indicating the sentences imposed in cases in Barbados where the original charge was causing death by dangerous driving. However, it is noteworthy that there have been very few convictions for this offence. In reviewing the cases submitted by Ms. Renee, the statistical data show that, between 1999 and 2002, there were 14 indictments of causing death by dangerous driving in the High Court. There were 14 pleas of Not Guilty and 2 convictions for the offence. On the other hand, for the lesser count of dangerous driving, there were 9 pleas of Guilty for that offence and 3 accused were found guilty after a trial. The usual penalty was a fine, which was imposed in 13 of the 14 cases. Disqualification was ordered in only 5 of the cases and only in one case, was the offender imprisoned. He was a public service vehicle driver with 99 previous convictions for traffic offences.

[14] In order to appreciate the implications of the foregoing statistics it is necessary to reproduce here the relevant statutory provisions. Section 81 of the Road Traffic Act, Cap. 29:5 deals with the offence of causing death by reckless or dangerous driving. It provides:

“81.(1) Any person who causes the death of another person by the driving of a motor vehicle on a road recklessly or at a speed or in a manner dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic that is actually on the road at the time or might reasonably be expected to be on the road at the time, is guilty of an offence and is liable on conviction on indictment to imprisonment for a term of 10 years.

(2) Where, upon the trial of a person for an offence under this section, the jury is not satisfied that his driving was the cause of the death but is satisfied that he is guilty of driving as described in section 82(1), it may find him guilty of an offence under that section whether or not section 86 has been complied with in respect of that offence.”

Section 82 provides for the offence of reckless or dangerous driving. It is to this effect:

“82.(1) Any person who drives on a road recklessly, or at a speed, or in a manner dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic that is actually on the road at the time or might reasonably be expected to be on the road at the time, is guilty of an offence and is liable on summary conviction

(a) In the case of a first conviction, to a fine of \$1 000 or to imprisonment for a term of 12 months or both; or

(b) In the case of a second subsequent conviction, to a fine of \$2 500 or to imprisonment for a term not exceeding 2 years, or both.”

[15] Under subsections (2) and (3) the court shall order particulars of any conviction under section 82 to be endorsed on the driving licence of the person convicted, who must be disqualified from holding or obtaining a driving licence unless there is some special reason for not doing so.

[16] Although there is no provision for endorsement or disqualification under section 81, the court is given a general discretion under section 94 to suspend, cancel or endorse a driving licence on conviction, as follows:

“94. (1) Any court before which a person is convicted of any offence in connection with the driving of a motor vehicle may,

(a) if the person convicted holds a driving licence,

(i) suspend the licence for such time as the court thinks fit,

(ii) cancel the licence and disqualify the person convicted from obtaining another licence for a stated period, or

(iii) endorse upon the licence particulars of any order the court makes under this section, together with the particulars of the conviction; or

(b) if the person convicted does not hold a driving licence, declare him disqualified from obtaining a licence for such period as the court thinks fit.

(2) Any disqualification imposed pursuant to subsection (1) may, at the discretion of the court, be limited to the driving of a motor vehicle of the same class or description as the vehicle in relation to which the offence was committed.”

[17] We think it is clear that the reason why so many convictions for the lesser offence of dangerous driving were recorded is that it attracts lighter penalties. Sentencing practice seems to suggest that a fine has been the usual penalty for this offence.

[18] Those statutory offences do not require either an intention to drive dangerously or an intention to injure. They require conduct on the part of an offender that falls below a standard of driving expected of a competent and careful driver. Where death is the result of dangerous driving, the intention of Parliament is clear that the heavier sentence of imprisonment should attend such driving which falls below reasonable standards.

[19] The remainder of Lord Woolf in *Cooksley* at paragraph [11] (iv) should always be borne in mind by sentencers. The learned Lord Chief Justice said:

“(iv) A factor that courts should bear in mind in determining the sentence which is appropriate is the fact that it is important for the courts to drive home the message as to the dangers that can result from dangerous driving on the road. It has to be appreciated by drivers the gravity of the consequences which can flow from their not maintaining proper standards of driving. Motor vehicles can be lethal if they are not driven properly and this being so, drivers must know that if as a result of their driving dangerously a person is killed, no matter what the mitigating circumstances, normally only a custodial sentence will be imposed. This is because of the need to deter other drivers from driving in a dangerous manner and because of the gravity of the offence.”

#### Guidelines

[20] The guidelines which we issue today are designed to set the range of custodial sentence for the offence of causing death by reckless or dangerous driving. We have drawn heavily upon the judgment of Lord Woolf in *Cooksley*. These guidelines seek to reflect an evident public concern with indisciplined driving on our roads and they take into account the vast increase in vehicular traffic on our roads in recent times. The Crime and Justice Bulletin No. 1, published by the National Task Force on Crime Prevention in 2000, shows at paragraph 19, page 7, that whereas in 1984 there were 42, 157 registered vehicles in Barbados, in 1994 there were 54, 215 and by 1999 that figure had jumped to 72, 805. At the same time this Court is acutely conscious that death in motor vehicle collisions carries a large sense of deprivation and devastation among surviving relatives and no amount of compensation and no term of imprisonment can ever adequately assuage the trauma associated with such death.

[21] Nevertheless, in so far as Parliament has legislated a maximum period of imprisonment of 10 years for this offence, and to the extent that the Penal System Reform Act Cap. 139 incorporates the concepts of offence-seriousness and proportionality in its provisions, it is clear that the intention of the legislature is to make a custodial sentence an appropriate punishment on conviction for this offence. We accept the guidance of Lord Taylor in Attorney-General's References Nos. 14 and 24 of 1993 *supra* that “in bad cases” drivers will lose their liberty for “upwards of 5 years”. However, the sentence will increase or decrease by reason of the aggravating and mitigating factors alluded to by Lord Woolf in *Cooksley*. Those factors, although not exhaustive, can apply with equal force in Barbados. Each case will necessarily turn upon its own special facts but a sentencer is required in every case to ask two basic questions:

(i) is this offence so serious, having regard to the facts and circumstances, that only a custodial sentence is merited?

(ii) assuming an answer in the affirmative, the next question is ‘what is the length of sentence that will be proportionate to those facts and circumstances?’

In making a determination of proportionality, the sentencer must apply and weigh the aggravating and the mitigating factors.

[22] If we are to give a proper interpretation of Parliament's intention, it is obvious that, as a general rule, a conviction for causing death by dangerous driving will carry a sentence of immediate custody. But a sentence of imprisonment should be no longer than is necessary. Having carefully considered the authorities referred to in *Cooksley*, bearing in mind the amount of traffic on the roads at the present time and contemporary attitudes to driving including "road rage", we recommend the following guidelines. The starting points mentioned below indicate the points at which the sentencer should start in seeking to determine an appropriate sentence.

1. Notwithstanding our interpretation of Parliament's intention, there will be cases where actual imprisonment will not necessarily be an appropriate punishment. The circumstances of such cases would, however, have to be exceptional. In these exceptional cases where the facts are not of a kind to attract imprisonment, for example, where there are no aggravating factors but strong mitigating circumstances, a suspended sentence of imprisonment or a substantial fine together with a period of disqualification may be enough to satisfy the justice of the case – see, for example, Attorney General's Reference No. 8 of 1994 (*R. v. Asquith*) (1995) 16 Cr.App.R.(S.) 327 and *R. v. Jenkins* [2001] 2 Cr.App.R.(S.) 265.

We refrain from attempting to list exceptional circumstances (beyond that mentioned below) because the variety of fact situations is so infinite as to make listing a hazardous exercise. We only say that we can envisage a situation in which imprisonment would only serve to exacerbate the tragedy and in which some other form of punishment would be appropriate. Such a situation could be the death of a spouse, family member or friend resulting from the momentary inattention of a driver, who himself may be seriously injured and maybe left in the position of the surviving parent required to take care of young children.

2. Where there are no aggravating factors and no strong mitigating factors, the length of sentence should normally be in the range of 12 to 18 months.

3. Where there is a momentary dangerous error of judgment or a short period of bad driving aggravated by other offences committed at the same time or previous convictions for bad driving, the starting point should be 2 years.

4. Where an offender's driving is aggravated by one or two of the factors listed at paragraph [12], we recommend that the starting point should be 4 years upon conviction following a contested trial.

5. In cases of highest culpability, those involving the presence of 3 or more of the aggravating factors listed at paragraph [12] (a) to (i), the starting point should be five (5) years.

6. Where there is a conviction under section 81(1) there should also be automatic disqualification from driving for such period of time as is reasonable.

[23] We also adopt the guidelines on disqualification set out in *Cooksley* at paragraph [42] as follows:

"A driving ban is designed to protect road users in the future from an offender who, through his conduct on this occasion, and perhaps other occasions, has shown himself to be a real risk on the roads. In general... the risk represented by the offender is reflected in the level of culpability which attaches to his driving, so that matters relevant to fixing the length of the driving disqualification for the offence of causing death by dangerous driving will be much the same as those appearing in the list of aggravating factors for the offence itself. Shorter bans of two years or so will be appropriate where the offender had a good driving record before the offence and where the offence resulted from momentary error of judgment. Longer bans, between 3 and 5 years, will be appropriate where, having regard to the circumstances of the offence and the offender's record, it is clear that the offender tends to disregard the rules of the road, or to drive carelessly or inappropriately. Bans between 5 and 10 years may be used where the offence itself, and the offender's record, show that here represents a real and continuing danger to other road users. Disqualification for life is a highly exceptional course, but may be appropriate in a case where the danger represented by the offender is an extreme and indefinite one."

[24] We can best conclude this section on the guidelines by quoting the recent statement on the function of guideline judgments by Lord Woolf in *R v. Millberg* [2003] 2 All ER 939 at paragraph [34] as follows:

"The Role of Guidelines

[34] ... [W]e would emphasise that guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanistic approach to the guidelines. It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double accounting must be avoided and can be a result of guidelines if they are applied indiscriminately. Guideline judgments are intended to assist the judge to arrive at the current sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge."

Conclusion

[25] In this case, there was clear evidence of speeding and racing and these facts aggravated the offence. Moreover, the appellant was driving a public service vehicle with passengers. Even though this is not a factor mentioned in the English authorities, we nevertheless accord it significance, mindful of the narrow and overcrowded state of our roads and the public concern that drivers of these vehicles are indisciplined. It is highly dangerous to drive such vehicles at excessive speeds on our roads; worse yet to race them. Dangerous driving is a serious social evil and the public is entitled to require the courts to reflect the loss of life by a commensurate penalty. On the other hand, the offence in this case is mitigated by the appellant's otherwise generally good character and his remorse which we accept as genuine. We also bear in mind that he acknowledges that he must serve a term of imprisonment. Another important consideration in this case is that almost 5 years elapsed between the

date of the collision and the trial. For all those years the appellant must have been brooding over the consequences of his driving and the prospect of imprisonment indelibly stamped on his conscience. It was a heavy burden to carry. This is not a factor mentioned in *Cooksley* but we are of opinion that, in the particular circumstances of this case, justice demands that we take it into account in determining an appropriate sentence.

Disposal

[26] So, whereas we agree with the trial judge that immediate custody was a deserving penalty in this case, we think that in all the circumstances, balancing the aggravating and mitigating factors and the long delay in bringing this matter to trial, the sentence of 6 years was excessive. However, we would wish to emphasise that we make no criticism at all of the sentence imposed by the trial judge, but we do feel able, in the light of the material laid before us and the argument advanced on appeal, to acknowledge to some extent the considerations now laid before us. Having regard to those considerations, we think it right to allow this appeal. Leave to appeal is granted. The appeal is allowed. The sentence is varied and reduced to 4 years and will take effect from 18 January 2003. The appellant is also disqualified from obtaining a licence to drive public service vehicles for a period of 6 years from the said date. The particulars of his conviction and the fact of disqualification are to be endorsed on the appellant's driving licence.

Chief Justice

Justice of Appeal Justice of Appeal