Ind 0045/2008

CAYMAN ISLANDS
CRIMINAL FORM 18
RULE 50(1) & 51(1)

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 8 of 2009
(Indictment No. 45/2008)
C#0694/08

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

HENRY YORK CARTER

Appellant

NOTIFICATION TO AUTHORITIES OF RESULT OF APPEAL

To: The Attorney General

This is to give you notice that **HENRY YORK CARTER** having sought leave to appeal against *his* Conviction & SENTENCE passed upon *him* by the Grand Court on the 27th day of February, 2009 as set out below:

Ind 45/08 **Causing Death by Dangerous Driving – Count 1**
3 years imprisonment
Disqualified from Driving for Life

The Court of Appeal has finally determined the said appeals, and has this **8th day of March 2010** given judgment therein to the effect following:

1. **Appeal against conviction dismissed. Conviction affirmed.**
2. **Appeal against sentence allowed, in respect of the disqualification. Disqualification for life set aside and a period of disqualification from holding a drivers licence for 15 years substituted, effective from 27th February 2009.**
3. **The sentence of 3 years imprisonment was affirmed.**
4. **Written reasons to be released.**

Dated this 26th day of March, 2010

Registrar

CAYMAN ISLANDS COURT OF APPEAL

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Between:

HER MAJESTY THE QUEEN

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- and -

HENRY YORK CARTER

Appellant

Before: **The Rt. Hon. Sir John Chadwick, President**
The Hon. Mr. Justice I. Forte, J.A.
The Hon. Dr. A. Conteh

Appearances: Mr. Clyde Allen for the Appellant
John Masters, Crown Counsel, for the Respondent

Date heard and Judgment given: 8th March, 2010
Reasons for Judgment delivered: 18th March, 2010

CAYMAN ISLANDS COURT OF APPEAL

Reasons for Judgment

Forte, J.A.

1. The appellant was convicted on the 16th January 2009 after a four day trial for the offence of causing death by reckless driving on the 24th June 2007. On the 27th February 2009, he was sentenced to a period of three years imprisonment and disqualified for life from holding a driver's licence.

   He now appeals his conviction and sentence.

2. At trial the prosecution led evidence that the appellant while driving his motor vehicle a Chevy Astro Van (the van) along the Bodden Town main road, hit down Glen Seymour, causing Seymour to receive injuries which resulted in his death. The prosecution relied on the evidence of two witnesses who were walking on the road at the time of the accident, an auto mechanic who

examined the van subsequent to the accident, and an accident reconstructionist attached to RCIP who was accepted as an expert witness by the Court.

3. The two witnesses, Carol Johnson and Daniel Minzett were walking along the Bodden Town main road on the evening of the incident. As they proceeded, both saw Mr. Seymour (the deceased) walking towards them going in the opposite direction. He eventually passed them in the area of the Leroy Frederick Beach entrance. He was walking on the opposite side of the road, and at that time he was walking on the pathway along the road-side, described by Ms. Johnson as "the banking" and Mr. Minzett as the marl area beside the road. It was also referred to during the trial, as the "road shoulder". It was however accepted by all, that this was an area beside the asphalted road-way, on which pedestrians would walk.

4. Soon after Mr. Seymour had passed the two witnesses, both saw the van, coming towards them going in the same direction as Mr. Seymour. Again after a short time had elapsed they both heard a loud sound, Ms. Johnson a "banging" and Mr. Minzett a "thumping" from behind them, and in the direction that Mr. Seymour and subsequently the van had gone. Both immediately turned around. At trial each gave a description of what they saw when they did so.

5. Ms. Johnson said that after she turned around she saw the van hit Mr. Seymour, whom she knew by the name Sleepy. Asked where was the van at the time she said, "Right where it hit the individual on that side of the road". When she turned around she saw Sleepy fall from the front side of the van to

the "banking". At this time the front of the van was close to the "bank". After the van hit Sleepy, "it leave driving slowly and just swerve back and go up to the road." On being cross-examined, Ms. Johnson insisted that she saw the van on the "the road shoulder". While this witness did not see when the vehicle made contact with the deceased, her evidence spoke to the fact that when she saw the deceased falling from the side of the vehicle, it (the vehicle) was on the "banking" and thereafter swerved back onto the roadway, and continued on, though slowly.

6. Mr. Minzett was not more helpful. When he turned around after hearing "the thumping", he saw Sleepy "down on the side of the road". He testified that the vehicle was at that time just off the side of the road. It was off the "black top" a description put to him by defence counsel to distinguish the asphalted road from the pedestrian walking area.

7. We note that, though neither of these witnesses saw the actual impact, both testified to seeing the van off the asphalted road-way, at the time Ms. Johnson saw the body of Sleepy falling from the van, and Mr. Minzett saw Sleepy's body already on the ground.

8. The Crown nonetheless relied strongly on the expert witness, Mr. Walters, to reconstruct the accident in order to bolster its case. Mr. Walters gave interesting evidence weakened to some extent by the fact that he had not attended the scene at the time of the accident, and consequently did his reconstruction, from (i) photographs taken of the scene, (ii) the damage to the van, and (iii) some injuries suffered by the deceased. His reconstruction also depended on what he described as "the uncontrolled point of rest of the

victim." From the photographs he was able to ascertain the "point of rest of the victim". This brought him to the conclusion that the deceased came to rest on the "left-hand side of the road, facing Savannah direction". By left-hand side of the road, he explained he meant the "the left-hand road shoulder". He described the damage to the van thus:

> "There was damage to the left corner of the left front fender. There is a contact damage there. And further up on the hood getting close to the windscreen there is induced damage."

He distinguished contact damage from induced damage as follows:

> "Contact damage is where force was applied to an object causing smashing while induced damage is an area where nothing actual touched but you can see bowing of the area warping or bowing where an object is warped out of shape caused due to contact damage travelling to other areas."

9. He opined that if a vehicle the size of the van strikes a pedestrian, the pedestrian is going to move forward along the line of travel that the vehicle was travelling. The pedestrian will travel along the straight line that the external force is applied and will go until he loses his momentum. When there is no momentum, gravity will take him to the ground, and he will fall along the straight on the path that he was picked up from.

10. On observation of the photographs, he concluded that the deceased would have been struck along the path that he was lying. From his observations he also concluded:

> "When this person was struck, the bumper on the left corner struck him on his tibia which caused his feet to move forward from under the body. At this point, the upper body, meaning the portion above the centre of mass of the body—a person's centre of mass is at the navel.---- --- ---. This area is going to fall backwards towards the vehicle. And because the speed of the vehicle is greater than the person walking, it's catching up with the person. Therefore after the tibia you are going to have the hip making contact with the fender area which caused the damage we see there on the left corner of the fender. At this point now we have the head coming back towards the windscreen then we'll have the head smashing into the windscreen."

11. He concluded that "because the corner of the vehicle was the area that made contact with the victim he did not remain on the hood of the vehicle for any period of time. He fell off shortly after he was struck -- --- --- -- because the corner of the vehicle there is no more area there for him to stay, so after the impact he made contact with the windshield and then he is going to fall off. He also concluded that "for the vehicle to be travelling along the road in that direction and the body to be where it was found, in order for the body to be there, the vehicle would have to be travelling the road shoulder also to strike

the body. It was his opinion that the deceased was struck on the "road shoulder".

12. In his defence, the appellant gave evidence. He said "as I came over the hill, I saw people in front. There were two people on the right-hand side and one person on my side of the road. The people on the right-hand side were far away. The man walking on my side had a black hat on. He was right on the line, right on the edge of the road. I kept driving normally because I would not hit him. After I crossed the entrance of Leroy Frederick Beach, the man just came out in the road about 50 to 60 feet up from the beach. I do not know if he slipped or fell or whatever. When the van hit him, he leaned back and his head hit the windscreen. In a split second, he was off the side of the van. It caught me by surprise". He was driving down the roadway, not on the shoulder or side of the road. He continued "I just kind of flipped. I started crying. I was scared. After two seconds, I drove off and drive down the road. I passed the gas station and pulled off by the public beach and called my boss. That was Mr. Mark Veilleux. I called Mark and tried to explain the incident to him. I could not bring myself to go back. He said he would call the police. I said all right and hung up. I left from there and parked the van." He was asked "why did you not go back. He said "I was scared. I thought no-one would believe that he stepped in front of me. I thought if he dies, I am going to go to jail. I figured he was still alive when I left."

He testified that he had two beers to drink that night.

In cross-examination he said he had lost the vision in his left eye. He has blind spots there. He stated also that if he drove through those big pot holes

on the side of the road, he would have lost control. Asked why he did not go back to the scene after driving away, he said he thought he could not bring himself to face the sight of the injuries.

13. The defence therefore joined issue with the prosecution as to where exactly the van came into contact with the deceased. Did the deceased step out suddenly into the path of the van, or did the appellant drive the van onto the "road shoulder" thereby coming into contact with the deceased.

14. In his direction to the jury, the Learned Trial Judge expressed his opinion on the evidence of Ms. Johnson and Mr. Minzett. This is what he said:

> "Ladies and gentlemen, you must be careful on drawing conclusions from the evidence of those two witnesses. According to what they said, they would have no reason to pay any attention at all to the defendant's vehicle while after they heard the loud bang they have described. The vehicle did not attract their attention prior to that. Despite what – Ms. Johnson said, or at least implied on her evidence it would seem that she turned around to see what was happening only after the collision. It seems to me therefore that neither Ms. Johnson nor Mr. Minzett could have seen where the van was at the time when it hit Glen Seymour. Carol Johnson's evidence is that she saw the van on the side of the road when she turned, but that is, as I have said, after the collision. In my view there is no reliable

evidence from either of these two witnesses about where the van was at the moment of impact, which is the important question before you.

The heart of the Crown's case is on the evidence of Mr. Walters, the accident reconstruction expert."

15. The Learned Trial Judge therefore expressed strong views on the value of the evidence of these two witnesses. This however must be read in the context that he was expressing his own opinion on the facts which was really the responsibility of the jury whom he had told previously:

"The facts of this case are your responsibility. You will wish to take account of the arguments and the speeches you have heard, but you are not bound to accept them. Equally, if in the course of my review of the evidence I appear to express any views concerning the facts, or emphasize a particular aspect of the evidence, do not adopt my views unless you agree with them, and if I do not mention something you think is important, you should have regard to it and give it such weight as you think fit. When it comes to the facts of this case, it is your judgment alone that counts."

In spite of his expressions of opinion on the evidence of Johnson and Minzett, the Learned Trial Judge still left that evidence for their consideration.

16. The appellant's ground of complaint broadly was that the verdict of the jury is unsafe.

Mr. Clyde Allen, the appellant's counsel in his oral arguments before us, traversed the notes of evidence in an effort to demonstrate the weakness of the evidence of Ms. Johnson and Mr. Minzett, and the lack of credibility of Mr. Walters whose opinion he asserts has no basis given the other evidence in the case. We do not agree. As we have earlier pointed out there was some evidence from Ms. Johnson and Mr. Minzett (despite the opinion of the Learned Trial Judge), from which the jury could have come to the conclusion that the appellant had driven onto the "road shoulder" when the van came in contact with Mr. Seymour. If the jury accepted Mr. Walters' evidence then they could have also come to the conclusion that when Ms. Johnson saw the deceased falling off the van, the collision would have just occurred. In this regard, it should be noted that Mr. Walters' reconstruction was consistent with the appellant's account which for emphasis is here repeated:

> "When the van hit him, he leaned back and his head hit the windscreen. In a split second he was off the side of the van."

This would demonstrate the weakness in Mr. Allen's submission before us that the collision was a "glancing blow", a suggestion with which Mr. Walters totally disagreed when testifying in cross-examination at trial.

17. Mr. Allen also complained that the evidence of Mr. Walters was based on assessment from photographs and consequently amounted to mere speculation. Like the Learned Trial Judge, we disagree. This was evidence of an expert, worthy of consideration by the jury. In fact the Learned Trial Judge, was careful in his direction to indicate to the jury how this evidence should be approached. This is how he addressed them:

> "When weighing the opinion evidence of Mr. Walters, keep in mind that he was working, as I have said, only from photographs. He was not present on January 4th, 2007. He has not examined the actual damage on the vehicle. Consider whether these limitations may have affected his opinion, may have weakened it. You are entitled to accept his opinion, but you are not obliged to do so."

18. In our view, there was ample evidence upon which the jury could have come to its decision, which is safe and reasonable. Consequently we conclude that there is no merit in the complaints raised on this appeal against conviction. For these reasons, we

dismissed the appeal against conviction, at the end of the hearing on the 8th March 2009.

We turn now to the question of Sentence.

19. SENTENCE:

The appellant was sentenced to 3 years imprisonment and disqualified from holding a drivers licence for life. Section 67(3) of the Traffic Law provides that on conviction for causing death by reckless driving, a period of disqualification must be imposed for a period of five years, or more if the Court thinks fit. A fixed period of disqualification in our view must be imposed as a disqualification for life is not in the contemplation of the Law.

20. The criminal record of the appellant's traffic offences is so bad, that it motivated the Learned Trial Judge to make the following comments before passing sentence:

> "Second Mr. Carter has amassed in his 29 years what I can only describe as the worst driving history I have seen. Because of its importance to my decision, I will set out the driving history in full.
>
> In June 1999 Mr. Carter was convicted of driving without insurance, driving with an expired registration, leaving

the scene of an accident and reckless driving. Fines were imposed on that occasion.

In April 2000, he was convicted of driving without insurance for the second time and of driving whilst disqualified. Fines were imposed.

In July 2001, Mr. Carter was convicted of careless driving, driving while disqualified for the second time, leaving the scene of an accident for the second time, moving a vehicle involved in an accident and driving without insurance for the third time. On this occasion he was sentenced to a combination of fines and community service.

On the same day in July 2001, he was convicted of a separate set of offences. These were driving while disqualified—now for the third time – driving without insurance – that would be for the fourth time –dangerous driving, failing to comply with an order of a police officer and failing to comply with a traffic signal.

On this occasion, he was sentenced to a combination of fines and suspended term of imprisonment.

In May 2003, Mr. Carter was convicted of driving while disqualified – which would be for the fourth time –

driving without insurance – which I make to be the fifth time – taking an automobile without the owner's consent, careless driving – that would be the third offence of that nature – and leaving the scene of an accident – the third such conviction. On this occasion, he was sentenced to imprisonment for some seven months and fines were imposed as well.

In March 2007, he was convicted of driving without insurance, driving with an expired licence and driving a vehicle that had no certificate of roadworthiness.

Mr. Carter's driving history manifests a compete disregard for the traffic laws of the country and for the safety of other people using the roadway. It is no exaggeration to say that he is a menace on the roads. It seems to me that the only appropriate way I can protect the public when faced with a history of this sort is to impose a driving prohibition for life, which I now do."

21. We did not have the traffic offences record of the appellant before us but both parties agreed to the accuracy of the previous convictions stated fully in the comments of the Learned Trial Judge. Consequently, we have come to the following conclusion based on the convictions referred to in the Learned Trial Judge's comments.

22. The sentiments expressed by the Learned Trial Judge, in the circumstances are understandable, even more so the period of disqualification he imposed. However we have come to the view that a fixed period of disqualification is required by the Law.

That being so, we allowed the appeal against sentence in so far as the period of disqualification is concerned and consequently set aside the life disqualification and substituted therefore, a period of disqualification from holding a drivers licence for 15 years, to be effective as of the date of conviction. The sentence of 3 years imprisonment was affirmed.

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Chadwick P

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Forte JA

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Conteh JA