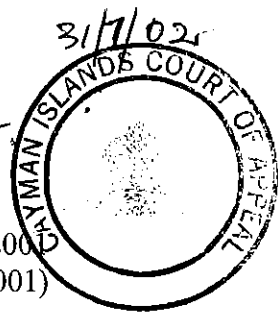


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IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
Criminal Appeal No. 47 of 2001
(Indictment No. 8 of 2001)

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

JOSH TERRY

Appellant



BEFORE: The Rt. Honourable Mr. Justice Edward Zacca, President,
The Honourable Mr. Justice Gerald Collett, J.A.
The Honourable Mr. Justice Ira Rowe, J.A.

Ramon Alberga Q.C. instructed by David McGrath of Quin & Hampson for the Appellant.
Marlene Smith-Andalcio for the Respondent Crown.

Heard: March 28th 2002.

Reasons released: July 31st 2002.

REASONS FOR JUDGMENT

Zacca, P.

The appellant was charged on an indictment containing two counts, which charged him with the offences of causing death by dangerous driving and causing death by driving whilst intoxicated. He pleaded guilty to the offence of causing death by dangerous driving and not guilty to causing death by driving whilst intoxicated. This plea was accepted by the Crown. He was sentenced to 2 years imprisonment and disqualified from driving a motor vehicle for 5 years.

The offence for which he pleaded guilty arose out of a collision on October 6th 2002 between the car he was driving and a Toyota Corolla, driven by the deceased Allan Cain. One Janice Tomlinson was seriously injured in the accident.

The appellant at the time of the collision was 18 years old.

The Crown's case is that the appellant was driving at an excessive speed on the incorrect side of the road around a bend. The police from their observations and measurement calculated the speed of the vehicle at 62 mph.

The appellant admitted having alcoholic drinks that night, but stated that he did not consider that his ability to drive was impaired. He was found to have 107 milligrams of alcohol in 100 milliliters of blood, which is slightly over the legal limit of 100 milligrams. It was suggested that this would be about one drink.

In sentencing the appellant, Graham J. made reference to guidelines on sentencing powers in May 1998 by Chief Justice Harre. He said:

"I have to bear in mind the guidelines the former Chief Justice laid down. "Five years" he said "for someone who has been drinking. Three and a half years for someone who kills somebody on the road by reason of their reckless driving."

These sentences would be after a trial and it must be assumed that the five year sentence was for an offence of causing death by driving a vehicle whilst intoxicated. The offence for which the appellant was sentenced was for causing death by dangerous driving. This is not to say that the alcohol contents should not be looked at in passing sentence. Graham J. also stated:

“You had been drinking. Parliament had decided that you shall not have in your blood anything over the 100 milligrams for 100 milliliters and you did. ... the amount of drink you had together with what, I am quite satisfied, was showing off in the way you were driving to the people in your very powerful truck, meant that you were showing a reckless disregard for the lives and limbs of others. You were enjoying yourself ... it's a combination of speed, a degree of drink and a general recklessness.”

The learned trial judge took into account the guilty plea, the good character of the appellant, the fact that he had no previous convictions, and there was remorse expressed on the part of the appellant. He also recognized the fact that the deceased's widow had forgiven the appellant.

It appears that soon after the incident, the appellant had gone to see the widow and apologised to her, expressing his regret. In fact the widow wrote a letter on January 3rd 2001 to the Attorney-General in the following terms:

“Dear Sir,

Re: Josh Terry

Our family has always been deeply rooted in Christian values and from the earliest moment of this unfortunate tragedy the Terry’s have reached out and embraced us with kind words and prayers. Josh has himself personally expressed his great remorse at this tragedy at a very moving meeting that we had with him.

From all we can see Josh Terry seems to be a fine young man. We have thought about this carefully and we do not believe that a prosecution of Josh will achieve anything other than further heart break amongst the two families and the ruin of this young man’s life.

The insurance company involved had resolved our claim with great promptness and dispatch in a way that has not added to our heart break and grieving. We ask that you can find it in your power not to prosecute this young man and any such action by you will have support of our family.

If you have any queries in relation to this matter, please do not hesitate to contact our local attorney, Mr. Peter Polack.”

This was a remarkable and generous request from a person who had lost her husband in such a tragic event. Her forgiveness must have come as a result of her Christian values.

The Grand Court had before it numerous character references. They came from the Church, attorneys, teachers, politicians, fire service, acting chief Education Officer, Community College, Port Authority of the Cayman Islands, the Scout association and a pre-sentence report.

The appellant was regarded by all as an exceptional student, community member and a person of integrity, one who had a bright future ahead of him and was highly regarded.

Mr. Alberga for the appellant submitted that having regard to all the circumstances of this case, the sentence imposed was manifestly excessive.

At the outset we wish to state that a custodial sentence is the appropriate one for the offence for which the appellant pleaded guilty. There would have to be exceptional circumstances for a non-custodial sentence to be imposed.

The Court was referred to a number of cases where sentencing was considered with respect to causing death by dangerous driving and causing death by driving a vehicle whilst intoxicated. A number of these cases occurred prior to the guidelines laid down by the Chief Justice.

R v. Mohammed [2000] CILR 400 was a case of causing death by driving whilst intoxicated. It was also a case, which was disposed of in the year 2000, sometime after the guidelines were laid down.

In that case the accused drove around a bend and into the back of a stationary vehicle. The victim, who had been adjusting a tow-line, was thrown against a fence post at the road side and died of his injuries. The accused was found to have a blood alcohol

reading of 130 mg, the legal limit being 100mg. He pleaded guilty, had no previous convictions and was of good character. He was sentenced to 15 months imprisonment and a disqualification for three years. It was conceded that speed was not a factor in the accident.

Sanderson J. reviewed a number of cases in coming to his decision on sentence.

At page 406 the learned judge stated:

“I will deal first with the question of what are the aggravating factors in this case. I conclude that the presence of alcohol alone is not sufficient to constitute an aggravating factor. The offence itself requires the presence of alcohol and, therefore, its presence alone cannot constitute an aggravating factor. However, as the blood alcohol reading increases over the statutory maximum of 100 mg., it can and will become an aggravating factor.

In this case, the reading was 130 mg. I consider that to be sufficiently over the legal limit that the Court is entitled to consider it an aggravating factor, but only a minimal one. It may be one or two drinks over the limit depending on the particular individual.”

At page 407:

“The case which is most helpful since the comments of the Chief Justice in May of 1998 is *R v. McLaughlin*, a decision of Graham J. Briefly again, the alcohol reading was 118 mg., the speed was 70 mph, he had an improper tyre and he was driving on a wet road. The sentence was 2½ years.

In this case, I considered the following factors in mitigation: The accused has pleaded guilty, speed was not a factor, he has no prior record of any previous trouble with

the authorities, he is remorseful, he is of good character, hard working and honest. In all the circumstance, I impose a sentence of 15 months' imprisonment. In addition, I order his disqualification from driving for a period of three years from the date of release."

It is to be observed that the sentence recommended in the guidelines for the offence of causing death by driving a vehicle whilst intoxicated was 5 years. This was of course after a trial. This was therefore the starting point in the case before Sanderson J. The mitigating factors reduced this to 15 months imprisonment.

In the instant case the starting point for the offence of causing death by dangerous driving could be 3 ½ years following the guidelines on sentencing.

In *R v. McLaughlin*, Grand Court, May 26th 2000, the accused had a reading of 118 mg. of alcohol. He was driving at 70 mph in a 30 mph zone. He was driving with a spare tyre, a small temporary tyre instead of a full, normal size tyre, and that may have contributed to the accident. The accused had two previous convictions for drugs. The accused was sentenced to 2 ½ years imprisonment by Graham J.

R v. Sean Huford Bennett, Grand Court 42 of 2000 a case of causing death by dangerous driving which was heard by Smellie C. J. on October 2nd and 3rd 2000. The accused pleaded guilty. He had been drinking alcohol had a reading of 114 mg. of blood alcohol. The accused was alleged to have made a dangerous manoeuvre by attempting to execute a turn, which he did not complete, but stopped suddenly. He did not check his rear view mirror nor did he signal his intention to turn. A collision occurred with another

vehicle and a passenger in the back seat of that other car suffered injuries from which she died.

The father of the deceased wrote a letter to the Court indicating that he and his family would not like to see the accused incarcerated.

The Chief Justice indicated that an appropriate sentence is invariably a period of incarceration. However having regard to the circumstances of the offence and the circumstances of the defendant himself he held that, exceptionally, the appropriate sentence should be a community service order.

It appears that the alcohol reading was not relied on as an aggravating factor.

On a charge of causing death by dangerous driving, the mere fact that the appellant had been drinking is not of itself relevant. In order to render evidence of the drink taken by him to be relevant, such evidence must show that the amount of drink taken was such as would adversely affect the driver or that the appellant was in fact adversely affected.

Evidence of excessive speed is not of itself evidence that the appellant was adversely affected by drink. The reading of the blood alcohol was so minimally over the prescribed limit, that it ought not to have been a relevant factor in considering the aggravating factors to be taken into account in the sentencing process. We are of the

view that the trial judge placed too much significance on the drink consumed by the appellant.

Whilst it is for the Attorney-General's department to decide who should be prosecuted, the forgiveness and requests of the widow is a matter which could be taken into account in the sentencing.

The appellant was a young man, aged 18 at the time of the collision. It is not likely that he will commit a similar offence in the future. It is said that he wishes to further his education and is regarded as a bright prospect.

In this case the mitigating factors to be taken into account far outweigh the aggravating factors.

Having regard to all the circumstances in this case and the range of sentences imposed by the Grand Court in cases subsequent to the guidelines, we were of the view that a sentence of 12 months imprisonment would be appropriate.

We therefore allowed the appeal against sentence and substituted a sentence of 12 months imprisonment. In all other respects the sentence remained the same.

