SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 3 OF 2006

BETWEEN:

THELBERT EDWARDS

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Michael Gordon Q.C.	Justice of Appeal
The Hon. Mr. Denys Barrow S.C.	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal

Appearances:

Mr. Shawn Innocent for the Appellant
Mrs. Victoria Charles-Clarke, DPP, for the Respondent

2006: October 18;
2007: January 15

JUDGMENT

[1] GORDON J.A. On January 27, 2004, at approximately 6.45 am the appellant was driving his motor car in a northward direction along the Gros Islet highway in the area of the turn-off to Beausejour. At that time and in that area the vehicle being driven by the appellant collided with Marie Fessal, a lady described as being of some 75 years of age. As a result of the impact, Ms. Fessal suffered multiple injuries and died. According to a statement made by the appellant shortly after the accident, he was traveling towards the North at about 60 miles per hour. The learned trial judge made a curious remark in relation to the speed of the appellant. She said, during the sentencing phase of the trial, "The evidence shows that the Defendant was traveling at 60 miles per hour in an area where the speed

limit ought to have been 20 miles per hour in my view."[1] (Emphasis added) The learned Director of Prosecution in her opening address said: "In his statement to the police after he was cautioned, the accused said he was driving about 60 miles per hour. It is the Prosecution's case that this manner of driving in an area where the speed limit is 40 miles per hour was dangerous driving…"[2] (Emphasis added)

[2] According to the measurements taken by the police, prior to the point of impact a driver would have had over 200 yards clear visibility. In the words of the appellant's statement to the police "At the time I was the only vehicle going up towards Gros Islet. Whilst traveling up, on arrival near the Elliot's Gas Station as a motor as a motor omnibus traveling from Gros Islet passed I saw a lady in the middle of the road."

[3] The appellant was indicted on two counts. The first for causing the death of Marie Fessal by dangerous driving on the Massade Road near the town of Gros Islet contrary to Section 73 (1) (a) of the Motor Vehicle Road Traffic Act No. 10 of 2003 (the Act); and the second for driving his motor vehicle dangerously on the said road contrary to section 73 (1) (b) of the Act.

[4] The trial started on March 10, 2006, a Friday, and the appellant pleaded Not Guilty. The first witness for the Crown was Dr. Stephen King, the pathologist who carried out the Post Mortem on the body of Marie Fessal. After his evidence consisting of a recounting of the multiple injuries and ascribing a primary cause of death the court adjourned to the following Monday morning. On the Monday morning when the case resumed the appellant changed his plea to guilty of causing the death of Marie Fessal by dangerous driving. It would appear that the appellant changed his plea because of his remorse at being the cause of the death of Ms Fessal.[3] Thereafter the sole issue before the trial court was sentence.

[1] Record of appeal Tab C at page 59
[2] Record of appeal Tab B at page 6
[3] Record of appeal Tab C at page 60

[5] The appellant was sentenced to five years imprisonment and it is from that sentence he has appealed. Learned counsel for the appellant framed his appeal on two broad grounds. The first I shall call the interpretation ground and the second the Constitutional ground.

The interpretation ground

[6] A necessary starting point is section 73 of the Act which reads as follows:

> "73 (1) No person shall –
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> (a) cause the death of another person by dangerous driving; or
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> (b) drive dangerously on any road.
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> (2) A person who contravenes section 1 (a) commits an offence and is liable on conviction on indictment as follows –
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> (a) to imprisonment for a term of not less than five years and not more than fifteen years; and
>
> (b) in addition to the sanction specified in section 106
>
> (3) …
>
> (4) A person who contravenes section (1) (b) commits an offence and is liable-
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> (a)on summary conviction to a fine of not less than one thousand dollars nor more than five thousand dollars or to imprisonment for a term of not more than one year, or both and in addition to the sanction specified under section 106; or
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> (b) on conviction on indictment, to a fine of not more than ten thousand dollars or to imprisonment for a term of not more than two years or to both and in addition, to the sanction specified under section 106.
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> (5) In determining whether driving is dangerous for the purpose of this section the Court shall consider all the circumstances of the driving including-
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> (a) the speed and manner of driving,
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> (b) the nature condition and use of the road; and,
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> (c) the amount of traffic that is actually on the road at the time of the alleged offence, or might reasonably be expected to be on the road at that time."

[7] At the trial learned counsel for the accused argued that section 1197 of the Criminal Code[4] permitted the substitution of a fine for imprisonment for any indictable offence punishable. Section 1197 reads as follows:

> "1197. – (1) In the case of any indictable offence punishable with imprisonment, the court may substitute a fine and impose in default of payment of the fine imprisonment not exceeding the term of imprisonment which may otherwise be imposed as a punishment for the offence.

[4] No. 9 of 2004

(2) Subject to the provisions of any enactment, such fine shall not exceed eight thousand dollars."

[8] The court was directed to section 3 of the Criminal Code which reads as follows:

> "3. – Unless the contrary is expressly provided by an enactment the provisions of this Code shall apply to all offences under any enactment and to all criminal proceedings under this Code or any enactment in respect of summary offences or indictable offences, as the case may be, whether such offences are created before or after the commencement of this Code."

[9] The trial court also considered the effect of section 1104 and 1109 (5) which read as follows:

> "1104. – Where a mandatory minimum punishment is prescribed in respect of any offence by this Code or any other enactment, a Court may not sentence an offender to any less punishment than that prescribed."

> "1109. (5) Where in an enactment it is provided that a person who commits any contravention of the enactment commits an offence, and on being convicted is liable to imprisonment, or words to that effect, the Court shall, when any such order is made, order that the defendant be imprisoned accordingly."

[10] At the trial, there was considerable argument on the relationship and hence interpretation of sections 1104 and 1197 of the Criminal Code and section 73 of the Act. The learned trial judge expressed her conclusion in the following way:

> "But section 1197 is in general terms. There are also other provisions existing which seem to be saying to the contrary. Section 1105 (5) - - 1109 (5) of the Criminal Code 2004 comparable to section 1289 (5) of the Criminal Code 1992, prescribes that where in an enactment it is provided that a person who commits any contravention of the enactment commits an offence and on being convicted is liable to imprisonment, or words to that effect, the court, shall, when such order is made order that the Defendant be imprisoned. So, there again, that provision its mandatory, the court shall. These sections speak with specificity and therefore, under the rules of statutory interpretation, as I understand them, they must necessarily supersede section 1364 of the 1992 Criminal Code or section 1197 of the 2004 Criminal Code, consequently a period of incarceration is necessary, in my opinion."

[11] The learned trial Judge was clearly relying on the maxim '*generalia specialibus non derogant'* (a general provision does not derogate from a specific one). In Seward v The Vera Cruz[5] the Earl of Selborne L.C. put it this way:

> "Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so."

[12] In contrast, however, to the rule of construction set out above is the alternative rule of the overriding effect of an Act. "An operative Act, as an expression of the will of the sovereign legislature, overrides inconsistent provisions of pre-existing law (whether statutory or not) and is itself overridden by any inconsistent subsequent Act."[6] In my view this latter rule of construction is the applicable rule in this case. It appears to me that consonant with the jurisprudence in criminal law, an accused person is entitled to every advantage offered by the law, or, to put it another way, where two or more conclusions are maintainable, the one more favourable to the accused is to be preferred

[13] The Motor Vehicle and Road Traffic Act 2003 received the Royal Assent on 20th January 2003 whilst the Criminal Code received the Royal Assent on 30th April 2004. It is clear, therefore that the Motor Vehicle and Road Traffic Act was earlier in time than the Criminal Code and I hold that to the extent that there are provisions in the Act inconsistent with the Criminal Code, those provisions are overridden by the later legislation.

[14] In the instant case I am of the view that section 1197 of the Criminal Code restores the discretion of the court to sentence a person to the payment of a fine rather than to a term of imprisonment of not less than five years. I shall later in this judgment deal with the issue of the quantum of sentence. I am fortified in this view when I read section 1097 of the Code which reads:

> "1097. (1) This section applies where a Court passes a custodial sentence.

[5] (1884) 10 App. Cas 59 at pg 68
[6] Bennion, Statutory Interpretation, 4th ed. At page 154

> (2) The custodial sentence shall be –
> (a) for any term (not exceeding the permitted maximum) as in the opinion of the Court is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with the offence;…(emphasis added)

The learned trial judge in believing herself bound by the minimum sentence did not bring her mind to the exercise of a judicial discretion as section 1097 directed her to.

[15] It would be possible to stop this judgment at this point, but the issue has been given new life by the Motor Vehicle and Road Traffic (Amendment) Act which received the Royal Assent on 30th January 2006. Some 92 sections in the Act were amended by that latter Act, including section 73 (2). A comparison of the amended and the original section 73 (2) reveals no differences to me. However, significantly, the amending Act post-dates the Criminal Code and must therefore be taken to override section 1197. I shall therefore proceed to consider the Constitutional ground.

The constitutional ground

[16] Learned counsel for the appellant argued that section 73 of the Act contravened Section 5 of the Constitution of Saint Lucia (the Constitution) which reads as follows:

> "5. PROTECTION FROM INHUMAN TREATMENT
> No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

He cited, in support of his argument, certain Canadian cases whose jurisprudence, he argued, supported his position that section 73 (2) (a) is unconstitutional. For a better understanding of the Canadian position it is necessary to set out section 12 of the Canadian Charter of Rights and Freedoms, which is the section that is much analysed, in the cases cited in argument.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

> "12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment"

[17] As good as any starting point in comparing the language of the two sections would be the statement of Lord Wilberforce in Minister of Home Affairs v Fisher[7] to the following effect:

> "Here, however, we are concerned with a Constitution, brought into force certainly by Act of Parliament, the Bermuda Constitution Act 1967 United Kingdom, but established by a self-contained document set out in Schedule 2 to the Bermuda Constitution Order 1968 (United Kingdom S.I. 1968 No. 182). It can be seen that this instrument has certain special characteristics. 1. It is, particularly in Chapter 1, drafted in a broad and ample style which lays down principles of width and generality. 2. Chapter 1 is headed "Protection of Fundamental Rights and Freedoms of the Individual." It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedom (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. 3. Section 11 of the Constitution forms part of Chapter 1. It is thus to "have effect for the purpose of affording protection to the aforesaid rights and freedom" subject only to such limitations contained in it "being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice…the public interest."

[18] A similar approach has been adopted by the Canadian Supreme Court. In Re B.C. Motor Vehicle Act[8] Lamer J. of the Supreme Court said the following at paragraph 22 of the judgment:

> "I propose, therefore, to approach the interpretation of s. 7 in the manner set forth by Dickson J. in *Hunter V Southam Inc [1984] 2 SCR 145* and *R. v Big M Drug Mart Ltd [1985] 1 SCR 295*. In *R v Big M Drug mart Ltd* Dickson J wrote at p. 344:
>
> > 'In *Hunter v Southam Inc [1984] 2 SCR 145* this Court expressed the view that the proper approach to the definition of thee rights and freedoms

[7] [1980] A.C. 319 at page 328
[8] [1985] 2 S.C.R. 486

> guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect…
>
> The interpretation should be, as the judgment in *Southam* emphasises, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection"

[19] On the premise of "a generous interpretation avoiding 'the austerity of tabulated legalism'" I find that section 5 of the Constitution and section 12 of the Canadian Charter of Rights and Freedoms to be comparable in concept seeking to protect the same interests, even though expressed differently.

[20] The position regarding minimum sentences and their legality has been addressed by this court, albeit in passing, in Newton Spence v The Queen[9] when Sir Dennis Byron, C.J., said at paragraph 13 the following:

> "I think that the answer is that whereas it is for Parliament to set sentencing policy, it is the duty of the courts to evaluate whether the laws passed by Parliament contravene the Constitution, without fear or favour. It is trite that the Constitution is the supreme law, and legislation must conform with it. In this case it is the duty of the court to consider whether the mandatory imposition of the death penalty contravenes the Constitution. This role of the court was eloquently and persuasively expressed in the South African case of State v Makwanyane v Mchunu (Case CCT/3/94) (South African Constitution) by Caskalson P:
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> > 'Para 87: The Attorney General argued that what is cruel, inhuman or degrading depends to a large extent upon contemporary attitudes within society, and that South African society does not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment. It was disputed whether public opinion, properly informed of the different considerations, would in fact favour the death penalty. I am, however, prepared to assume that it does and that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence."

[9] SVR Criminal Appeal No. 20/1998 judgment delivered April 2, 2001

> 'Para 88: Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."

[21] In other words, once one concedes that it is within the competence of Parliament to set sentencing policy, it flows ineluctably that Parliament is competent to set mandatory minimum sentences, subject to the duty of the courts to evaluate whether such laws contravene the Constitution. To put it another way, each such law must be examined by the courts to see whether the fundamental rights and freedoms are observed or contravened.

[22] R v Goltz[10], a decision of the Canadian Supreme Court sitting with a nine member coram, is informative and, I find, of great assistance. In that case the respondent was found guilty of driving on a public road whilst prohibited under section 86 (1) (a) (ii) of the British Columbia Motor Vehicle Act, contrary to section 88 (1) (a). Section 88 (1) (c) prescribed a minimum penalty of 7 days imprisonment and a $300.00 fine for a first conviction. The constitutional question before the Supreme Court was whether section 88 (1) (c) infringed section 12 of the Canadian Charter of Rights and Freedoms.

[23] Gonthier J after reciting the law, the facts and the judicial history of the case said this:

[10] [1991] 3 S.C.R. 485

When one looks to the criminal law, it is evident that there are many serious crimes, the commission of which presents a real danger to society for which no mandatory minimum sentence is prescribed by the Criminal Code.
"A comparison of the relative severity of those many offences at law which do not carry a mandatory jail term as punishment for a first conviction with that of the offence here under consideration leads me to the conclusion that there is no reason, why the latter must carry a mandatory minimum punishment of seven days' imprisonment"

[24] Gonthier J. continued:

"The current test for determining whether a law prescribes a cruel and unusual punishment was established in *R v Smith*[11] per Lamer J. as he then was.[12] The test was born of an extensive review of the history and the meaning of the principle against cruel and unusual punishment, which background need not be repeated here…
"In Smith the Court struck down a seven-year minimum sentencing provision which applied to the offence of importing narcotics under s. 5 (1) of the *narcotic Control Act*. In its view that mandatory sentence amounted to cruel and unusual punishment under s. 12 of the Charter. Each member of the Court in Smith accepted the general principle that a sentence which is grossly or excessively disproportionate to the wrongdoing would infringe s. 12…
The general standard for determining s. 12 infringements is contained in the following passage from the judgment in *Smith* at p. 1072:

> …the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect the punishment may have on the person on whom it is imposed. .. The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the Charter is…. 'whether the punishment prescribed is so excessive as to outrage the standards of decency'. In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate…

The Smith case makes it plain that gross disproportionality must be determined by paying close attention both to the particular situation in which the offence occurred and to the personal traits of the offender, though it clearly does not go as far as a complete individualization of sentencing, which might put in question the constitutional validity of mandatory minimum sentences generally. Moreover, where the constitutional validity of a statutory provision is at stake, and not merely the justice of a particular sentence imposed by a judge at trial, it will often be necessary to go beyond the specific facts of the appeal, to assess the proportionality of the sentence prescribed by statute

[11] [1987] 1 S.C.R. 1045
[12] Lamer J of R v Smith became the Chief Justice and was part of the coram in Goltx.

[25] The court in *Smith* employed a hypothetical example to illustrate why a minimum sentence of seven years for importing narcotics under the Narcotic Control Act could lead to gross disproportionality. It contrasted the position of a tourist returning from a foreign land with one marijuana cigarette with that of a serious hard drug dealer convicted of importing a large quantity of heroin. It held that the challenged sentence would be grossly disproportionate to the appropriate sentence in the case of the hypothetical small offender. The court concluded that despite the possible appropriateness of the sentence of seven years of the appellant in *Smith*, a 27 year old with two previous convictions caught returning from Bolivia with Can $100,000.00 worth of cocaine, the minimum mandatory sentence cast too wide a net. "It was invalid because its potential effects were so excessive as to outrage decency"

[26] In R v Morrisey[13], another case from the Supreme Court of Canada Gonthier J introduced his judgment in this way:

> "Is a four year minimum sentence of imprisonment cruel and unusual punishment for the offence of criminal negligence causing death with a firearm? As I set out these reasons, it is my view that this punishment does not constitute cruel and unusual punishment. The offence of criminal negligence causing death requires proof of wanton and reckless disregard for the lives of other people – a high threshold to pass. This offence does not punish accidents. Nor does it punish the merely unfortunate. It punishes those who use firearms in a manner that represents a marked departure from the standard of care employed by a reasonable person resulting in death."

[27] The issue has been addressed in other jurisdictions. In Buzani Dodo v The State[14], Ackerman J, having concluded that the legislature had the power to legislate minimum sentences continued at paragraph 26:

> "The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the judiciary. What an appropriate balance ought to be is incapable of comprehensive abstract formulation, but must be decided as specific challenges arise. In the field of sentencing, however, it can be stated as a matter of principle that the legislature ought not to oblige the judiciary to impose a punishment that is wholly lacking in

[13] [2000] 2 SCR 90
[14] 2001 Constitutional Court of South Africa CCT 1/01

> proportionality to the crime. This would be inimical to the rule of law and the constitutional state. It would a fortiori be so if the legislature obliged the judiciary to pass a sentence which was inconsistent with the Constitution and in particular the Bill of Rights. The clearest example of this would be a statutory provision that obliged a court to impose a sentence which was inconsistent with an accused's right not to be sentenced to a punishment which was cruel, inhuman or degrading as envisaged by section 12 (1) (e) of the Constitution".

And again at paragraph 38:

> To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.

[28] Constitutionally, Saint Lucia, and indeed the majority of member states of the British Commonwealth, differs significantly from the United Kingdom in that in the UK the principle of legislative supremacy reigns, whilst in the Commonwealth countries the legislature is subject to the constitution. The majority of the constitutions of those states contain, in one form or another, an entrenched Bill of Rights. In the case of St. Lucia such rights are expressed at the commencement of our Constitution and are referred to as "The Protection of Fundamental Freedoms". Until the inception of the Human Rights Act, 1998, the United Kingdom had no such charter of rights but even the Human Rights Act is not entrenched and is, theoretically, subject to legislative removal. One makes the point that this power is theoretical only in the context of international obligations undertaken by the UK by way of treaty.

[29] In her book, Civil Liberties and Human Rights[15] Helen Fenwick, writing of the English experience says:

> In adjudication on the HRA[16], domestic judges are likely to refer to decisions of courts from other jurisdictions, and Canadian cases in particular are likely to be considered with some frequency although it cannot be assumed that the judiciary will invariably welcome the use of Canadian precedents. Canadian judges share a similar constitutional background with UK judges and Canada has adopted the Charter of Rights and Freedoms relatively recently.."

[30] In sum, I find the Canadian and South African jurisprudence of great persuasive assistance.

The case at bar

[31] Until this appellant was sentenced to five years imprisonment, no other person was sentenced to imprisonment for causing death by dangerous driving in St. Lucia for the last 20 years. Information of the period beyond 20 years was not available, nor do I consider it necessary to go beyond 20 years. In making this statement, it should be clearly understood that I do endorse a custodial sentence in appropriate circumstances for causing death by dangerous driving.

[32] Prior to the passage of the Act, the law in force was the Motor Vehicles and Road Traffic Act, 1994. Section 55 of that former Act made it a crime to cause 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. A person convicted was liable to imprisonment for a term of ten years. No band was stipulated as the jurisprudence has always been that absent language stipulating a minimum, a stated sentence was a maximum and a court could sentence a convicted offender to any sentence up to the maximum.

[33] Section 60 of the Criminal Code defines 'recklessly' in this way:

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[15] 3rd Edition, 2002
[16] Human Rights Act 1998 (England)

> "A person causes an event recklessly if the act causing the event involves an obvious and serious risk of causing injury or damage and the person fails to give any thought to the possibility of there being any such risk or having recognized that there is some risk involved, he or she nonetheless goes on to take the risk."

[34] A comparison of section 55 of the former Act and section 73 of the Act leads me to the conclusion that under the provisions of the Act there is an objective standard of driving that is considered dangerous whereas under section 55 of the former Act an element of mens rea is involved. In R v Lawrence[17] Lord Diplock defined recklessness in the context of reckless driving as including "the heedlessness of the presence of a risk as well as disregard of a recognised risk".

[35] The use of hypothetical situations, as was done in Morrisey is encouraged so as to generalize the consideration of whether there has been a breach of section 5 of the Constitution. This must be so because the determination is not whether a particular accused person or appellant is deserving of a prison sentence or not, but whether in all realistically conceived circumstances the sanction imposed by the questioned section is proportionate. As was said in Smith the challenged provision of the Narcotics Control Act was held to infringe s.12 of the Charter of Rights and Freedoms because it was … "inevitable that, in some cases, a verdict of guilt will lead to the imposition of a term of imprisonment which will be grossly disproportionate"

[36] Suppose a Minister of religion of mature years and blameless character, in so far as the Criminal law is concerned, on his way to perform his pastoral duties to one of his flock who appears to be about to join with his maker exceeds the speed limit and, coincidentally causes the death of a third person. A jury finds him guilty of causing death by dangerous driving. I, as a trial judge, would find it obscene, using that word in its meaning of being repugnant to accepted standards of morality, to have to sentence that driver to five years imprisonment. Such a sentence would be the quintessence of disproportionality. It is worthy of note that none of the following crimes carry a mandatory minimum sentence: non-capital murder, attempted murder, causing death by gross negligence or recklessness

[17] [1982] AC 510

(under the Criminal Code) or manslaughter. In the language of Smith I would find "the punishment prescribed so excessive as to outrage the standards of decency"

[37] I hold that section 73 (2) (a) is in breach of section 5 of the Constitution in that the mandatory minimum sentence of five years imprisonment for the crime of causing death by dangerous driving constitutes inhuman and degrading punishment.

Sentence

[38] There are two alternatives available to this court. Either it can remit this case back to the High Court for sentencing, or it can itself sentence the appellant. The court called for and received a report from the Probationary services department to which reference will be made later. Thus, in my view, this court is in as good a position to exercise its discretion in relation to sentence as the High Court and little would be achieved by sending the matter back other than further delay.

[39] In the first paragraph of this judgment I referred to the rather curious choice of words by the trial judge when she referred to the speed at which the appellant was traveling. It will be recalled that the appellant admitted to traveling at 60 miles per hour. The trial judge said "the speed limit ought to have been 20 miles per hour in my view". It will also be recalled that the learned Director of Public Prosecutions in her opening address said "It is the prosecution's case that this manner of driving in an area where the speed limit is 40 miles per hour was dangerous driving". Where the case for the prosecution as set out by the learned Director states that the speed limit was 40 miles per hour and no evidence of any kind was led as to the actual speed limit I am of the view that the trial judge misled herself by coming to a different conclusion based on her own recollection of the physical circumstances surrounding the accident site. Of course the trial judge may well have been influenced by the fact that the learned Director resiled from the position that the speed limit was 40 miles per hour and concurred with the court that it was "fifteen to twenty or twenty in that area"

[40] Section 73 (5) of the Act[18] sets out what a court may consider in coming to its conclusion whether any driving was dangerous or not. Sub-section 5 mandates that speed is a consideration to be taken into account as is the amount of traffic that is actually on the road at the time of the alleged offence. The accused in his statement under caution to the police said "… at the time I was the only vehicle going up towards Gros Islet."[19] It further transpires from the measurements taken by the police that the appellant had an unobstructed view of over 200 yards to the point of impact. In the sentencing exercise undertaken by the trial judge she stated "And the very fact that the deceased contributed somewhat to the predicament by crossing the road at an inopportune time oblivious of the defendant's dangerous driving, that too, I'll take into account as a mitigating factor". I mention these points not to exculpate the appellant, he is stuck with his guilty plea, but rather to establish the environment in which the sentencing exercise must be undertaken. As the learned trial judge said, and I agree, "Now, these guidelines show that the court has to strike an appropriate balance between the level of culpability and the magnitude of harm resulting from the offence. The defendant's overall culpability is the dominant concern of the sentencing exercise rather than the consequences".

[41] Before coming to factors personal to the appellant, I must deal with one other matter deriving from the sentencing exercise conducted by the learned trial judge. It would appear that the trial judge took into account the fact that the appellant was driving without insurance and treated that as an aggravating factor. The reality is that at the time of the trial there had been no trial, and hence no conviction, of this offence. It, therefore, was quite wrong to take this matter into account as an aggravating circumstance.

[42] This court requested from the department of probation and parole services a pre-sentence report on the appellant. With commendable speed and admirable thoroughness, the department produced the requested report on 6th November 2006. The appellant was the youngest of four children of Ursula and Macdonald Edward of Marc. His eldest sister is an inspector of police, the next sister is a pastry chef and the youngest sister is a business woman. Both the appellants parents and his siblings spoke highly of the appellant's sense

[18] See paragraph 6 above

of responsibility in respect of his obligations to his aged and unwell parents. The appellant has two children. According to the report, the appellant has shown and continues to show remorse for his involvement in the death of Marie Fessal.

[43] Section 142 of the Criminal Justice Act of England speaks to five purposes of sentencing. They are the punishment of offenders; the reduction of crime (including its reduction by deterrence); the reform and rehabilitation of offenders, the protection of the public; and, the making of reparation by offenders to persons affected by their offences. Section 1102 of the Criminal Code mandates that a court, in sentencing, shall observe the general guidelines set forth in that section. The guidelines are four in number. They are: the rehabilitation of the offender; the gravity of the punishment must be commensurate with the gravity of the offence; the offender shall only be sentenced for an offence of which he has been convicted; and, where a fine is imposed the means of the offender must be taken into account.

[44] One final matter that I take into account is section 73 (3) (a) of the Act which reads as follows:

> "Where a person is charged under subsection 1 (a), the licence of the person to drive a motor vehicle is suspended until the charge has been determined."

In other words, by the time of the delivery of this decision, the appellant will have been suspended from driving for three years less a few days. I am of the view that this is a matter that can properly be taken into consideration in determining the proper punishment.

[45] Although I have found the minimum sentence of five years imprisonment on conviction to be grossly disproportionate and hence unconstitutional, nevertheless, I cannot ignore that Parliament has sent a strong signal of its view of the increasing seriousness of the offence of causing death by dangerous driving. The maximum sentence has been increased from 10 years under the 1994 Motor Vehicles and Road Traffic Act to its present maximum of fifteen years. In the circumstances, the courts must give efficacy to the mood of Parliament as expressed through legislation. I would opine that unless good reason or special

circumstances exist, an offender convicted of causing death by dangerous driving must expect a custodial sentence on conviction.

[46] In all of the circumstances set out above, in the exercise of my judicial discretion, I find that the appropriate sentence for this offence committed by this appellant is that the appellant be fined the sum of $4,000.00 payable within 60 days or in default he shall spend one year in prison. Lest there be any misunderstanding, the court is not to be understood as setting the value of a human life at $4,000.00, but rather finds that this offender in the circumstances of this case should be punished in this way. I will not order the payment of compensation by the appellant to the estate of the deceased for the reason that I do not wish to inhibit any civil remedy, which may be, contemplated by the successors of Ms Fessal. The licence of the appellant having been de facto suspended for almost three years, I do not consider it appropriate to disqualify him from driving for a further period.

Michael Gordon, QC
Justice of Appeal

[47] BARROW J.A. At issue on this appeal is whether it was mandatory to sentence the appellant to a minimum term of imprisonment for 5 years upon his conviction for the offence of causing death by dangerous driving contrary to section 73 (1) (a) of the Motor Vehicle and Road Traffic Act, No. 10 of 2003 (the Act).[20] The trial judge imposed that sentence on the appellant because she held she could not do otherwise.

Liable to imprisonment for not less than 5 years

[48] Section 73 provides, so far as material:

> "73 (1) No person shall –
> (c) cause the death of another person by dangerous driving; or
> (d) drive dangerously on any road.

[20] As amended by the Motor Vehicle and Road Traffic (Amendment) Act No. 10 of 2006

(2) A person who contravenes section 1(a), commits an offence and is liable, on conviction on indictment, as follows –

(a) to imprisonment for a term not less than five years and not exceeding more than fifteen years; and

(b) in addition to the sanction specified in section 106."

[49] The trial judge construed that provision in this manner:

> "Now, the provision in section 73 (2) of the Motor Vehicle and Road Traffic Act states that a person convicted of causing death by dangerous driving is to be imprisoned for a term of not less than five years and not more than 15 years. In relation to the mandatory period of incarceration, the court has a band within which to operate when weighing aggravating against mitigating factors. I therefore do not consider the provision unconstitutional as it has not deprived the court of its judicial function as a sentencer."

[50] The judge referred to section 1197 of the Criminal Code 2004 (the Code) which she said "recognizes that in the case of an indictable offence punishable with imprisonment, the Court may substitute a fine". After referring to counsel's submission that she could do so in this case the judge reasoned,

> "But section 1197 is in general terms. There are also other provisions existing which seem to be saying the contrary. Section 1109 (5)of the Criminal Code 2004 … prescribes that where in an enactment it is provided that a person who commits any contravention of the enactment commits an offence and on being convicted is liable to imprisonment, or words to that effect, the court shall, when such order is made, order that the defendant be imprisoned. So, there, again, in that provision it's mandatory; the court shall. These sections speak with specificity and, therefore, under the rules of statutory interpretation as I understand them, they must necessarily supersede … section 1197 of the 2004 Criminal Code, consequently a period of incarceration is necessary, in my opinion."[21]

[21] Record of Appeal, page C 59

Imprisonment for felony

[51] Before considering the statutory provisions that the judge considered it will help to sketch the history of 'liability' to imprisonment. At common law it was mandatory for a court to sentence a person convicted on indictment of a felony to a term of imprisonment. A court had no power to impose a fine, as the Lord Chief Justice of England stated in Markwick.[22] In England it was the Criminal Justice Act 1948 that conferred the power upon the courts to fine instead of imprison upon conviction on indictment for felony, as appears in this passage from the judgment in Markwick:

> "Before the Criminal Justice Act, 1948, it would have been impossible for the Recorder to have imposed a fine. Except in the case of manslaughter, a court had no power to impose a fine on conviction on indictment of felony, though magistrates could do so in some cases on summary conviction. That restriction had often been found hampering, and the position was altered by Parliament."[23]

[52] In Jones v Attorney General of Bahamas[24] Lord Lane identified the true form of a mandatory sentence when he compared the earlier and the later forms of the mandatory death sentence. He noted that at common law death by hanging was the mandatory punishment for murder. Section 1 of the Offences Against the Person Act 1865 of the Bahamas put this common law rule on a statutory footing in these terms:

> "I. Whosoever shall be convicted of murder shall suffer death as a felon.
>
> "II. Upon every conviction of murder the court shall pronounce sentence of death …"[25]

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[22] (1953) 37 Cr. App. Rep. 125 at 126

[23] section 13 of the Criminal Justice Act, 1948, was replaced by section 7 of the Criminal Law Act, 1967, which provided at sub-section (3) "Where a person is convicted on indictment of any offence other than an offence for which the sentence is fixed by law, the court, if not precluded from sentencing the offender by its exercise of some other power (such as the power to make a probation order), may impose a fine in lieu or in addition to dealing with him in any other way in which the court has power to deal with him, subject however to any enactment limiting the amount of the fine that may be imposed or requiring the offender to be dealt with in a particular way."

[24] [1995] 1 WLR 891

[25] see 894C

[53] The Penal Code 1927 of the Bahamas, as amended, was worded differently in this respect. Section 312 provided:

> "312 - Whoever commits murder shall be liable to suffer death."[26]

[54] Counsel for the appellant, in Jones, argued that the words "liable to suffer death" imported a discretion in the judge to pass some lesser sentence. To this Lord Lane stated:[27]

> "It is true that the word "liable" is ambiguous, but in their Lordships' judgment it can, at the best from the applicant's point of view, only be a concession to the possibility of an exercise of the prerogative of mercy and a reprieve under the powers given to the Governor-General."

His Lordship supported that view by reference to a number of other provisions of the Penal Code which, though interesting, do not call for discussion for present purposes. The same restraint denies discussion of the reasoning of Lord Bingham in Bowe and Davis v The Queen[28] which led to the conclusion[29] that the human rights provisions in the Bahamas Constitution mandated that section 312 should be construed as imposing a discretionary and not a mandatory sentence of death. It is sufficient for present purposes to appreciate the "ambiguous" quality of the expression "shall be liable", and that even on the earlier view that held section 312 imposed a mandatory sentence of death, it was not the wording of the expression that made the sentence mandatory. Rather, it was the common law rule that is its underpinning and the other statutory provisions that are its framework.

[55] The former common law rule of mandatory imprisonment, upon conviction on indictment for felony, finds its statutory equivalent in section 1109 of the Code. Contrary to the view of the judge that this is a section that "speaks with specificity", it is a section that declares itself to be of general application. This appears from sub-section (1), to which the judge did not advert. The relevant provisions of section 1109 read as follows:

> "1109. – (1) Where the Court has power under any enactment to make an order in respect of the contravention of any of the provisions of the enactment, *the*

[26] see 894F
[27] at 894H to 895A
[28] [2006] UKPC 10; Privy Council Appeal No. 44 of 2005 , judgment delivered 8th March 2006
[29] At paragraph 43

following general provisions of this section with respect to the nature of the order which may be so made in different cases, shall, unless the contrary is expressly provided by the particular enactment or by necessary implication, have effect." (Emphasis added).

…

"(5) Where in an enactment it is provided that a person who commits any contravention of the enactment commits an offence, and on being convicted is liable to imprisonment, or words to that effect, the Court shall when any such order is made, order that the defendant be imprisoned accordingly."

[56] That provision, when read in context, speaks to the terms of the order in the usual case of conviction of an offence for which it is provided that the offender is liable to imprisonment. The usual order shall be a sentence of imprisonment. This provision applies regardless of whether or not a minimum term of imprisonment is provided for the offence. It is a provision that applies in the case, for example, of convictions on indictment for: manslaughter, where the offender "shall be liable" to life imprisonment (s. 93); maim or dangerous harm, where the offender "is liable" to imprisonment for twenty years (s. 99); wounding, where the offender "is liable" to imprisonment for ten years (s. 100); negligent harm, where the offender "is liable" to imprisonment for one year (s. 111) or assault, where the offender "is liable" to imprisonment for three years (s. 115). The provision also applies in the case, for example, of summary convictions for: negligent harm, where the offender "is liable" to imprisonment for six months (s. 111); abstracting electricity, where the offender "is liable" to imprisonment for one year (s. 210); or damage to a building or structure, where the offender is liable to imprisonment for two years (s. 294).

Discretion to fine instead of imprison

[57] The proposition that every person convicted of any of the foregoing offences must be imprisoned merely has to be stated to be rejected. Section 1109 (5) cannot mean, as a matter of conception, that every person who is liable to imprisonment for having committed an offence shall be imprisoned. Such an idea would no doubt have been perfectly reasonable in the days when death was the penalty for all crimes of felony except petty

larceny and mayhem,[30] and even as recently as the first half of the last century, before the common law rule was altered by the 1948 legislation, as was noted in the case of Markwick.[31]

[58] The creation of a discretion to relieve against the harshness of mandatory imprisonment for felony that was done by the English 1948 legislation finds its modern day counterpart in St. Lucia, in section 1197 of the Code. The history and radical nature of that provision were not appreciated in the court below. That section creates an overarching discretion that does not otherwise exist. Section 1197 states:

> "1197. – (1) In the case of any indictable offence punishable with imprisonment, the Court may substitute a fine and impose in default of payment of the fine imprisonment not exceeding the term of imprisonment which may otherwise be imposed as punishment for the offence.
>
> "(2) Subject to the provisions of any enactment, such fine shall not exceed eight thousand dollars."

[59] As I understand it, therefore, section 1109 (5) states, as a "general" provision, the order that a court shall pronounce, in sentencing a person convicted of an offence for which he is liable to be imprisoned, is that he shall be imprisoned. He shall be imprisoned for a term not less than the minimum provided (if any) and not exceeding the maximum permitted by law. But section 1197 of the Code confers a discretion on the court to fine instead of imprisoning. The ability of the court to exercise that discretion is unaffected by whether or not a minimum term of imprisonment is provided. Section 73 (2) of the Act establishes liability to a minimum term of imprisonment; it does not establish that it is mandatory to sentence a person to imprisonment. Mandating that imprisonment shall be for a minimum term is not the same as mandating that there shall be a sentence of imprisonment.[32] In

[30] Stephen, History of Criminal Law, Vol I, pp. 457 et seq.
[31] See paragraph above.
[32] In R v Morrisey [2000] 2 S.C.R. 90 the Supreme Court of Canada considered the mandatory punishment legislated for criminal negligence causing death with a firearm. The relevant provision of the criminal code, set out in paragraph 15 of the report, provides that a person convicted of the offence is liable "to a minimum punishment of imprisonment for a term of four years". The contrast is drawn between liability to a minimum punishment of imprisonment and liability to imprisonment for a minimum term. In the former

Jones Lord Lane regarded the word "liable" as containing a concession, in the case of the death penalty, to the exercise of the prerogative of mercy. In the present case of a general rule of imprisonment, the concession is to the exercise of the discretion to fine, created by section 1197 of the Code.

[60] In my respectful view the judge erred in concluding that she did not have a discretion but was bound by law to pronounce sentence of a term of imprisonment upon the appellant. It was open to the judge, and required of her, to decide whether to sentence the appellant to a term of imprisonment or to a fine instead. Because the judge did not make that decision this court must now do so.

Power to set minimum sentences

[61] The right of Parliament to set minimum sentences must not only be recognized; it must be respected. The intention of Parliament in establishing, for the offence of causing death by dangerous driving, a minimum term of imprisonment for any person that the court decides deserves to be imprisoned, must be accepted by the court as reflecting the seriousness with which society regards this offence and as increasing the criminality of motor homicide. In Harvey[33] Lord Bingham C.J. considered and rejected a submission that a mandatory minimum sentence of 7 years imprisonment for a drug offence was manifestly excessive and then proceeded to state that, in any event, such an argument was inappropriate because the purpose of the minimum sentence provision is to oblige the court, in the absence of circumstances which would render it unjust to do so, to impose the prescribed custodial sentence. He said[34]:

> "This means that Parliament has chosen a term of seven years as the standard penalty … The object of the section quite plainly is to require courts to impose a sentence of at least seven years' in circumstances where, but for the section, they would not or might not do so. If that were not the intention of the section it is in our judgment very difficult to see what the intention of the section was."

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situation the sentencer may impose no lesser punishment than imprisonment but in the latter the sentencer may impose a lesser punishment than imprisonment.

[33] [2001] 1 Cr. App. R. (S) 368, C.A.

[34] Harvey [2001] 1 Cr. App. R. (S) 368, C.A. per Lord Bingham C.J. at penultimate paragraph.

Usual custodial sentence

[62] In the face of the clear legislative intent of section 73 (2) of the Act the court must move away from the position of former years, which was that absent some aggravating feature a custodial sentence for motor manslaughter is not appropriate; see. Boswell (1984) 79 Cr. App. R 277 at 280.The position will now be similar to that in England, the Director submitted in reliance on Cooksley[35], in which it was stated:

> " 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. (Emphasis added).

That case, which set new sentencing guidelines for causing death by dangerous driving, confirmed that even in a case where there are no aggravating circumstances, for an adult offender, an immediate custodial sentence will generally be necessary, starting at 12 to 18 months but reduced for a guilty plea.

[63] In Jenkins[36] it was stated that in order to avoid a custodial sentence there have to be exceptional mitigating features. In the latter case a learning-defective sixteen year old killed his best friend, who was his pillion passenger, in an accident that was caused by the throttle of a poorly maintained motorcycle sticking. Notwithstanding that because of his disability the driver may not have fully appreciated the consequences of driving the motorcycle in the condition and his great remorse it was decided on appeal that a custodial sentence was necessary.

[35] [2003] 3 All ER 40 at 11 (iv) (a)
[36] [2001] 2 Cr. App. R (S) 265

[64] A wholesale importation of English sentencing principles and practice must be avoided but the new approach to sentencing in that jurisdiction will be of value on a case by case basis in this jurisdiction. It is pertinent to observe that the comparable English legislation does not provide for a minimum term of imprisonment, in contrast to the local legislation, and that the maximum penalty under the former was imprisonment for 10 years[37], in contrast to a maximum penalty of 15 years' imprisonment under the local legislation. Both of these factors, it seems to me, attach a high level of criminality to the offence in St. Lucia.

Regard to severity of minimum term in deciding whether to imprison

[65] But there is another aspect of a sentence for a minimum term that arises for consideration. Where a person must be sentenced to a minimum term of imprisonment, if he is sentenced to imprisonment, is the severity of that sentence a proper consideration for the court to regard in deciding whether or not to impose a custodial sentence?

[66] In Cooksley[38] the English court of appeal established four starting sentences according to the degree of culpability in the commission of the offence. For a case where there were no aggravating features, a starting sentence of 12 to 18 months; where there is intermediate culpability, a starting sentence of 2 to 3 years; where there is higher culpability, a starting sentence of 4 to 5 years; and for most serious culpability, 6 years and over. It was emphasized that these were to be treated only as starting sentences and the sentencer would have to decide on the appropriate sentence in each case. It is in this context that the principle exists in England that a custodial sentence will usually be required.

[67] Where, as in St. Lucia, a sentencing court must start with a sentence of 5 years, meaning that it must impose that sentence on a person whom otherwise it would have sentenced to (say) two years' imprisonment, is it proper for the court to decide that the minimum sentence is too severe a punishment and therefore decide to impose a non-custodial

[37] Since the decision in Cooksley it was increased to 14 years by section 285 of the Criminal Justice Act 2003.
[38] Paragraph 32

sentence instead? Two approaches are available: one is that the court must decide between a custodial and a non-custodial sentence; the second is that the court must decide between a 5 year custodial sentence and a non-custodial sentence.

[68] Mandatory sentences are well recognized for their effect of driving lawyers and judges to great and sometimes ingenious efforts to avoid what some regard as their excessive severity. I fear that if a sentencing court were to adopt the second approach it would be guilty of ingenuity. The intention of the legislature is clearly expressed in section 73 (2) of the Act; it is to provide that in those cases in which a custodial sentence is appropriate, that sentence shall be for not less than the specified minimum term. As was recognized in Harvey, Parliament is competent to require the imposition of a sentence for a term that would otherwise be inappropriate. In our case Parliament has not, by section 73 (2) of the Act, removed the decision of what sentence to impose from the discretion of the sentencer; rather, it has limited the range of custodial sentence, if the sentencer decides to impose such a sentence. For that reason I do not think any constitutional issues arise.

Custodial or non-custodial sentence

Therefore, I approach the sentencing of the appellant on the basis that the court must decide whether or not to impose a custodial sentence. The maximum punishment for this offence, of imprisonment for 15 years, leads on general principle to the conclusion that a custodial sentence will be required in all but exceptional cases.

[69] There was nothing exceptional in relation to the manner in which the accident occurred. It was a bit before 7:00 in the morning and the appellant was rushing to get to work for 7 o'clock. He was driving in a built up area at a speed of 60 miles per hour or more. His was the only vehicle going north. He saw the deceased, who was a woman of about 75 years of age, on the right side of the road. He saw a bus coming in the opposite direction and as it passed he saw the deceased in the middle of the road. He applied his brakes but hit the deceased who died shortly after. The point of impact was 10 feet, 8 inches from the appellant's left hand side of the road, which was 22 feet, 2 inches wide. There was a clear line of sight along the road for 641 feet. The appellant's brake marks measured about 35

feet and the point of impact was 79 feet from where the brake marks began. The vehicle stopped 56 feet beyond the point of impact.

[70] The interpretation of the evidence most favourable to the appellant was that the deceased walked out into the middle of the road, after the bus passed her and when she was obscured from the appellant's sight, without heeding the presence of the appellant's oncoming vehicle. Even if I were to treat that aspect as a substantial cause of the accident there is no getting around what the judge regarded as the appellant's "highly culpable standard of driving".[39] In my respectful view that was a fair assessment to make of driving at that speed in that area. The verdict (on the appellant's own plea of guilty) of causing death by dangerous driving really puts the matter beyond dispute; by that verdict it is settled that the appellant drove dangerously. That was the cause of the accident. At most the alleged negligence of the deceased (which I will treat as established for sentencing purposes) should be treated as a mitigating factor, as the judge did.

[71] Other mitigating factors that the judge identified were the appellant's unblemished record, his plea of guilty, and his genuine remorse. Since the hearing of the appeal this court has had the benefit of a pre-sentence report which describes the appellant as a young man of very good character, who is an excellent son to his aged and unwell parents, with whom he lives along with his common law wife and two children, to whom he is also very good. He is the main provider for his parents and for his children. He is well-regarded and loved, he is hard working, steady and has progressed from a primary school education to holding a position of gourmet chef, and supervising a staff of seven, at a leading hotel. The report confirmed the remorse of the appellant and recommended him for rehabilitation.

[39] Record of Appeal. Page 59C, line 14

No exceptional case

[72] These factors do not make this an exceptional case. They are painfully normal in the sense that so often members of society leading solid and commendable lives, because of one fatal error of judgment, have their lives terribly upset by the price they are made to pay for that error. The mitigating factors, had a minimum term of imprisonment not been specified, would have served to keep a normal starting sentence at the lower point in the range or even reduce it. Those factors could not, in view of the seriousness of this offence, have served to avoid the imposition of a custodial sentence. I think that proposition is now inescapable in St. Lucia in light of the increase of the maximum punishment for causing death by dangerous driving to 15 years from 10 years.[40] Cooksley[41] and the line of other English cases that preceded it provide clear guidance as to the approach our legislation requires our courts to take. That legislation must be accepted as expressing the abhorrence of society for causing death by dangerous driving and the demand of society that in all cases, save exceptional cases where it would be appropriate not to impose a custodial sentence, a sentence of imprisonment for not less than 5 years should be imposed.

[73] For the reasons given I would allow the appeal and set aside the order made by the High Court. In the exercise of the sentencing power that this court is called upon to exercise, I would impose a custodial sentence. Bound by section 73(2) of the Act to impose a term not less than 5 years, I would order that the appellant be imprisoned for a term of 5 years, account being taken of any period of confinement that he has already undergone.

[40] Section 55 Motor Vehicle and Road Traffic Act, 1994
[41] [2003] 3 All ER 40

[74] The appellant's driver's licence was suspended from 30th January 2004 when he was charged and when he pleaded guilty the court imposed disqualification from driving for a period of 2 years. I do not think it is necessary to impose any further disqualification.

Denys Barrow, SC
Justice of Appeal

[75] RAWLINS J. A I have read the judgments of my brothers Gordon, JA and Barrow, JA. I agree with Gordon, JA, for the reasons that he gives, that section 73(2)(a) of the Act infringes section 5 of the Constitution of St. Lucia. I also agree with the sentence that he proposes. In my view, the present case is not a fit one for the imposition of a custodial sentence, particularly given the personal circumstances of Edwards, his guilty plea at the earliest opportunity, his clean record, and the suggestion by the learned trial judge that there might have been contributory negligence.

[76] In the premise, the order of this Court is that the conviction of the appellant, Edwards, is affirmed, but the sentence is varied from 5 years imprisonment to a fine of $4,000.00. The appellant shall pay this fine within 60 days of today's date. In default, he shall be imprisoned for 1 year. Since his licence has been de facto suspended for almost 3 years, the appellant is not disqualified from driving for a further period.

[77] The circumstances of this case are difficult. I share in the sympathy and empathy for the relatives of the deceased, Ms. Fessal.

Rawlins,J.A
Justice of Appeal