

IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(CRIMINAL JURISDICTION)

CRIMINAL CASE NO. 25 of 2007

THE QUEEN

and

DWIGHT CALLWOOD

Appearances: Mr. Terrance Williams, DPP with Miss Tiffany Scatliffe and Mr. Myron Walwyn for the Crown
Mr. Herbert McKenzie for the Accused

2007: October 29th,
November 9th, 14th and 21st

Judgment on Sentencing

(Criminal Law – Sentencing – Manslaughter – Criminal Code 1997 – s. 153 – Conduct Endangering Persons – Merchant Shipping Act 13/2001 – s. 122(2)(a)(iii) – Conduct Endangering Persons – Merchant Shipping Act 13/2001 – s. 122(2)(a)(ii))

[1] Joseph-Olivetti, J:- The Prisoner was found guilty on Friday 9th November 2007 of one count of Manslaughter contrary to section 153 of the Criminal Code 1997 ("the Code") and two counts of Conduct Endangering Persons contrary to Section 122(2)(a)(iii) and 122(2)(b)(ii) of the Merchant Shipping Act 13 of 2001. A sentencing hearing was held on 14th November 2007 and sentencing was deferred.

The Facts

- [2] The Prisoner was the captain of a 38ft C44 Scarab racing boat named "Bad Ass". On Sunday, 26th June 2005, sometime after 3:00 p.m., the prisoner left Cane Garden Bay in his boat bound for Norman Island. His passengers were Mr. Curtis Clark, Mr. Orlando Arthur and his girlfriend Ms. Amanda Emanuel. On the way to Normal Island the Prisoner stopped in Road Town to allow Mr. Clark to get some cash from the sailing vessel "Mandalay" on which he was a guest. During the stop Mr. Clark invited one of the crew members of the "Mandalay", Mr. Linden Boyle, to accompany them.
- [3] On the way to Norman Island they stopped at the Willy T which is a floating bar and restaurant. They then proceeded to Norman Island where they had dinner at "The Bight" restaurant.
- [4] After dinner they then boarded the boat and set out on their return trip to Cane garden Bay. It was about 10:30 p.m. They were seated as follows. Ms. Emanuel sat in the middle seat which was designed for the captain. Mr. Arthur occupied the seat to the left of the captain's seat; Mr. Clark occupied the seat to the right. The Prisoner sat behind Ms. Emanuel on the back rest of her seat while Mr. Boyle sat or lay on the hood of the engines.
- [5] When they set off the Prisoner encountered a problem with one of the engines which was overheating. He eventually repaired it but operated the engines at different RPM's as it was still overheating. They were traveling at

about 40 to 45 miles per hour. After passing the area of Steel Point on the island of Tortola the boat allegedly hit a wave which caused it to leave the water and then to drop back at an angle causing Mr. Boyle, Mr. Arthur and the Prisoner to fall over board. None of the individuals who fell over board were wearing life jackets.

- [6] The Prisoner was able to make it back to the boat but the bodies of Mr. Boyle and Mr. Arthur were never recovered despite intensive searches both by sea, land and air using VISAR, US Coast Guard and other volunteers.
- [7] The boat is licensed to carry only three persons for whom special seats like wells are provided. The boat is also required to carry special life jackets or each passenger, flares, life ring, a VHS and a light. The Prisoner had none of this equipment on board. Further Mr. Arthur being his friend, he was aware that he could not swim.

Mitigation

- [8] Two character witnesses spoke on behalf of the Prisoner – his father Mr. Jenario Callwood and the mother of Ms. Emmanuel, Ms. Arletta Emmanuel. Mr. Callwood testified that the Prisoner is 28 years old, very kind, loving and respectable, that he introduced him to marine matters and that he is his right

hand so to speak in his business. He also spoke of an occasion when the Prisoner rescued him when he was in danger at sea.

- [9] Ms. Emmanuel described the Prisoner as hardworking and responsible and very good with his (he has 5 sons) and hi sister's children. Both were of the view that a custodial sentence 'would be very hard'.
- [10] The Prisoner himself spoke. He said he did not understand what had happened that night but it had changed his life. He expressed concern for his children. He said that not one day goes by when he does not think of Orlando and Boyle and he hopes one day their families would forgive him for their deaths.
- [11] Mr. McKenzie, Learned Counsel for the Prisoner sought leniency. Counsel urged that the mitigating factors outweighed the aggravating factors. He emphasized that the Prisoner assisted in the search even though he was himself, injured, he cooperated fully with all investigations and he was instrumental in getting one of his uncle's boats to return to the site to take part in the search.
- [12] Counsel submitted that there was no evidence that the boat was used for commercial gain, and that he was charged not with traveling at an excessive speed but at an unsafe speed and not even the expert witness called by the Crown, Captain 'Pat' could testify as to what was a safe speed.

[13] With respect to his criminal record, counsel contended that he pleaded guilty to all the charges and that he did so as a gesture of magnanimity as his cousin was the culprit. Counsel asked for a non-custodial sentence.

Crown's Submissions

[14] The Crown submitted that in the absence of real guidelines on manslaughter by gross negligence, the court should follow the guidelines established by the UK case of **R. v. Cooksley**¹ which is a case of Causing Death by Dangerous Driving.

[15] The UK cases of **R. v. Litchfield**² and **R. v. Kite**³ (**Manslaughter**) were also cited as well as the local cases of **R. v. Arjaan Hendrickson** (**Manslaughter**), **R. v. Franklyn Hodge**⁴, **R. v. Wesley Stowe**⁵, **R. v. Enos Aaron**⁶, **R. v. Martin Malone**⁷, **R. v. Jeffrey Rose**⁸, **R. v. Kenneth Taylor**⁹ and **R. v. McDonald Williams**¹⁰ (Causing Death by Dangerous Driving).

[16] The Crown identified the aggravating factors as: (1) the seriousness of the offences; (2) more than one person was killed as a result of the offences; (3) the Prisoner was driving too fast in the circumstances; (4) the Prisoner

¹ [2003] All E.R. 40

² [1988] Crim. L.R. 507

³ [1996] 2 Cr. App. R.

⁴ March 1995

⁵ March 1996

⁶ March 2000

⁷ March/October 2000

⁸ March 2003

⁹ March 2004

¹⁰ October 2005

overloaded the vessel; (5) the Prisoner was in a position where he could not properly control the vessel; (6) the boat was operated without a valid coastal craft licence.

- [17] The only mitigating factor identified by the Crown was that the Prisoner immediately reported the matter to the police.

Submissions on behalf of the Prisoner

- [18] Mr. McKenzie learned counsel for the Prisoner identified the mitigating factors as: (1) his previously good boat driving record; (2) persons on the boat were either good friends or acquaintances; (3) his remorse, and the fact that he testified that he has learnt from the incident; (4) that although injured he participated in the initial search – he went in for help, and returned to the scene promptly to search for the missing persons; (5) he did not take the boat out to demonstrate its speed; (6) he co-operated with the police and the BVI Maritime Authorities throughout the investigations.

Court's Consideration

- [19] The maximum sentence this Court can impose for the offence of Manslaughter is life imprisonment as stipulated by section 153(2) of the Code and that for the offence of Conduct Endangering Persons is a fine not

exceeding ten thousand dollars or imprisonment for a term not exceeding two years or both.

- [20] Punishment is always a matter for the court's discretion having regard to the particular circumstances of the case. I now have to consider what is a just sentence here. Both the Code (Part II) and the Criminal Justice (Alternative sentencing) Act ('the CJAS Act") (Part I) give the Court a wide discretion on sentencing and a wide range of options. The Court, in determining sentence, and in particular alternative sentencing, must have regard to the specific matters stipulated by CJAS Act, section 4 as are relevant and known to the court. For our purposes these factors are:- (a) the circumstances of the offences; (b) the injury, loss or damage resulting from the offence; (c) the degree to which the Prisoner has shown contrition for the offence; (d) the deterrent effect any sentence may have on the Prisoner or other persons; (e) the need to ensure that the Prisoner is adequately punished for the offence; (f) the character, antecedents, age and means of the Prisoner; and (g) any other matter that the court considers appropriate.
- [21] The Court is of the view that this offence of manslaughter having regard to the particular circumstances of this case is most similar to causing death by dangerous driving cases and will be guided by **R. v. Cooksley** as it clearly

superseded **R. V. Boswell** which the Defence relied on. However I hasten to say that the principles do not differ substantially.

- [22] **R. v. Cooksley** makes it abundantly clear that a custodial sentence is invariably warranted even for a first offender. Here I have had regard to all the circumstances and see nothing to take this case outside this general principle.
- [23] The Prisoner as captain of the vessel was responsible for the lives of all those on board. His actions that fatal night can only be described as wanton. He operated his boat without a valid licence, he set out to sea without the required and necessary safety and communications equipment, he overloaded his craft, he allowed Mr. Boyle to take up a position o the hood of the engines at the back of the boat with nothing to hold on to except for the exhaust vents and the ventilation holes in the covers themselves.
- [24] He occupied a position whilst driving which from the demonstration given at the boat by Officer Howe was patently unsafe. It was clear that he did not have proper control of the wheel nor could be reach the controls easily and he was not in a secure and stable position perched at the back rest of the captain's seat behind Ms. Emmanuel. This is illustrated by the fact that he was among the persons who fell overboard. He drove at 40 – 45 mph late at night. I have no doubt that, despite the verdict of the jury on count 1 that he

caused the death of Mr. Arthur as it is obvious from the evidence that Mr. Arthur could not be said to have committed suicide. So I will take that into account as well despite his Counsel's submissions that I should not.

- [25] The territory of the BVI is among the yachting capitals of the world and it is incumbent on those who ply these waters whether for hire or for pleasure to do so with due regard to the safety of their passengers and to other users of the sea. The Prisoner was permitted to operate a racing boat, 20 tons with an output of 80 mph without any formal qualifications as there is no requirement that he had a licence.
- [26] Despite his experience, his answers in cross-examination make it abundantly clear that he did not appreciate what his actions and omissions could result in and the need for him to take every precaution to ensure safety of his boat and that of his passengers. This is an omission which the authorities, it is hoped, would take steps to remedy as what is also clear is that the Prisoner does not accept that his actions or omissions caused the death of the two men. That in itself is frightening as it underscores the level of his understanding as to the duties and obligations of a captain.
- [27] He said, "I still don't understand what happened that night" and the DPP had to literally extract from him the concession that he will never operate a boat in such conditions again.

- [28] I have also taken into account that the Prisoner has shown remorse for the deaths of both men, that one of them, Mr. Arthur was a close friend and that he will suffer always from knowing that he was responsible for his death and the efforts he took to assist in the search and later in the investigations. These are all mitigating factors as his counsel argued. I have also taken into account his record and despite the explanation offered he cannot be treated as a first time offender.
- [29] The court also considered that instances of loss of life or injury at sea are becoming more prevalent in the Territory and that a clear message must be sent to all who enjoy the crystalline waters of the BVI must do so in a responsible manner and with proper regard to the laws and their obligations, both civil and criminal.

Conclusion

- [30] I hereby sentence you, Dwight Callwood to

Rita Joseph Olivetti
High Court Judge
British Virgin Islands