

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. 27 OF 2011
BETWEEN:

THE QUEEN

AND

WENDELL VARLACK

APPEARANCES:

Jude I. Hanley of the Director of Prosecutions' Office for the Crown
Patrick Thompson of McTodman and Co. for the Prisoner

2012: March 15, 22
April 23

JUDGMENT ON SENTENCING

(Criminal Law – Sentencing – Causing Death by Dangerous Driving – Road Traffic Act, Cap 218
Section 25 – Principles to be considered – Custodial Sentence Imposed)

[1] **Joseph-Olivetti J:** On the evening of April 13, 2010 a young woman, Tofficah Thompson was struck down by Wendell Varlack's motor vehicle driven by him whilst she was crossing the road in the vicinity of the H. Lavity Stoutt Community College. She was severely injured and eventually succumbed to her injuries. On February 16, 2012, Varlack was convicted after trial by jury of causing death by dangerous driving and he was released on bail pending sentencing. A sentencing hearing was held on March 9, 2012 and sentence was pronounced on March 22. Varlack was sentenced to 18 months imprisonment. An outline of my reasons was given then and I now give my comprehensive reasons as I indicated I would.

The Facts

[2] The Crown's case which the jury accepted can be summarised as follows. On the evening of April 13, 2010, Tofficah Thompson, a student at the H. Lavity Stoutt Community College was struck by a taxi van TX 479 driven by Mr. Wendell Varlack along the Paraquita Bay Public Road. Tofficah was hit in the process of crossing the road. Three vehicles travelling in opposite directions had stopped to facilitate her. When she got to the middle of the road, Varlack, driving his vehicle from west to east, passed two of the stationary vehicles without even slowing down

and struck her. He was oblivious that he had hit her. After the collision, Tofficah was carried on the hood of the vehicle for some 193 feet, and then rolled off. Varlack's vehicle finally came to a stop shortly after that.

- [3] Tofficah was attended to by emergency medical technicians at the site and then she was taken to the Peebles Hospital where she remained unconscious until her death on 30 April. Her injuries were horrific. She was brought to the A&E Department at 8:45 p.m. in an unconscious state demonstrating signs of severe brain contusion. She sustained a 6 cm stellate deep laceration in the right parietal scalp area which was swollen and bleeding actively, a compound fracture of the distal phalanx of the left index finger and partial avulsion of the nail, abrasions to the left middle finger, left knee, left foot, left great and second toes, right foot, right knee, abrasions to right lower chest and upper abdomen.
- [4] CT scans of the pelvis showed comminuted fractures of the left hemi-pelvis and left sacrum. Brain CT scans showed intracranial haemorrhage with acute brain swelling of the left parietal lobe. A repeat within two days showed extensive generalized brain swelling and brain contusion involving the left cerebral hemisphere and the brain stem. She was declared brain dead on 20 April but kept alive by ventilator. She was pronounced dead on 30 April. (Her parents, not surprisingly, were reluctant to turn off the ventilator.)
- [5] Two overseas neurologists were consulted and concurred with the findings and the diagnosis of irreversible brain death of the physicians at the Peebles Hospital. Primary cause of death was severe cerebral contusion, subarachnoid haemorrhage of the left parietal lobe with diffused axonal brain injury and brain death secondary to road traffic accident.
- [6] Several witnesses, including police officer Gilbert testified at trial that they noticed Varlack staggering and that he smelt of alcohol. As a result Officer Gilbert asked Varlack to undergo a blood and urine analysis and he complied. This was in accordance with section 26(1) of the Road Traffic Act, Cap 218. Although the tests were done and results formulated no report of the results was made available at trial. Dr. Corinthia Dupuis, the anatomical pathologist, testified that she received the samples, tested and recorded the results and kept them on file. She did not prepare a formal report at the time. Subsequently when the Police requested her to do so she was unable to locate the results. We did not hear of any searches or investigations having been made to locate the missing results. Ms. Dupuis herself had by that time left the employ of the BVI Health Services Authority.

Defence Submissions

- [7] The defence called one witness, Mrs. Dancia Penn-Sallah and Varlack himself spoke briefly before he was overcome with emotion and Mr. Thompson, learned Counsel for the Defence completed his written speech for him.
- [8] Mr. Thompson in essence submitted that his client was 55 years old, a taxi driver of many years experience who had driven persons safely without incident; that Varlack had an unblemished record and enjoyed a good reputation in the community as borne out by Mrs. Penn-Sallah, that he was a family man of many responsibilities. In particular he played a major role in caring for his aged parent and that he was remorseful. In addition that he had health problems.
- [9] Mr. Thompson stressed that what happened was merely an error of judgment on the part of his client, a defence in my view which was rightly rejected by the Jury. To my mind if Varlack's driving that night can be classed as an error in judgment then it must be considered a monumental and reckless one indeed.
- [10] Counsel referred to several local and regional authorities including **Q. v. Markenzee Hunte SLUHCR2009/0018** where the defendant pleaded guilty and was sentenced to a fine of \$7,500 ECD and 3 years imprisonment in default.
- [11] Mr. Thompson also urged the court to adopt the approach of the court in **R. v. O'Keefe [1969] 2 Q.B. 29**, (admittedly not a death by dangerous driving case) in which the appellant pleaded guilty to various charges and was given a 12 month sentence suspended for 3 years. The court held that sentencing courts must first consider and dismiss all non-custodial penalties (fine, probation, etc.) as inappropriate, then decide that a sentence of imprisonment had to be passed, fix the length of that sentence, and then and only then go on to ask whether the sentence of imprisonment could legitimately be suspended in the particular circumstances.
- [12] Counsel in brief submitted that having regard to all the circumstances and to the local and regional trend gleaned from the authorities cited that a fine of \$7,500.00 or a suspended sentence would be just punishment.

Courts' Considerations

- [13] I have considered the evidence given and the submissions made on behalf of Varlack, the Crown's very helpful sentencing guidelines and the victim impact statements by Mrs. Yvonne Stoutt, Tofficah's mother and her boyfriend Mr. Scatliffe who witnessed the tragic incident.
- [14] The maximum penalty I can impose for this offence is 5 years imprisonment. See section 25(1) of Cap 218 of the Road Traffic Act, Revised Edition of the Laws of the Virgin Islands enacted between 1955 and 1984 which states:-
- "Any person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be liable on conviction on indictment to imprisonment for a term not exceeding five years."
- [15] The court, however, has a discretion in sentencing as its task is to impose a sentence which is just having regard to the well established aims of sentencing and to the particular circumstances of the case and the offender. The primary factor is to first consider the seriousness of the offence committed. That is determined by assessing the culpability of the offender and balance it against the harm caused or risk being caused by the offence. The seriousness of the offence is not to be diminished; the punishment should be commensurate with the gravity of the offence. And where sentencing guidelines exist the court is to have regard to those guidelines.
- [16] Now to the sentencing guidelines. Both counsel agree that as no guidelines have been laid down to date by the Court of Appeal that we are to be guided by the English position as is the norm where our procedure is silent. The current position in England is enshrined in **Robert Charles Cooksley et al v Regina [2003] 996 EWCA Crim. 996**. And I bear in mind that the maximum penalty was increased from 5 years to 10 years imprisonment in 1993.
- [17] In **Cooksley**, the court held that the primary consideration that must be taken into account in determining sentence must always be the culpability of the offender and that the effects of the offence on the family of the deceased, the impact on the family is a matter that the courts can and should take into account. See Lord Woolfe, CJ-

"Where death does result, often the effects of the offence will cause grave distress to the family of the deceased. The impact on the family is a matter that the courts can and should take into account. However, as was pointed out by Lord Taylor CJ in **Attorney General's References (Nos. 14 and 24 of 1993) (Shepherd and Wernet)(1994) 15 Cr. App.R.(S) 640** at p. 644- We wish to stress that human life cannot be restored, nor can its loss be measured by the length of a prison sentence. We recognise that no term of months or years imposed on the offender can reconcile the family of a deceased victim to their loss, now will it cure their anguish."The court emphasised that motor vehicles can be lethal if they are not driven properly thus drivers must know that if as a result of their dangerous driving a person is killed, no matter what the mitigating circumstances, normally only a custodial sentence will be imposed."

[18] And Lord Woolfe, CJ emphasised at para 11-

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

Aggravating Factors

[19] I now turn to consider the aggravating factors. Ms. Faulkner, Counsel for the Crown in the main has correctly identified them. I find that Varlack made an inappropriate and dangerous attempt at passing vehicles which had stopped in front of him; he had no regard to the fact that a vehicle travelling in the opposite direction had also stopped; he failed to have any or any proper regard to vulnerable road users who were or might be expected to be on the road; he was travelling at an excessive speed in all the circumstances albeit he was within the official speed limit having regard to the fact that he was in the vicinity of a college, that it was late

evening and the lighting conditions were poor and he was unable to stop on impact; moreover, he was driving when he was mentally or physically incapacitated (clear inference to be drawn from the evidence of incapacity of some sort); he was unaware that he had struck a pedestrian, he did not even know that he carried the young woman on the bonnet of his car before she fell off. In fact he travelled some considerable distance before he stopped.

[20] The court notes that Mr. Varlack was an experienced taxi driver and he, more than anyone, ought to have been aware of the dangers posed by motor vehicles which are driven in an inappropriate manner. In addition, he resides at East End and it can be properly inferred that he traversed this route often as it is the major road from East End to Road Town and was thoroughly familiar with it and the traffic that could be expected to be encountered along the route. It is also of moment that the damage to his vehicle was extensive reflecting the fact that he did not slow down to avoid impact.

Mitigating Factors

[21] Of mitigating factors I find that Varlack was of unblemished character, a first time offender with a prior good driving record and that he seemed to be genuinely remorseful.

[22] I have taken into account his age, his family situation and his health concerns. His ailments are not such that would prevent him from having adequate medical attention if incarcerated.

[23] I have considered also the victim impact statements. Clearly, Tofficah was a gifted, caring young woman of 22 years who was the apple of her father's eyes and a beloved member of her family. Her mother explained that she assisted in the community and was also an athlete. Her family has suffered untold loss which we can do nothing to assuage.

[24] Taking all these factors into consideration I find that Varlack had a high level of culpability and that in all the circumstances a custodial sentence is called for.

[25] The guidelines in Cooksley were applied by this court in **R v McDonald Williams (BVI Crim. No. 21 of 2005 (unrep.))**. McDonald was found guilty of causing death by dangerous driving and a 12 month sentence of imprisonment was imposed. I noted at para. 59 of that judgment-

“How many more deaths are we willing to tolerate? In my view one more is too many. To my mind the imposition of a fine cannot have the desired impact... in these

circumstances only a custodial sentence would reflect a fitting punishment having regard to the magnitude of the harm caused and serve to deter others.”

[26] The court is still more so than ever concerned to bring home to drivers the need to take the utmost care on the roads especially as the number of vehicles has increased dramatically in the Territory over the last five years as can be seen from the traffic figures published by the Traffic Department. A motor vehicle is a lethal weapon if not driven properly, the right to life is protected by the Constitution and Government has a duty to protect the lives of its residents and the human race, despite gigantic strides in science has not to date been able to create human life or to resurrect the dead. Therefore, it must be emphasised *ad nauseum* if needs be that the taking of a human life by dangerous driving is a serious occurrence and that loss of liberty can normally be expected by any driver found culpable of this offence. And perhaps too the Government may wish to look at the penalties mandated to ensure that they are of sufficient deterrent effect and adequately reflect the concerns of the public.

Conclusion

[27] For the foregoing reasons a sentence of 18 months imprisonment is imposed on Varlack; time spent on remand to be taken into account in computing his sentence. I note that he was disqualified from driving since the date of the offence and will impose no further disqualification.

Postscript

[28] Before I close I feel constrained to mention several pertinent matters. One is the apparent failure of the authorities to carry out investigations into the missing files to ascertain what happened to the test results of Varlack. Files do not simply grow feet and abscond. Two, the need for more street lights and lighted pedestrian crossings in the vicinity of the college to protect the flowers of the Territory in whom we put such hope for the future. Three, a note of concern was raised by Tofficah's mother. She said that she and Tofficah's father were left distraught as they were not allowed to see their daughter, save for the mother's identification of her when Tofficah was brought to the hospital. How painful it must have been to be designated to just sit outside your child's hospital room door watching her from a distance and not being allowed to communicate with her. Both parents, for 17 days not able to touch their child, providing some comfort for themselves and maybe even some stimuli for her, a chance taken

away that can never be retrieved. Was this situation medically necessary? Maybe the personnel at Peebles Hospital may wish to revisit that policy.

[29] And finally, my highest commendation to the eyewitness, Mr. Forteau who acted as a good Samaritan in ensuring that the young woman's body was protected whilst it lay on the road awaiting the emergency medical team and his willingness to assist the Police thereafter. I remarked his surprise at trial that the other driver who had stopped in the westbound lane had not attended to give evidence. Indeed that person had driven away from the scene before the arrival of the medics and had apparently not come forward to assist at the site or afterwards. Mr. Forteau knows who he is and so does that person and one can only hope that no member of his family who is in need of aid will receive the same help he meted out to a fellow human being in time of dire need.

.....
Justice Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands