

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

SAINT LUCIA

CRIMINAL CASE NO. SLUCRD 2011/0021

BETWEEN:

THE QUEEN

Claimant

AND

ROMAULD CLARKE

Defendant

Appearances:

Mr. Alberton Richelieu Counsel for the Defendant
Mr. Giovanni James Crown Counsel for the Crown

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2012: April 25
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JUDGMENT ON SENTENCING

[1]. **CUMBERBATCH, J. :** On the 9th April 2005 at around 11.30 am the defendant was the driver of motor car PB135. Whilst travelling along Thomazo Road in the Quarter of Dennery the said car was involved in an accident as a result of which one Dominic Mungroo lost his life. On the 16th September 2011 the defendant was indicted by the Director of Public Prosecutions for the offence of causing death by dangerous driving in that he on the said day drove motor vehicle PB135 along the Thomazo road in a manner dangerous to the public thereby causing the death of Dominic Mungroo (the deceased) contrary to section 73 91) (a) of the Motor Vehicles and Road Traffic Act

No. 10 of 2003 (the Act). He was also indicted for the second count of dangerous driving in that on the said day he drove the said motor vehicle along the Thomazo Road in a dangerous manner. On the 16th January 2012 at his arraignment the defendant pleaded guilty to the offence of causing death by dangerous driving.

[2] **THE FACTS**

On the said date the defendant was driving his motor car along the Thomazo Road. Whilst driving he was listening to cricket on his radio. At some stage of his journey the defendant fell asleep at the wheel. His car left the road and struck the deceased who was standing near to the entrance of a shop owned by one Cynthia Paul some 8 to 10 feet off the road. The deceased died as a result of injuries received in the accident. The defendant was charged with the offence to which he has pleaded guilty on the 13th April 2005 and a preliminary inquiry was held. On the 2nd October 2007 the defendant was committed to stand trial in the High Court for the offence charged.

[3] The court ordered a pre-sentence report which was prepared with the usual thoroughness and from it the court learnt that the defendant who at that time was aged 45 went to bed at around 1.30am that morning and awoke at around 5.00am. He was not known by members of the community to be a consumer of strong alcoholic drinks and the general consensus is that he is a person of good character. I shall return to other aspects of this report later in this judgment.

[4] **THE HEARING**

At the sentencing hearing Mr. Richelieu for the defendant told the court of his client's good character as is evidenced in the Pre-sentencing report. He also submitted that the defendant's remorse is genuine as he breaks into tears whenever he spoke of the incident. The defendant was very helpful to the family of the deceased after the incident by providing provisions for their use at

the funeral. He was also supportive of the family when their house was burnt in that he provided clothing and other items for their use and benefit. Counsel concludes by submitting that the defendant poses no risk to the community.

[5] Mr. Richelieu contends that there is only one aggravating factor herein that is that the defendant fell asleep whilst driving on that fateful day. Counsel however submits that the defendant is not known to be a heavy drinker of alcoholic beverages, nor is there any evidence that he had attended a party the night before the accident. He further contends the following to be the mitigating factors herein:

- (1) The Defendant has no previous convictions;
- (2) The Defendant's good character as alluded to the Probation Report;
- (3) The Defendant's plea of guilty at first instance, obviating the need for a trial
- (4) The genuine remorse on the Defendant;
- (5) The Victim Impact, and the fact that the deceased's parents spoke so highly of the Defendant.

[6] Counsel for the defendant relies on the dictum of Lord Woolf in R v Cooksley et al (2003) EWCA Crim 996 at paragraph 1 in support of his submissions as to how the court should consider the aggravating and mitigating factors in the sentencing process. I find that that dictum is worth repeating here:

"This offence causes particular difficulty for sentencers. By definition, it is one which always gives rise to extremely serious harm: the death of at least one victim (and in some cases serious injury to others). Understandably this often leads to calls from victims' families, and from the wider community, for tough sentencing.

On the other hand, an offender sentenced for causing death by dangerous driving did not intend to cause death or serious injury, even in the extreme case where he or she deliberately drove for a prolonged period with no regard for safety of others. The Panel believes that new guidelines will help sentencers to strike an appropriate balance between the level of culpability of the offender and the magnitude of the harm resulting from the offence, including the number of people killed, was relevant to the sentence, but that the primary consideration must always be the culpability of the offender. That was supported by the majority of the respondents to our consultation paper, and it remains our view. Two of the detailed points in the panel's advice deserve particular mention. One is the significance of multiple deaths. Although the number of people killed is often a matter of chance, there are (as some of our consultees pointed out to us) cases where the offender has knowingly put more than one person at risk, or where the occurrence of multiple deaths was reasonably foreseeable. In such cases, we recommend that the occurrence of more than one death should be treated as a more seriously aggravating factor. The second point is the inclusion of "driving when knowingly deprived of adequate sleep or rest" in the list of factors that would aggravate the seriousness of an offence. Under previous sentencing guidelines, briefly dozing at the wheel: was seen an example of a "momentary dangerous error of judgment", indicating a less serious offence. The panel's view (again supported by consultees) is that falling asleep is more likely to aggravate than mitigate the seriousness of an offence, because drivers do not normally fall asleep without warning, and proper course of action for motorist who feels drowsy is to stop and rest."

[7] Counsel submits that in the circumstances the defendant's conduct towards the family of the deceased has led them to believe and accept that he is remorseful and that the accident is not his fault. On the question of the effect of the impact on the family of the victim on sentencing, counsel submits for the court's attention the dictum of Hughes LJ in R v Odedara (2009) EWCA 2828;

"The impact on the bereaved is the same whether they are parents, spouses, children or friends. Such people cope as they can with a sudden and unexpected loss of a loved one. Those who have to cope with this kind of shattering blow may well be tempted to think, at least at the height of their loss, that imprisonment will provide some kind of solace but it rarely does and it is not its principal purpose. No sentence, can bring back the departed, no sentence can a price on life."

[8] In concluding, Mr. Richelieu has urged the court to find that the defendant is a man of good character with no previous convictions. He also submits that the defendant's driver's licence has been suspended for some 6 years pending the hearing and determination of this matter. He describes his client as being a victim of human frailty which overcame his belief of his capacity to overcome tiredness. In the circumstances counsel submits that his client should be spared a custodial sentence and be placed on probation with his driver's licence restored to him.

[9] **THE LAW**

The defendant has pleaded guilty to contravening section 73 (1) (a) of the Act. Section 73 (2) of the Act provides thus:

A person who contravenes subsection (1)(a), commits an offence and is liable, on conviction on indictment as follows:-

(a) To imprisonment for a term not less than 5 years and not exceeding 15 years; and

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

[10] Section 106 of the Act provides as follows:

Disqualification from driving upon conviction:

- (1) If a person is convicted of a traffic offence or an offence under the regulations, the Court may consider the driving record of the person and disqualify the person from driving a motor vehicle or trailer for a definite period of time, if the Court considers that the facts of the case or the person's driving record or both the facts of the case and his or her driving record when taken together, justify the qualification.
- (2) If a term of imprisonment is imposed on conviction, the period of disqualification commences from the day following the end of the term of imprisonment.
- (3) The Clerk of the Court shall notify the Licensing Authority of the disqualification in writing or otherwise.

[11] One interpretation of the provisions of section 73 (2) of the Act is that the Legislature has enacted a mandatory minimum sentence of five (5) years imprisonment for a defendant who commits an offence contrary to section 73 (1)(a) of the Act. Mr. Richelieu has however submitted that his client should benefit from a non-custodial sentence. Crown counsel Mr. James has been kind enough to provide the court with the decision of the Court of Appeal in *Thelbert Edwards v The Queen* criminal appeal No. 3 of 2006. In that decision Gordon JA, whose decision represented the decision of the majority of the court, considered the provisions of section 73 (2)(a) of the Act and found that section to be in breach of section 5 of the constitution in that the mandatory minimum

sentence of five (5) years imprisonment for the offence of causing death by dangerous driving was inhuman and degrading punishment. However at paragraph 45 of his decision Gordon JA opined thus:

“Although I have found the minimum sentence of five (5) 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 ten (10) years under the 1994 Motor Vehicles and Road Traffic Act to its present maximum of fifteen (15) 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”.

[12] **FINDINGS**

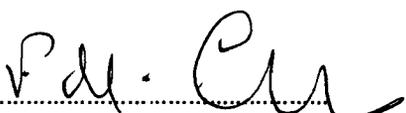
I accept the aggravating and mitigating factors as stated by Mr. Richelieu, save and except that I would include the death of the deceased as another aggravating factor. In seeking to strike an appropriate balance between the level of culpability of the defendant and the magnitude of harm resulting from the offence which has happened in this case in which life has been lost, I find the dictum of Lord Woolf in R v Cooksley et al supra to be most instructive. Lord Woolf opined that drivers do not normally fall asleep without warning and the proper course of action for a motorist who feels drowsy is to stop and rest.

- [13] The defendant was quick to state at the time of the accident that he had fallen asleep. There is no evidence before me that the defendant suffered from any health issue which caused him to fall asleep spontaneously. In the absence thereof, I find that the defendant while driving did feel sleepy but nevertheless persisted in continuing his journey with devastating consequences. The defendant refused and/or failed to take into consideration the fact that he was up until around 1.30 am that fateful morning and should not have stretched the limits of his endurance by continuing to drive instead of stopping for a rest.
- [14] The court finds that the defendant is indeed remorseful for this unfortunate incident. This view is echoed by the parents of the deceased who stated in the pre-sentence report that they have no ill feelings towards the defendant and that they in no way blame him for what has happened. They go on to state that they believe him to be truly remorseful and would not want him to receive a custodial sentence. I have also considered in the defendant's favor his hitherto clean criminal record and the glowing comments made about him by members of the community in which he resides. I find his assistance to the family of the deceased when they lost their home through fire to be exemplary.
- [15] Gordon JA in *Thelbert Edwards v The Queen* supra that unless good reason or special circumstances exist, an offender convicted of causing death by dangerous driving must expect a custodial sentence.
- [16] I have balanced the defendant's culpability in this incident with the result. Though I find that the defendant was or ought to have been aware that he was sleepy there is no evidence that sleep was induced by his involvement in conduct which was either unlawful or considered to be morally unacceptable sufficiently prior to this unfortunate incident. In this regard I have considered the fact

that the defendant is not known for being a consumer of hard liquor and that he does not patronize the local rum shop.

[17] In the circumstances I find that this case reaches the threshold of good reason or special circumstances as enunciated by Gordon JA in the Thelbert Edwards decision aforesaid. I am comforted in that view by the comments of the parents of the deceased who stated that they do not wish to see the defendant sent to prison. The court therefore will not impose a custodial sentence against the defendant.

[18] The defendant is fined \$5000.00 or three (3) years imprisonment. The fine shall be paid within six (6) months of the date hereof. The defendant's driver's licence has been suspended for the past seven (7) years whilst his trial reached a stage of finality. I find the delay in the trial process through no fault of his own and in all the circumstances of this case than to continue this suspension will be unjustified. The defendant's driver's licence will be restored to him forthwith.


FRANCIS M. CUMBERBATCH
HIGH COURT JUDGE