EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CRIMINAL)
A.D. 2013

CLAIM NO. : SKBHCR 2013/0025

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

KIMO LIBURD

Appearances:
Mr. O'Neil Simpson for the Crown
Ms. Marsha Henderson for the Defendant

2013: November 14
December 6

Sentence – Causing Death by Dangerous Driving – Applications Principles – Culpability of the Offender the Dominant Factor - Mitigating and Aggravating factors – Shifting of Blame on Others for death of child – Whether certain aggravating factors can neutralize good character - Whether appropriate sentence a custodial sentence.

Suspended Sentence – Partly suspended sentence – Not to be considered a soft alternative - Only Appropriate where appropriate sentence is a custodial sentence falling within the statutory range – Applicable where serving a small part of custodial sentence effectively deters first time offenders.

On the night of the 19th February 2012, the defendant Kimo Liburd speeding in a dangerous manner on the Kim Collins Highway careened out of control and slammed into an oncoming vehicle causing the death of a small child sleeping in the backseat of that other vehicle. On his trial for the offence of causing death by dangerous driving, He sought to raise the defence of mechanical defect and that the death of the child was due to the parents' failure to secure their child in a car seat or seat belt. The jury rejected these propositions and convicted him. At his sentencing hearing, a plea was made on his behalf that he should be given a non-custodial sentence, or in the alternative any custodial sentence imposed should be suspended.

Held:

1. This was an appropriate case for a custodial sentence as this was a high-speed high-impact act of dangerous driving, where the defendant was highly culpable. Further, he lost the full benefit of the mitigating effect of his good character for his continuous shifting of the blame for the death of the child on the parents. In the circumstances the appropriate sentence is a one-year sentence of imprisonment. His licence will also be revoked for a period of five year. Should he wish to obtain a driver's licence again, he will be required to take an extended test.

Applied: R v Cooksley et al [2003] Crim. 996; Principles found at Blackstone Criminal Practice and Procedure 2008 edn. paragraph 32-9 at page 2809; Thelbert Edwards v R Criminal Appeal No. 3 of 2006 (St. Lucia) (unreported)

Considered: R v Jesse Charles Criminal Case No. 8 of 2003 St. Lucia (unreported); Markenzee S. Hunte Criminal Case No. 18 of 2009 St. Lucia (unreported); R v Wendell Varrick Criminal Case No. 27 of 2011 British Virgin Islands (unreported); Desmond Baptiste v R Criminal Appeal No. 8 of 2003 St. Vincent and the Grenadines; Director of Public Prosecutions v Elvis Richardson Criminal Case No. 25 of 2013

2. A partly suspended sentence is especially applicable to serious first time offenders or first time prisoners who are bound to have to serve some time in prison, but who may well be effectively deterred by eventually serving only a small part of even the minimum sentence appropriate to the offence. This is its principal role. This was a case in which a one-year custodial sentence is the sentence fixed by this court, but it is appropriate, having regard to the career prospects of the defendant, to suspend a part of the sentence.

Applied: Section 11 of the Alternative Sentencing Powers Act, Cap. 320; Dicta of Lord Lane CJ in R v Clarke [1982] 3 All ER 232 at pages at 236.

Considered: R v Brannigan (Kevin) 2013 WL 3994991 Court of Appeal (Northen Ireland); R v Blenkiron (Jason) 2012 WL 4808725 Court of Appeal (Criminal Division); Director of Public Prosecutions v Elvis Richardson Criminal Case No. 25 of 2013

Per Curiam

A Probation Officer preparing a Social Inquiry Report for sentencing purposes, has a duty to be fair not only to the defendant but also to the victim and the community. It is recommended that they not only interview persons identified by the defendants, but they also find persons within the community where that person lives, in an effort to gather independent information on the defendant. Further they must properly identify persons who they have interviewed in their report, so that the process can be fair and transparent allowing the defendant, if he wishes, to have a reasonable opportunity to challenge any information or findings they might make.

JUDGMENT

[1] RAMDHANI J (Ag.) – A young couple with their sleeping two year-old daughter in the back seat of their car was driving along the Kim Collins Highway at about 8:00 p.m. on the 19th February 2012. They were on their way to church. Gospel music was on the radio, and they were discussing their child's birthday that was four days away. This peace, tranquility and the joy of young life was not to last. With hardly any warning, a furiously speeding vehicle coming in the opposite direction careened out of control leaving its lane flying into the path of their car, smashing almost head-on with their vehicle slamming it 26 feet backwards and sideways. The mother of the child, did not know what had happened, so sudden and unexpected was this collision. The father, who barely had about three seconds to see the speeding car, hardly seemed to know what had happened immediately after the disaster. Their sleeping daughter at the back, it seemed, never awoke from her sleep. She died later at the hospital as a result of the injuries suffered from the accident.

[2] The other vehicle was PA 1436 and was being driven by the defendant, 29 year-old Kimo Liburd. His vehicle was totaled from the collision. The backdoor of his hatchback vehicle flew off on impact and ended up 42 feet away from the point of impact. He was relatively unhurt from the collision.

[3] He was charged with the offence of causing death by dangerous driving and when his matter came on for trial he pleaded not guilty. He attempted to claim that it was no fault of his own, that he had simply overtaken another vehicle and while he was traveling above the speed limit, for some reason unknown to him his vehicle started to vibrate and then when he applied his brakes, the vehicle went out of control. Amazingly in his defence, he made a lot of the fact that the couple were at fault for the death of their child, as they had failed to properly secure her in the car with any car seat or seat belt. This theme continued to play out in this trial to the very end. The trial lasted for a few days and he was found guilty as charged.

Mitigation and Social Inquiry Report

[4] A Social Inquiry Report was ordered which was presented to the Court on the 7th November 2013 by Ms. Trevicia Clarke, Probation Officer. This Report shows that the defendant is the second of six children, but grew mostly with his stepfather who was a disciplinarian. In his youth the defendant moved around a bit but managed to complete not only high school passing five subjects at CXC, but also received a credit at the Clarence Fitzroy Byrant College for Mechanical Technology and Vehicle Technology.

[5] He began working at a very young age whilst still attending school, and had a number of jobs including one at Covaro at Port Zante in the quarry greasing the vehicles. He was also employed with an auto rental business where he was responsible for installing sound systems in vehicles. In 2003 he started to work at the St. Kitts Marriot in Frigate Bay as a dishwasher. He was promoted a number of times and by October 2010 he was a Front Desk Manager at the Marriot; he still holds this job.

[6] One of the curious things arising from the Report was that one of the persons interviewed, a Ms. Shirley Williams, stated that the defendant has a passion for cars and car racing. When questioned about this by the Court, the Probation Officer attempted to resile from the latter part of this statement. The Court considered that this was a most startling reaction. Probation Officers must take their work seriously, and not make light of anything that is told to them. They are not there to simply write down what is said to them by persons identified by defendants who are to be sentenced. When they prepare these types of reports for the Courts, they have a duty to be fair not only to the defendant but also to the victim and the community. It is recommended that they not only interview persons identified by the defendants, but they should also find persons from the community in which the defendant lives to gather independent information on the defendant. Further they must properly identify persons who they have interviewed in their report, so that the process can be fair and transparent allowing the defendant a reasonable opportunity to challenge any information or findings they might make.

[7] That being said, today the defendant is presented to the court as a young man who is hard working without any previous convictions.

[8] By way of mitigation a number of witnesses gave evidence on his behalf. Two of his co-workers from the Marriot, Mr. Ashmo Dorsett and Ms. Shubashnami Persaud spoke of his character. They had good things to say of him, of his hard working nature and his ability to take charge and be helpful to others. Mr. Dorsett states that the defendant has been like a teacher to him. Ms. Persaud states that he is a key person and they miss him. Ms. Sylvia Jones, a retiree who has made St. Kitts her home also spoke in good terms of him. She stated that he assisted her quite a lot in settling in St. Kitts. She also mentioned that other persons who had stayed at the Marriot had sent letters on the defendant's behalf to be considered as part of the sentencing hearing. (They were considered.)

[9] The defendant through his attorney has requested that having regard to the mitigating circumstances and precedent, a non-custodial sentence should be imposed or in the alternative if one is to be imposed, the court exercises its discretion under the Alternative Sentencing Powers Act, Chapter 3:20, and instead impose a suspended sentence.

[10] In this case the prosecution has properly left it to the court to determine sentence and has simply provided the court with helpful material on the relevant principles relating to sentence.

The approach to be taken by the Court

[11] I have considered the plea in mitigation by Ms. Henderson for the defendant, the evidence of the three character witnesses, the Social Inquiry Report, as well as the Crown's submissions.

[12] As in Elvis Richardson,[1] the prosecution has also presented this Court with statistics showing the number of traffic accidents over the last several years inclusive of data relating to accidents resulting in serious injuries and death. This evidence was admitted by consent and it was found in a Report of Inspector Carl Caines of the Traffic Department. He provides statistics for the last five years. I set these out in that case. It is relevant to set them out here again. In 2009, there were 1,111 traffic accidents with 38 cases involving serious injuries and four deaths. In 2010, the number increased to 1254 traffic accidents with 69 cases of serious injuries and six deaths. In 2011, the number of traffic accidents went down to 1199, with 35 cases of serious injuries; deaths also went down to two this year. In 2012, the number of total traffic accidents was 1083 with 27 cases of serious injuries and four deaths. So far this year there have been 884 traffic accidents with 21 cases of serious injuries and already four deaths for the year.

[13] I now turn to the penalty that the court can impose for this offence. Under section 50(1) of the Road Traffic Act, the court is empowered to impose a maximum of 5 years imprisonment for this offence. The starting point in approaching any sentence the court is reminded of the aim of sentencing, these being retribution, deterrence, prevention and rehabilitation.[2] In embarking on this exercise, the court must make a determination as to the seriousness of the offence, and specifically, where on the scale of seriousness, this particular offence falls.

[14] As I have noted in Elvis Richardson the Court is convinced that this is a serious offence. This is an offence that is proven by fault, which does not have to reach the threshold of intention to drive dangerously. Parliament has set out the standard that in determining what would be expected of and obvious to a competent and careful driver regard must be not only be to the driving itself, but also 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. These are matters which must be looked at objectively.

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[1] Criminal Case No. 25 of 2013
[2] Desmond Baptiste v R Criminal Appeal No. 8 of 2003 (SVG)

[15] With regard to the issue of fault, it is appropriate to refer to the learning found in Cooksley et al where the English Court of Appeal made the following points:

> *"i) Although the offence is one which does not require an intention to drive dangerously or an intention to injure, because before an offender can be convicted of dangerous driving, his driving has to fall 'far below' the standard of driving that would be expected of a competent and careful driver and the driving must be such that it would be obvious to the same competent and careful driver that driving in that way would be dangerous, it will usually be obvious to the offender that the driving was dangerous and he therefore deserves to be punished accordingly."*
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> *ii) In view of the much heavier sentence which can be imposed where death results as compared with those cases where death does not result, it is clear that Parliament regarded the consequences if the dangerous driving as being a relevant sentencing consideration so that if death does result this in itself can justify a heavier sentence than could be imposed for a case where death does not result.*
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> *iii) 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 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 (Peter James Shepherd, Robert Stuart Wernet) [1994] 15 CAR (S) 640 at p644:*
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> > *"We wish to stress that human life cannot be restored, not can its loss be measured by the length of the prison sentence. We recognize that no term of months or years impose don the offender can reconcile the family of a deceased victim to their loss, nor will it cure their anguish."*
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> *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."*

[16] These are the guiding principles that the courts of England have adopted. The courts of the Eastern Caribbean States have been applying these principles in these types of cases. This court agrees that these principles are applicable in this case.

[17] In determining how serious is the particular offence the key problem for the sentencing court, is the tension between the outcome of the offence and the degree of the offender's culpability. Whilst is accepted that causing death is invariably a serious crime, culpability of the offender 'must be the dominant factor when assessing as precisely as possible just where in the level of serious crimes the particular offence comes'.

[18] In assessing culpability, it is therefore important to determine what are the aggravating and mitigating factors in any case. In considering these factors it has been pointed out that these need to be looked at carefully and it must be 'appreciated that the significance of the factors can differ. There can be cases with three or more aggravating factors, which are not as serious as other cases with one serious aggravating factor.

[19] Turning to the decision of this region, it is useful to first consider Thelbert Edwards v R[3] in which the Court of Appeal made reference to the kinds of sentences that were imposed by the courts in St. Lucia prior to that case. Gordon JA stated at paragraph 31:

> *"Until this person 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 clearly be understood that I do endorse a custodial sentence in appropriate circumstances for causing death by dangerous driving."*

[20] Arguably, this appears to be a statement that has not accepted the English starting position, that in the 'normal case' a custodial sentence would apply. But it should be noted that Thelbert Edwards itself broke the record of non-custodial sentences for this type of offences. By a majority the Court of Appeal considered that instead of the mandatory minimum of 5 years, an appropriate sentence was a one-year imprisonment. In this case the accident occurred just a bit before 7:00 a.m. when the driver was rushing to work for 7:00 a.m. He was driving at about 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

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[3] Criminal Appeal No. 3 of 2006 (St. Lucia) (unreported)

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.' There was a clear line of vision for 641 feet and where the accident occurred, the road was about 22 feet wide. The point of impact was 79 feet from where the point of impact began and the vehicle stopped 56 feet beyond the point of impact.' It is noted that in St. Lucia, the maximum term which could have been granted is 15 years imprisonment.

[21] Following Thelbert Edwards in St. Lucia is the case of R v Jesse Charles[4] in which the defendant after leaving a nightclub at 3:00 a.m. had fallen asleep while driving and as a result the car ran off the road and collided with a wall. The defendant's friend who was a passenger of the car, died as a result. There was no evidence of alcohol consumption but he fell asleep clearly because he had been deprived of sleep. The Court considered that he must have felt the effects of sleepiness prior to falling asleep. There were a number of mitigating factor in that case. He had no previous convictions. He was a man of good character. He had pleaded guilty at the first reasonable opportunity, and he had shown genuine remorse, turned himself in at the police station and had admitted freely that he had fallen asleep. He was prepared to make good his obligations to the family of the deceased. He was fined the sum of $10,000.00 or in default to serve three years imprisonment. He was also disqualified from holding a driver's licence for all classes of vehicle for a period of five years.

[22] There is also the case of R v Markenzee S. Hunte SLUHCR2009/0018 St. Lucia (unreported) in which the defendant drove at a dangerous speed and overtook a vehicle and collided with an oncoming vehicle in the other lane. The Court considered that the defendant's dangerous driving consisted of a momentary act of driving that departed from the requisite standard of driving. Here the defendant a man of good character was found to be remorseful. He also had an unblemished driving record. He was also injured as a result of the accident. He was fined the sum of $7,000.00 or in default a term of imprisonment of

[4] Criminal Case No. 8 of 2003

three years. He was also disqualified from holding a driver's licence for all classes of vehicle for a period of three years. The court made reference to R v Mathew Adjodha[5] a case involving the same offence in which that defendant was fined $4000.

[23] In R v Wendell Varlack,[6] the deceased, a young woman, was hit while crossing the road. Three vehicles on the opposite side had stopped to facilitate her crossing. The defendant passed two stationary vehicles without even slowing down and struck the deceased. The accident also took place in the vicinity of a college, and the court considered that he failed to have any regard to vulnerable road users who were or might be expected to be on the road. The lighting conditions were poor. He was a taxi driver and he had traveled this route before, therefore should have been expected to know the kind of traffic which would be on that road. What was considered significant was that he was mentally or physically incapacitated in that he was oblivious that he had struck the deceased carrying her on the bonnet before she fell off. In fact he had traveled a considerable distance before he stopped. By way of mitigating factors, the Court considered that he was of good character, having a good driving record and was genuinely remorseful. In passing sentence, the court had regard to the victim's impact statement – the deceased had been a gifted 22 year-old young lady who was the apple of her father's eye and beloved member of her family. She assisted in the community and was an athlete. The Court considered that there was a high level of culpability and imposed 18 months imprisonment on the defendant.

The Aggravating and Mitigating Factors in this Case

[24] There are several aggravating factors in this case. The first is the level of speed at which the defendant was traveling on that night. This was a very dark road, with no street lights, at the relevant time. This was a high-impact high-speed collision. The defendant was going at such a furious speed and for some distance. He had turned into the Kim Collins highway, and a pickup had turned in front of him. He had overtaken this and he himself stated that he was speeding above the speed limit. But having regard to the evidence, the

[5] SLUHCR2007/0029
[6] Case No. 27 of 2011 (BVI),

jury would have found that he was traveling at an even greater speed closer to 80 miles per hour, or even more as when he went out of control, he slammed the oncoming car, which was going at about 30 to 40 kilometers per hour, backwards and sideways at a distance of about 26 feet. His own hatchback backdoor flew off on the impact and landed 42 feet away from the point of impact. In his description of the accident he does not say that he saw his car careening into the path of the oncoming vehicle. He appeared oblivious of this. He seemed more intent on speeding.

[25] He took this family through a trial. That is not aggravating in itself. He is entitled to require the prosecution to prove their case. That is his right. But what is aggravating is that he attempted to lay the blame for the death of the child at the feet of the parents. His defence on the matter of death of the child was that the parents were at fault. This Court has never heard such an amazing response from anyone, namely: "That even though I may be at fault for my car going out of control, and slamming into yours, on your side if the road, if you did not buckle up your little child in the backseat, then it is your fault that your child suffered injuries and died from the collision!'[7]

[26] I note that the police actually charged the parents for failing to put on a seatbelt, but which charge was discontinued in the Magistrate's Court for want of prosecution. That initial exercise of the prosecutorial discretion to charge was also surprising to this court. I will not speculate on what prompted this. But I would note in this sentencing that, these questions of whether the father had been charged were actually put to the father in the trial. From the initial stages following the incident, this family has been made not only to endure the death

[7] In the few cases in which a failure to wear a seat belt arose as an issue, it arose to support arguments that it went to mitigation, not that the defendant was not at fault for the death of the victim. In those cases the court rejected this a matter of mitigation. Note in this regard HM Advocate v McCourt (Gary Andrew) 2013 WL 5336323 High Court of Justiciary, in which court making reference R v Powell [2011] 2 Cr App R (S) 41, a case of causing death by careless or inconsiderate driving in which the accused caused the death of his friend who was a passenger in the car that the accused was driving. The passenger was boisterous and not wearing a seatbelt. The Court of Appeal was not impressed with the argument that the fact that the deceased was boisterous and not wearing a seatbelt should be regarded as mitigatory factors. At paragraph 16 of its judgment the court observed as follows: *"It is said on his behalf that he was driving in difficult conditions, with a boisterous passenger. If that is so, it cannot, in our judgment, amount to mitigation for his admitted careless driving. Nor does the fact that his passenger was not wearing a seatbelt. If anything, those were surely factors that urged greater caution in a motorist than might normally have been required."*

of their child, but also to endure the public blame that was being leveled at them, and that it was their fault their child died; had nothing to do with the defendant's driving. In this context I also note the last witness for the defendant in the mitigation say, that her belief as to why the defendant would have gone through with a trial and not have accepted the blame, having regard he had earlier apologized to the mother was that: 'If Kimo had believed he had done something wrong, he would have taken responsibility'. I have not used this statement to form a view of the defendant; this simply is in agreement with my view.

[27] There are several matters going to mitigation. He is a man of good character and has no previous convictions. He remained at the scene of the collision and assisted. He also appears to be a well-liked and dedicated and hard working person, able to hold down a job and be steadily promoted. There is no doubt in this Court's mind that he is a person with a positive outlook well suited for the job he holds, and a role model for some of his fellow workers. I note the kind of attention he gives to the visiting tourists to the island. He is in a relationship with a 'significant other' and has a son whom he loves dearly. Generally this young man is a positive member of society, and has a good future.

[28] But this is a bad case. It is one of those exceptional cases. The level of 'fault' on the part of the defendant is high. On a dark highway, he speeds and overtakes at such a furious speed that he lost control of his vehicle. He did not even know he was about to hit another car when he careened into its path.

[29] The jury must have found that this defendant was speeding out of control. Mr. Boris Johnson, the father of the deceased child, stated that he approximated that the defendant was going at least 80 miles per hour. Whatever speed this defendant was going at, he was able to hit a vehicle that as traveling at about 40 kilometers per hour backwards and sideways for about 26 feet. That is terrible speed on that stretch of road. The roads in the Federation were not designed for that kind of speed. No-one would be able to get out of the way of such speeding cars. This speed made this car a most lethal weapon. It is

amazing that more serious injuries and other deaths did not result except the single death of this innocent small child.

[30] What is even more aggravating in this case, as mentioned before, is that this defendant's position in this trial is that (a) he was not at fault for the accident by his not guilty plea; but much more startling (b) that he lay the blame for the death of the child at the feet of the parents – because they did not have her secured in the car seat or a seat belt. I also note his statement in the Social Inquiry Report where he said: *"It was something that was not planned; I have never hurt anyone before. I am familiar with the family involved in the accident so this has caused more hurt for me. I have a child of my own and I would not like for my child to be harmed or hurt or even taken away from me. I am sorry for the pain that I have caused to everyone involved. Since incarceration I have now realized the things we take for granted are the things we should appreciate more."*

[31] This Court is not satisfied that this defendant has shown any level or appropriate remorse. He had said 'sorry' to the mother before the trial. But if that meant he was at fault for the death, that position was resiled from at the trial. And these words coming in the Social Inquiry Report does not say much towards that. This attitude of his has caused even greater suffering to the family, as the mother Mrs. Johnson has testified as part of the victim impact aspect of the sentencing hearing. She states:

> *"On the 18th February, he took something from me, my only child. I did forgive him, but I was hurt and truly devastated to hear him come here and say not guilty. They tell me its my fault. I had to go back through everything and no one is taking blame and I am hurt. … she was our whole world, she was our whole world…"*

[32] There is authority for the view that continuous shifting the blame on the parents can neutralize the benefit of his good character.[8] As the English and Wales Court of Appeal, noting that ordinary principles applied to these types of cases and that proper credit may be given for matters such a previous good character and genuine remorse, stated:

> *"16. However, he lacks the mitigation which could have accompanied an early guilty plea. Such a plea not only saves time and cost, but the admission of guilt is often a step in the healing process for those affected by the tragedy. In addition,*

[8] R. v Jones (Gareth James) [2013] 1 Cr. App. R. (S.) 20, [2012] EWCA Crim 972

> *the judge, who had observed the appellant throughout the trial, felt that the appellant showed no remorse at all for what had happened, but had rather exhibited a self-pitying arrogance. Again, potential mitigation was lost.*
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> *17. Before turning to the facts of the offence itself, we consider that this appellant's crime is* ***aggravated by his behaviour in seeking wrongly to blame the victim****, Tom Brenchley, in a variety of ways for the collision. The appellant did this at the scene, in interview and in evidence. Those attempts to shift responsibility to the victim are expressly recognised in the guideline as making the case worse. The variety of excuses employed serves to demonstrate their falsity".*[9] [emphasis supplied]

[33] I have not used the defendant's continuous shifting of the blame to ***completely*** neutralize his good character. I will still give him ***some*** credit for that. But this is really an aggravating matter.

[34] People who drive dangerously must be given pause. It is time to drive with due care and attention.

[35] These senseless deaths caused by dangerous driving interrupt the natural order of life. Hopes and aspirations are all suddenly dashed as plans for the future disappear into nothingness. This is what the death of a loved one brings even when death is expected. The imagination quivers when it is done in this most horrific and unexpected manner. Not only does it leave close family members and relatives in agony for years and perhaps even for their lifetimes, but society too loses something of immeasurable value when death drives on our roads. These acts of death by dangerous driving leave an indelible mark on all lives that it touches.

[36] This defendant caused the death of an innocent child. He could not stop his vehicle for a distance of 154 feet after he lost control, and then after crashing into the oncoming car, his momentum took him another 62 feet before his vehicle came to a stop. I am of the view that an immediate custodial sentence is appropriate in this matter. This case is nearly as

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[9] Note Attorney General's Reference (No.76 of 2009), Re 2009 WL 4248592 Court of Appeal (Criminal Division) at paragraph 16 where which the court considered that it went to mitigation when the defendant did not 'seek to minimise his behaviour or to blame anyone else.'

bad as the case from the British Virgin Islands, but this defendant has many positive things going for him. So I have had regard to the mitigating factors, and instead of the 18 months that was imposed on the defendant in the British Virgin Islands, I order that this offender serve a one-year term of imprisonment. His driver's licence will be taken away and he will be required to take a new test if he so desires, five years from the date of this sentence. He is not to drive any class of motor vehicle including motorcycles for five years starting with today's date.

The Question of a Suspended Sentence

[37] I have been asked to consider suspending any sentence that I might make. This is a power given to the Court under Division II of the Alternative Sentencing Powers Act, Chapter 3:20.

> *"6. Suspended Sentences.*
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> *(1) A court which passes a sentence of imprisonment on an offender for a term of not exceeding three years for an offence may suspend the sentence by ordering that the sentence shall not take effect unless*
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> > *(a) during a period specified in the order, being of not less than 12 months and not more than 3 years from the date of the order, in this Act referred to as the operational period, the offender commits in the Federation another offence punishable with imprisonment for a period exceeding 6 months hereafter referred to as a "subsequent offence"; and*
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> > *(b) thereafter a court having power to do so order pursuant to section 7 that the original sentence shall take effect.*
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> *(2) A Magistrate or a Judge shall not give a suspended sentence under subsection (1) if the offence involved the use, or the illegal possession of, a firearm or imitation firearm.*
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> *(3) A court shall not give a suspended sentence unless the case appears to the court to be one in respect of which a sentence of imprisonment would have been appropriate in the absence of power to suspend such a sentence by an order under subsection (1)."*

[38] Whilst in St. Kitts and Nevis, there is no statutory requirement that a court can only impose a suspended sentence in 'exceptional circumstances', as is the case in the United Kingdom, the legislation has nonetheless made it clear that a suspended sentence cannot be imposed unless the court considers that an immediate custodial sentence was appropriate. A suspended sentence therefore cannot be seen as a soft alternative, and simply to be imposed even when a custodial sentence was not appropriate.

[39] As I have indicated in the Elvis Richardson case, the defendant's personal characteristics may be relevant in deciding whether to suspend the custodial sentence. As one court has noted, "it has usually been on the basis of some significant personal features of the defendant's position."[10]

[40] It must be noted however, that if personal mitigation has been reflected in the actual sentence imposed, then it would not factor in relation to the question of suspension. It is useful to refer to R. v Brannigan (Kevin)[11] where the English Court of Appeal stated:

> *"In sentencing for these types of offences both in relation to the careless driving causing grievous bodily injury and in relation to offences around perverting the course of justice the authorities make it clear that it is only in exceptional circumstances that the sentence can be suspended. In this case the learned judge appears not to have reflected upon that issue because he makes no mention whatsoever of the need for exceptional circumstances. Personal mitigation is of course a matter that can be taken into consideration but it seems to us that the personal mitigation played no role at all in relation to the original offence of the careless driving causing grievous bodily injury and we have reflected the personal mitigation in the sentence that we have identified as appropriate for the consecutive sentences for dangerous driving and perverting the course of justice. In those circumstances we do not consider that exceptional circumstances have been demonstrated. We do not consider that it was appropriate to suspend the sentences and we consider that it was unduly lenient to do so.*[12]

[41] I have agonized whether this is a suitable case for a suspended sentence. Whilst I have given such a sentence recently, that case is significantly different, having regard to the speed at which this defendant drove. This defendant may as well have been racing. That

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[10] R. v Daniel (George Geremiah) 2012 WL 5894535 Court of Appeal (Criminal Division)
[11] 2013 WL 3994991 Court of Appeal (Northern Ireland)
[12] Attorney General's Reference (No 4 of 1989) [1989] 11 Cr App R(S) 517

defendant also pleaded guilty and he did not attempt to blame anyone for the death of the deceased. In R. v Blenkiron (Jason)[13] the defendant was charged in relation to his dangerous driving which occurred when he was drunk. He was considered to have posed a serious risk to the public. A custodial sentence was imposed and the defendant appealed asserting that the sentence should have been suspended having regard to his personal circumstances. The Court of Appeal stated:

> *"We agree with the judge's assessment of seriousness. The risk to the public caused by the appellant's reckless acts was such that the judge was entitled to find, that the appellant must serve a short sentence of imprisonment, notwithstanding his good character and personal circumstances. We are unable to conclude that the judge went wrong in principle or that the sentence he imposed after some thought was manifestly excessive."*

[42] I am of the view that this defendant should serve some time. Having regard to my belief that quite apart from his good character, which I gave him some credit for in fixing the appropriate sentence, *he is a man who is on a defined career path*, and so the question for me is whether I should suspend a part of this sentence. This power to suspend a part of the sentence is found in section 11 of the Alternative Sentence Act. Section 11 reads:

> *"Partly suspended sentences.*
>
> *(1) A court by which a person is convicted and sentenced for a period not less than three months and not more than 2 years may order that the offender be released after partly serving the sentence subject to the restoration of the balance of the sentence on his or her being convicted in the Federation of St. Kitts and Nevis of another offence during the period of the suspended part of the sentence hereafter to be referred to as the whole period.*
>
> *(2) A court shall not while exercising the power conferred in subsection (1) order a period of imprisonment of less than 28 days or suspend a part of the sentence for a period of more than a quarter of the whole period.*
>
> *(3) The period of imprisonment mentioned in subsection (2) shall be the period actually ordered by the court, reduced (where applicable) by remission and time spent on remand."*

[43] The appropriate sentence in this case is one-year imprisonment, and so it falls with section 11 as being a sentence of not less than three months and not more than two years. I also

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[13] 2012 WL 4808725 Court of Appeal (Criminal Division

note the maximum that I can suspend under the Act. How then should I approach this discretion.

[44] In this regard, I am mindful of the consideration discussed in R v Clarke[14] where Lord Lane CJ stated:

> *"Before imposing a partly suspended sentence the court should ask the following question: first of all, is this a case where a custodial sentence is really necessary? If it not, it should pass a non-custodial sentence; but if it is necessary then the court should ask itself, second, this: can we make a community service order equivalent to imprisonment, or can we suspend the whole sentence? The problem requires very careful consideration. It is easy to slip into a partly suspended sentence because the court does not have the courage of its own convictions. That temptation must be resisted. If it is possible to make a community service order or to suspend the whole of the sentence, then of course that should be done. If not then the third point arises: what is the shortest sentence that the court can properly impose? In many cases, of which an obvious example is the case of the first offender for whom a short term of imprisonment is a sufficient shock, without any suspension, that would be enough. …*
>
> *If imprisonment is necessary, and if a very short sentence is not enough, and if it is not appropriate to suspend the sentence altogether, then partial suspension should be considered. Great care must be taken to ensure that the power is not used in a way which may serve to increase the length of the sentence..."*

[45] Lord Lane CJ went on to quote with approval the underlying rationale behind partially suspended sentences found in the words of the Home Office Advisory Council on the Penal System in their Sentences of Imprisonment: a review of maximum penalties (1978) paragraph 282:

> *"…we view partially suspended sentences as a legitimate means of exploiting one of the few reliable pieces of criminological knowledge that many offenders sent to prison for the first time do not subsequently re-offend. We see it not as a means of administering a 'short, sharp shock', nor as a substitute for a wholly suspended sentence, but as especially applicable to serious first time offenders or first time prisoners who are bound to have to serve some time in prison, but who may well be effectively deterred by eventually serving only a small part of even the minimum sentence appropriate to the offence. This, in our view, must be its principal role."*

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[14] [1982] 3 All ER 232 at page 236

[46] This Court's approach to the appropriate sentence was an exercise that was carefully carried out. I repeat that the appropriate sentence in this case is a one-year sentence. There has been no increase of the sentence simply for the purpose of suspending a part. A partial suspension of the sentence is only considered because of the personal circumstances of the defendant being a man ***committed to bettering himself***. Such a partial suspension would not harm the public and it will benefit the defendant.

[47] In the circumstances of this case, I consider it would be appropriate to suspend one quarter of the total sentence. Having to serve the remainder of his one-year sentence is not likely to disrupt his career path. He is to serve the rest. After he is released, if he commits an offence within the period of twelve months thereafter, he will be returned to this Court for consideration whether he should serve the suspended portion of this sentence. At the date of his sentence, he had been remanded for nearly one month. That time should be reckoned as part of this sentence.

[48] I wish to thank both the learned counsel for the Prosecution and for the Defence for their submission in this matter.

Darshan Ramdhani
Resident Judge (Ag.)