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 2013/0030

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

ELVIS RICHARDSON

Appearances:

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

2013: November 7
December 6

Sentence – Causing Death by Dangerous Driving – Degree of Fault should determine the appropriate sentence – Assessment of Aggravating and Mitigating Factors – Other Offences Allegedly Committed at the same time not to be considered unless proven by a Plea or Conviction – Whether Culpability of deceased a Consideration as going to Mitigation.

Sentence – Suspended Sentence – The Alternative Sentencing Act, Chapter – Only applicable when Immediate Custodial Sentence Appropriate - Factors to be considered – Personal Characteristics Relevant – Whether immediate custodial sentence will have the effect of derailing the future prospects of the Defendant.

Plea of Guilty – Facts to be presented by Prosecution – Depositions Evidence to be used unless irrelevant to sentencing – Prosecution to notify defendant of the facts which is to be relied on – Prosecution may accept defendant's version of facts in suitable case – Where there is no agreed version of facts Prosecution to invite court to conduct a Newton Hearing.

On Friday the 11th November 2011, Elvis Richardson, the defendant speeding in an uninsured vehicle just after dark along the Newtown Bay Road in Basseterre, fatally struck an 80 year-old man crossing the road. He volunteered a blood test and it was discovered that he had been drinking but it could not be proven that he had exceeded the legal limit. From the evidence, the deceased appeared to have relied on a third party's direction to cross the road at that time. The defendant was charged with causing death by dangerous driving with an alternative count of dangerous driving. At the first reasonable opportunity, he pleaded guilty to the first charge.

Held:

1. The appropriate sentence in a matter such as this must be arrived at having regard to the aims of sentencing, and the aggravating and mitigating factors to determine the degree of fault to be attributed to the defendant. In this case, the act of dangerous driving consisted of the act of speeding at a time and place when it was dangerous to do so, and being unable to stop in time to avoid hitting the deceased crossing the road. It was important in this process to have regard to the culpability of the deceased in crossing at a time when it was unsafe to do so. In this case, the appropriate sentence is a custodial sentence of nine months imprisonment. Additionally, the defendant driver's licence will be revoked for a period of eighteen months at which time if he intends to drive again, he will have to take an extended driving test. He is fined the sum of EC$15,000.00 to be paid within six months. He is also ordered to carry out community service as a Traffic Crossing Warden in Nevis for 150 hours, to be arranged through the Royal St. Christopher and Nevis Police Force Traffic Department.

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.

2. A custodial sentence may be suspended in an appropriate case where an immediate custodial sentence might have the effect of derailing the stability and future prospects of a man of good character in a case with strong mitigating factors. In this case, this custodial sentence will be suspended, this defendant being a stable man, and one of the few certified divers on the island, with a steady job in his field, and with future prospects. The custodial part of the sentence will be suspended for a period of twelve months. Should the defendant commit any further offences in this period, he will be brought back to court for consideration of the possible activation of the suspended sentence.

Applied: Sentence 6 of the Alternative Sentencing Powers Act, Chapter 3:20; R v Bowen (Ashley) 2013 WL 617957 Court of Appeal (Criminal Division)

Considered: R v Daniel (George Geremiah) 2012 WL 5894535 Court of Appeal (Criminal Division); R v Brannigan (Kevin) [2013] NICA 39

Per curiam:

A prosecutor should not request that the court impose a custodial sentence in matters such as this. A prosecutor's role at sentencing is limited to presenting to the court all the relevant material, and to ensuring that the court is aware of the maximum or minimum ranges of sentence. It is up to the court to decide whether a custodial sentence is suitable; this is a judicial matter.

It is important for the court, in approaching the determination of an appropriate sentence, to understand the effect that the offence has on the victim or his or her immediate family in cases where the victim is deceased. In future, the prosecution should normally present admissible evidence, possibly in the form of 'victim impact statement(s)' showing the impact the offence has on either the victim or his or her family. In an appropriate case it might also be important to consider the impact the offence has on the community. The opinions of the victim or the victim's close relatives as to the appropriate sentence are not relevant.

JUDGMENT

[1] RAMDHANI J (Ag.) – The defendant, Elvis Richardson, was charged on an indictment containing two counts under the Road Traffic Act of St. Kitts and Nevis Cap. 15.06, namely causing death by dangerous driving contrary to section 50(1) of the Act, and in the alternative, a charge of dangerous driving. When he was arraigned on the 4th September 2013, he pleaded not guilty to both counts, but on the 8th September 2013 when the matter came before the court for the second time, he changed his plea to the first count and pleaded guilty. The other charge was then subsumed in the first. He cannot be tried on that charge again.

[2] The facts presented by the prosecution show that on Friday the 11th November 2011, the defendant was driving an uninsured vehicle along the Newtown Bay Road in Basseterre during the 'late hours of the night'. He was speeding above the speed limit and he struck one Mr. Joseph Allen, an 80 year-old man crossing the street at that time, who fell onto the bonnet of the car and was dragged for about 100 feet before being tossed onto the side of the road.

[3] When the police arrived at the scene, they took a blood sample from the defendant and this was later tested showing that there was some alcohol content in his blood. There was no evidence that it exceeded the legal limit.

[4] The deceased died at the scene of the accident. The cause of death was later recorded as hypovolemic shock secondary to a left massive hemothorax (blood in the chest cavity) and hemoperituem (blood in the abdominal cavity) secondary to traffic accident. The spleen

was ruptured and there was injury to the kidneys. He literally died from massive blood loss that was caused by the multiple broken ribs.

[5] The Crown has asked the court to impose a custodial sentence. This is an unusual stance. Apart from capital offences, the prosecution's role is limited to presenting to the court all the relevant material, and to ensuring that the court is aware of the maximum or minimum ranges of sentence. It is up the court to decide whether a custodial sentence is suitable; this is a judicial matter.

[6] 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 Guidelines and instead impose a suspended sentence.

Preliminary Issues on Factual Background

[7] There were two matters related to the factual background of the case that were raised by the court during the sentencing hearing, all of which related to matters which were contained in the depositions, and whether these matters had any bearing on the issue of the appropriate sentence. These were:

(i) The evidence that related to the alcohol content found in the blood did not state clearly that the defendant had in excess of the legally specified limit in his blood.

(ii) There was evidence in the deposition that indicated that the deceased appeared to have been called across the road by another person who was talking on a cell phone at the time. It appeared to open the possibility that the deceased may have been contributory negligent at the time.

[8] The defence raised a third factual matter, namely that there was evidence on the deposition that contradicted the prosecution's statement that it was late at night, when in

fact it was only after 7:00 p.m. in the evening. This is not of any great moment, as the depositions show that it was at 8:00 p.m. that the incident happened. There is no doubt that night had already set. I will leave this here.

[9] The prosecution's response on the first issue was that regardless of whether the alcohol content had passed the prescribed limit, the mere fact that he had been drinking should be considered as an aggravating factor.

[10] On the second issue, the prosecution contended it would be inappropriate to have regard to any possible contributory negligence on the part of the deceased as that was a matter for a civil trial and had not part in this criminal process. It flew in the face of the guilty plea, the prosecution contended, and should not be considered as a mitigating factor to reduce sentence.

[11] He submitted generally that if the defence, who had latched on the court's questions in enquiring whether these matters should be considered, had wanted to present a different version of the facts, they should have notified the prosecution earlier. In any event, he states that if there are these kinds of variations being suggested, then it would entail that a Newton[1] hearing be held to determine which version of the facts were true.

[12] With regard to this stance of the prosecution, it must be noted that the prosecution had filed and served submissions in which one version of the facts were presented. Even the court was not sure whether these had represented to full version of the facts or whether it would have been added to at the hearing. What is more significant, these are matters contained in the deposition itself and are not being raised by the defendant ex tempore.

[13] The prosecution urged that the court should embark on a Newton hearing. This is a hearing which is required when there are conflicting versions of the facts being presented from the prosecution and the defence which are material to the sentencing. But there is really no different version being put forward by the defendant. This defendant would have

[1] (1982) 77 Cr. App. R. 13

pleaded guilty having been through a committal proceedings and having seen the evidence on the deposition. How could he have imagined that these would have been left out of the recital of the facts? He is entitled to all bits of evidence being considered, once they are relevant to the sentencing process. So, if the prosecution will succeed in preventing the court from considering these matters it will only be on the basis that it is either inappropriate to consider them in the sense that they are irrelevant to the sentencing. There are not irrelevant in this case, and will be dealt with later.

[14] It would be appropriate at this stage, to give briefly some guidance for the future conduct of guilty pleas, so as to avoid this sort of avoidable conflict. As a starting point this court is aware that the Director of Public Prosecutions is actively involved in reviewing all matters and it is to be commended that he plays an active role in deciding whether or not to accept pleas on lesser counts or on one charge on an indictment containing many counts.

[15] In Practice Direction (CA (Crim Div): Criminal Proceedings: General Matters)[2] the point was made that the prosecuting attorney should normally have a discussion with counsel for the defence and outline what are the facts that are to be relied on in the event of a guilty plea. In R v Underwood[3] there is an outline of the principles relied on in the United Kingdom where the defendant admits that he or she is guilty, but disputes the basis of offending alleged by the prosecution:

(a) The prosecution may accept and agree the defendant's account of the disputed facts or reject it in its entirety, or in part. If the prosecution accepts the defendant's basis of plea, it must ensure that the basis of plea is factually accurate and enables the sentencing judge to impose a sentence appropriate to reflect the justice of the case;
(b) In resolving any disputed factual matters, the prosecution must consider its primary duty to the court and must not agree with or acquiesce in an agreement which contains material factual disputes;
(c) If the prosecution does accept the defendant's basis of plea, it must be reduced to writing, be signed by advocates for both sides, and made available to the judge prior to the prosecution's opening;
(d) An agreed basis of plea that has been reached between the parties should not contain matters which are in dispute and any aspects upon which there is not agreement should be clearly identified;

[2] [2012] EWCA Crim. 1631
[3] [2005] 1 Cr. App. R. 13

(e) On occasion, the prosecution may lack the evidence positively to dispute the defendant's account, for example, where the defendant asserts a matter outside the knowledge of the prosecution. Simply because the prosecution does not have evidence to contradict the defendant's assertions does not mean those assertions should be agreed. In such a case, the prosecution should test the defendant's evidence and submissions by requesting a *Newton* hearing (R v Newton (1982) 77 Cr. App. R. 13 , (1982) 4 Cr. App. R. (S.) 388),

(f) If it is not possible for the parties to resolve a factual dispute when attempting to reach a plea agreement under this part, it is the responsibility of the prosecution to consider whether the matter should proceed to trial, or to invite the court to hold a *Newton* hearing as necessary.

[16] It is to be noted that the 'judge is not bound by any such agreement and is entitled of his or her own motion to insist that any evidence relevant to the facts in dispute (or upon which the judge requires further evidence for whatever reason) should be called."[4] As was noted by the English and Wales Court of Appeal:

> *"Both sides must ensure that the judge is aware of any discrepancy between the basis of plea and the prosecution case that could potentially have a significant effect on sentence so that consideration can be given to holding a Newton hearing. Even where the basis of plea is agreed between the prosecution and the defence, the judge is not bound by such agreement…But if the judge is minded not to accept the basis of plea in a case where that may affect sentence, he should say so.*[5]

[17] This court considers that these principles may be applied with some modification as is appropriate in cases in this jurisdiction. It might also be useful to remind defence advocates that the defendant may seek an indication from the court what is the maximum sentence to be imposed if he were to plead guilty. Such an indication must be given in open court and in the presence of the defendant.[6]

[18] Lastly before returning to the instant case, it would be useful that the prosecution adopt a practice of presenting, as a normal part of the sentencing process, a 'Victim Impact Statement' either from the victim or the family where the victim is deceased. This would be of assistance to the court in the sentencing process, in that it provides the court with information, and allows the victims or affected persons to say how the crime has affected

[4] Practice Direction (CA (Crim Div): Criminal Proceedings: General Matters) [2012] EWCA Crim 1631;
[5] R. v Cairns (James Philip) [2013] EWCA 467
[6] R v Goodyear [2005] EWCA Crim 888

them. Several useful principles can be gleaned from the cases of R v Hobstaff[7] and R v Perks,[8] namely:

(i) the evidence of the effects of an offence upon a victim must be in admissible form;

(ii) The court must pass what it judges to be an appropriate sentence having regard to the circumstances of the offence and offender taking into account, so far as the court thinks appropriate, the consequences of the offence to the victim;

(iii) The opinions of the victim or the victim's close relative as to the appropriate sentence are not relevant.

[19] In this case, the prosecution did present the son of the deceased to speak to the impact of his father's death. He stated that he was affected by his father's death and that he has missed him. He said that he was the one who ensured that his father was provided for. The court got the impression that the fact this deceased was an 80 year-old man has somehow allowed the son to cope with his father's sudden passing. There was nothing else coming from the son by way of what impact his father's death had on him or his family.

The Defendant - Mitigation by Counsel for the Defendant – The Social Inquiry Report

[20] The defendant did not give any evidence on his behalf during the mitigation, and he relied through his counsel on the Social Inquiry Report. This shows that the defendant is a 31 year-old man who has lived a life not absent of misfortune. From an early age following the death of his mother, he has lived with his paternal aunt.

[21] It is significant to note that this defendant who left school at an early age did not flit around from job to job, but held three jobs for the next nine years. There was a minor conviction

[7] [1993] 14 Cr. App. R (S) 606
[8] The Times 11/5/00

against him in 2000 but in 2006 he was again convicted of an unrelated offence and was imprisoned. Upon his release, following a few odd jobs, he got into the world of diving and became a professional diving instructor, one of the few on the island.

[22] From the Social Inquiry Report, it would appear that this is a young man who has faced many challenges in life. He is now a stable man, able to hold down a permanent job. One of the witnesses who spoke on his behalf says that the defendant has worked hard to turning his life around and he is committed to his job and living a proper life. His 'significant other' also gave evidence and spoke to his stability, and the fact that this accident and the death of the deceased have taken a toll on the defendant. There is no reason to doubt this.

The Approach to be Taken by the Court.

[23] I have considered the plea in Mitigation, the evidence of the two character witnesses, the Social Inquiry Report, as well as the Crown's submissions. I was assisted considerably by the written submissions from both sides as to how the court should approach the issue of sentence.

[24] 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 deaths. 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.

[25] 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. In approaching any sentence, the court is reminded of the

aim of sentencing, these being retribution, deterrence, prevention and rehabilitation.[9] In embarking on this exercise, the court must make a determination as to seriousness of the offence, and specifically, where on the scale of seriousness, this particular offence falls.

[26] There is no doubt in the court's mind that this is a serious offence. The senseless taking of a life by dangerous driving results in an unknown toll on the peace and tranquility of our Caribbean societies. The trauma that the victim's family and the wider society as a whole goes through when a member is torn from our midst is immeasurable. These accidents and sudden deaths which occur in the split moment, resulting from conduct ranging from a callous, deliberate and the worst form of reckless and dangerous driving to a momentary lapse in judgment by a driver lead, without a doubt, to immense human suffering.

[27] It 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 had not only 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 that must be looked at objectively.

[28] With regard to the issue of fault, it is appropriate to refer to the learning found in R v Cooksley et al[10] 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."*
>
> *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*

[9] Desmond Baptiste v R Criminal Appeal No. 8 of 2003 (SVG)
[10] [2003] EWCA Crim. 996

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.

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:

> *"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."*

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."

[29] These are the guiding principles that the courts of the United Kingdom have adopted. The courts of the OECS have been applying these principles in these types of cases, and I agree that they are the principles to be applied. Some of the cases that have taken this approach will be addressed shortly.

[30] So how does the court make the determination as to how serious is the particular offence? In answering this question, the authorities have shown that 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 it 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'.

[31] In assessing culpability, it is therefore important to determine what are the mitigating and aggravating 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 a case providing a bad example of one factor.

[32] Those factors that can be considered as aggravating factors can be placed into four general groups. The learned authors of Blackstone Criminal Practice and Procedure 2008 edition sets out these groups as being:

> (i) Matters going to the offence itself –
>
> *"such as the consumption of alcohol or drugs including medication known to cause drowsiness, greatly excessive speed, racing, competitive driving, showing off, disregard of warnings of others, prolonged, persistent and deliberate bad driving, aggressive driving, driving while attention avoidably distracted (e.g. reading or using a mobile telephone, especially if hand held), driving whilst knowingly suffering from a medical condition which significantly impaired driving skills, driving when knowingly deprived of adequate sleep or rest, or driving a poorly maintained or dangerously loaded vehicle, especially where motivated by commercial concerns."*
>
> Texting on a mobile phone can be added to this list.
>
> (ii) Matter going to the offender's driving record –
>
> *"such as other offences committed at the same time, or previous motoring convictions."*
>
> (iii) Matters going to the consequences of the offence –
>
> *"for example more than one death being caused, especially where the offender knowingly put more than one life at risk, or seriously injuring one or more victim."*
>
> (iv) Matters going to the Offender's behaviour at the time –
>
> *"such as failure to stop, falsely claiming that one of the victims was responsible, trying to throw the victim off the bonnet of the car, causing death while attempting to escape detection, or committing the offence while on bail."*

[33] In relation to matters of mitigation, it has been accepted that these would include *"a good driving record, absence of previous convictions, a timely plea of guilty, genuine shock or remorse, which might be greater if the victim was either a close friend or relative, age but*

only to the extent that lack of experience contributed to the offence, or the fact that the offender had been seriously injured."[11]

[34] I now turn to the cases.

[35] It is useful as a starting position to refer to the case of Thelbert Edwards v R[12] which the Court of Appeal made reference to the kinds of sentences which 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."*

[36] Arguably this appears to be a statement which 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 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.

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[11] Blackstone Criminal Practice and Proecudure 2008 edn. Para 32-9 at page 2809
[12] Criminal Appeal No. 3 of 2006 (St. Lucia) (unreported)

[37] Following Thelbert Edwards in St. Lucia is the case of R v Jesse Charles[13], 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 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 factors 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.

[38] There is also the case of R v Markenzee S. Hunte[14] 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 three years. He was also disqualified from holding a driver's licence for all classes of vehicle for a period of three years. This case also made reference to R v Mathew Adjodha[15] in which the defendant was fined $4000.00.

[39] In R v Wendell Varlack[16] 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

[13] Criminal Case No. 8 of 2003 St. Lucia (unreported)
[14] Criminal Case No. 18 of 2009 St. Lucia (unreported)
[15] Criminal Case No. 29 of 2007 St. Lucia (unreported)
[16] Criminal Case No. 27 of 2011 British Virgin Islands (unreported)

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.

[40] There such cases from this jurisdiction have been brought to my attention. There is the case of DPP v Tyrone Nisbette[17] where the defendant was convicted in 2004 and was ordered to pay $6,000.00 in three months or serve one year. He was also disqualified for nine months. There is also the case of DPP v Devon Williams[18] a case in 2011 where the defendant was fined $20,000.00 to be paid in two years or serve two years imprisonment. His licence was suspended for two years. There is also the case of DPP v Sylvester Allen[19] where the defendant was convicted in 2011 ordered to pay a fine of $15,000.00; he was ordered to pay $5000.00 within one month or serve 15 months imprisonment, and pay the balance within five months thereafter or serve a one-year imprisonment. His licence was suspended or 1 year from the date of the conviction. None of these cases were really helpful as, from the records I was unable to get full details on the mitigating and aggravating factors.

[17] SKBHCR2004/0029
[18] SKBHCR2011/0018
[19] SKNHCR2011/0020

The Aggravating and Mitigating Factors in this Case

[41] The primary aggravating factor in this case was the speed at which the defendant was traveling. As one of the witnesses in the case stated, he was going at about 80 miles an hour, and the court noted that the tyre impression spanned some 172 feet, an indication as to the difficulty he had in bringing his vehicle to a stop. This incident occurred after dark, and the defendant was also found to have some alcohol in his blood. While this was not above the legal limit, it is still a factor under this head against him.

[42] The prosecution urged the court in their written submission to treat the evidence that showed that he was driving an uninsured vehicle as an aggravating factor. Driving an uninsured vehicle has very serious consequences for the issue of compensation for any person injured in an accident involving that vehicle. But whether this bit of evidence could be used as an aggravating factor was raised in Thelbert Edwards and Gordon JA stated at para [41]:

> *"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 wrong quite wrong to take this matter into account as an aggravating circumstance."*

[43] Benjamin J as he then was, in the case of Jesse Charles was also called upon to treat with the defendant driving while being an unlicenced driver as an aggravating factor. He dealt with the matter this way:

> *"The second aggravating factor was the defendant being an unlicensed driver though he was in possession of a learner's permit. In response to the Court, the Crown informed that the defendant has not been convicted for any other offences relating to this accident or otherwise. Accordingly the Court is constrained from treating this as an aggravating factor."*

[44] I am not at ease with the view that where a defendant had admitted or has not contested the prosecution's version of the facts which included that he was driving an uninsured vehicle, it is a matter that cannot be taken against him. What our Court of Appeal is saying is that a conviction is required, and I also note that in Thelbert Edwards, it is a case in which the defendant pleaded guilty, not a trial in which he was simply found guilty of the

charge against him. I am bound by this, reluctantly. In this case, I am unable to consider this as a mitigating factor. It would appear the State's prosecuting arm must now make sure that they charge for each of these minor offences, if they expect to use them against the defendant during the sentencing process.

[45] His previous convictions do not relate to the motoring offences and so they do not count as aggravating.

[46] The defendant has pleaded guilty at the first reasonable opportunity saving this court a trial. He has also avoided putting the family of the victim through further trauma. That counts in his favor. This court also accepts that he has shown genuine remorse, even attending the funeral of the deceased who was the father of one of his friends. He is also to be taken as having a good driving record in the absence of evidence to the contrary. The court notes that while this defendant has not led a blameless life, having had previous convictions, it would appear that he has taken steps to turn his life around and he appears to be in a stable relationship and holds down a skilled job as one of the few professional and certified divers on the island. He has good future prospects.

[47] The evidence indicated that the deceased crossed on the instruction of another person. The question is whether this can be used as a mitigating factor. The prosecution has submitted that it cannot be so used. An interesting discussion is found in the Victorian Sentencing Manual. It is stated:

> "In Howarth (2000) 1 VR 593; [2000] VSCA 94, a culpable driving case, Brooking JA examined in obiter dicta the consequence for sentence of the complicity of a victim in an offence. Despite the emphasis repeatedly given in sentencing decisions to the 'innocence' of many victims, he concluded that complicity of the victim was neither a circumstance of mitigation, nor the absence of a circumstance of aggravation. The issue was revisited in Tran (2002) 4 VR 457, where the court disapproved the additional comments of Brooking JA in Howarth. Callaway JA reviewed the conflicting arguments and stated at [34] (footnotes omitted):
>
> > The correct view is that the complicity of a victim constitutes the absence of a circumstance of aggravation, albeit a circumstance of aggravation that is commonly present. Not too much attention is to be paid to labels. When it is said that a victim is 'innocent', that means only that he or she was not complicit. It is a matter for the judge, within the limits of a sound

> discretion, to decide what weight (if any) to attribute to the victim's complicity. In a case like R v Wright it may be important that a circumstance of aggravation was absent. In a case like the present, as we shall see, although it is proper to take the victim's complicity into account, it is not determinative. Similarly, not too much should be read into the labelling of innocence as a circumstance of aggravation. Conceptually it is so, but its significance depends on the facts of the particular case. This judgment is not intended to introduce a new straightjacket, but rather to free judges from an inflexible prohibition against their considering, in any case at all, the complicity or otherwise of the victim."[20]

[48] It would seem, that while there is some authority that the deceased's culpability should be treated as neutral, it would seem that that should be left to the individual judge's assessment of the circumstances surrounding this issue; the court should not be straight-jacketed. In fact in Thelbert Edwards the High Court judge had taken similar conduct of the victim in crossing the road as a mitigating factor. Gordon JA recited this aspect at paragraph 40 of the judgment:

> *"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 opportune time oblivious of the defendant's dangerous driving, that too I'll take into account as a mitigating factor."*

[49] The Court of Appeal had no adverse criticism for the Learned Judge on this aspect of her approach. I too will find that this is a mitigating factor in this case.

[50] Taking all these factors into consideration, I find that this defendant's dangerous driving consisted of an act of reckless speeding that made it impossible for him to stop in time even though he saw someone crossing the road some 172 feet in front of him.

[51] I have had regard to the fact that the maximum sentence in this jurisdiction is five years. It is time that drivers drive with due care and attention. A death has been caused by this dangerous piece of driving. This driver could not stop this car for a whole 172 feet before colliding with the deceased, and then another 67 feet to the point where the vehicle came to a stop. I am of the view that an immediate custodial sentence is appropriate in this matter. This case is not as bad as the case from the British Virgin Islands, and so making

[20] para 28.7.5 of the Victorian Sentencing Manual published by the Published in Melbourne by the Judicial College of Victoria

allowances for his guilty plea, I would order that this offender serve nine months imprisonment. I will also order that he pay a fine of $15,000.00 to be paid within six months. His driver's licence will be taken away for eighteen months and he will be required to take a new test if he so desires at the end of eighteen months of this sentence.

[52] I have been asked to consider suspending any sentence which I might impose. This is a power given to the court under Division II of the Alternative Sentencing Powers Act, Chapter 3:20. Section 6 reads:

> *"6. Suspended Sentences.*
>
> *(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*
>
> *(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*
>
> *(b) thereafter a court having power to do so order pursuant to section 7 that the original sentence shall take effect.*
>
> *(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.*
>
> *(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)."*

[53] The legislation does not state in what circumstances a court would be entitled to suspend a sentence. In the UK, the Powers of the Criminal Courts Act 1973 as amended by the Criminal Justice Act 1991, the power to suspend could only be justified by the exceptional circumstances of the particular case.[21] On this basis it was stated that:

> *"The significant amendment is the new emphasis on the exceptional nature of a suspended sentence. Parliament has given statutory force to the principle that a*

[21] R v Okinikan [1993] 2 All ER 5

suspended sentence should not be regarded as a soft option, but should only be imposed in exceptional circumstances.

The Court cannot lay down a definition of 'exceptional circumstances'. They will inevitably depend on the facts of each individual case. However, taken on their own, or in combination, good character, youth and an early plea are not exceptional circumstances justifying a suspended sentence. They are common features of many cases. They may amount to mitigation sufficient to persuade the court that a custodial sentence should not be passed or reduce its length. The statutory language was clear and unequivocal."

[54] The St. Kitts and Nevis Act does not prescribe the need for 'exceptional circumstances' to guide the court's discretion in the decision to impose a suspended sentence, and the temptation could be that a court might wish to consider that the discretion to impose a suspended sentence is therefore at large. This cannot be the case. The legislation itself states that the court shall not impose a custodial sentence unless an immediate custodial sentence is appropriate; in other words a court may not impose any penalty which 'hangs over the head' of a defendant, so that if he breaches any conditions the penalty is triggered, unless in the first case it would have been appropriate to impose such a sentence. He is not really to be punished on this offence for future conduct, but his punishment may be held in abeyance for regard to some special factor related to his case. So what factors then are relevant?

[55] In R. v Daniel (George Geremiah),[22] the English Court of Appeal considered that the personal characteristics of the defendant are factors to consider. The court stated:

"Whilst suspended sentences have been imposed in other cases, it has usually been on the basis of some significant personal features of the defendant's position. Whilst there are some such features in the appellant's case, we do not consider that they were so significant as to justify suspension of the sentence."

[56] In R. v Brannigan (Kevin),[23] whilst the English Court of Appeal in which the court was of the view that while personal mitigation is of course a matter that can be taken into consideration on the issue of whether to impose a suspended sentence, if it is taken into

[22] 2012 WL 5894535 Court of Appeal (Criminal Division)
[23] [2013] NICA 39

consideration in fixing the appropriate sentence, it will not be taken into consideration in considering whether to suspend the sentence.

[57] I would consider that a suspended sentence might be suitable in cases where a custodial sentence is appropriate but where such a sentence might have the effect of derailing the stability and future prospects of a man of good character in a case of strong mitigating factors. In R. v Bowen (Ashley)[24] the English and Wales Court of Appeal stated:

> "A sentence of 16 months' imprisonment imposed following a guilty plea to dangerous driving, where the offender had driven his car at a man fighting the offender's brother, was reduced to a suspended sentence of six months. The judge should have avoided immediate custody, given the risk that would have posed to the offender's employment, home and family, and where, although he had a criminal record, that was well in the past."

[58] I have considered that this is a suitable case for a suspended sentence, suspended for the period of 12 months, this being the operational period.[25] During that time if the defendant commits another offence, he will not be entitled to a probation order for that offence. And he will also be brought back to this court and may then get the whole or a lesser term of the suspended sentence if the court considers that fitting and proper.

[59] The court acknowledges the assistance of the both the learned counsel for prosecution and the defence.

Darshan Ramdhani
Resident Judge (Ag.)

[24] 2013 WL 617957 Court of Appeal (Criminal Division)
[25] Section 6 of the Act.