IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCR 2015/0069

BETWEEN:

THE QUEEN

V

SIMON JOSEPH

Appearances:
Ms. Crisan Greenidge for the Crown
Mr. Anslem Clouden for the Accused

2017: October 27

SENTENCING JUDGMENT

Criminal Law – Sentencing – Driving Offences – Causing Death by Dangerous Driving – Section 55(1) Road Traffic Act Cap 289A – Sentencing Methodology – Aggravating and Mitigating Factors – Serious Offences – Dangerous Offenders - Immediate Imprisonment – Court Considerations – Suspended Sentences.

[1] **AZIZ, J.:** The Learned Director of Public Prosecutions indicted the defendant on the 1st August 2017, for the offence of causing the death of Whitfield Bascombe by dangerous driving. The offence took place on the 12th December 2014 along the Calivigny Public Road in the parish of St George.

[2] On the 3rd October 2017, the defendant was arraigned and pleaded guilty to the offence. This was the first reasonable opportunity for him to enter his plea of guilty.

[3] The defendant having pleaded guilty to the offence on the Indictment, the court ordered a full social inquiry report to be prepared for the sentence hearing.

FACTS

[4] Ms. Bernadette Harry knew the defendant as she had a relationship with him. She knew him for about two years and a few months, which is when he had returned from Canada. She had been informed that the defendant had bought a truck but the defendant didn't drive it as he told her that he didn't have a licence. On the night of the 11th December 2014, Ms. Harry went out with the defendant in the truck, and he was driving.

[5] On the 12th December 2014, Ms. Harry was picked up by the defendant at her home in Lacalome and they went out at about 4.00 p.m. and they went towards Westerhall where the defendant lived. They left his home about 7.00 p.m. to go out and again the defendant was driving his truck. They went to KFC for food although Ms. Harry didn't want to go and made a joke and said "You going to kill me." They both went to KFC and left about minutes to 8.00 p.m. to return to Westerhall. She stated that on the way back between 9.00 p.m. and 10.00 p.m., the defendant was driving they stopped at the Cliff for some barbeque at a stand and continued onwards. The defendant was driving taking his time and he was not speeding. When they got to Fort Jeudy, Ms. Harry stated that the truck picked up speed, and she asked the defendant what happened and he stated that he did not know. At this time the truck was going to and fro as described by Ms. Harry when it bounced on the left side of the road and it turned and faced towards a person known as Mr. Burke's house. The truck went straight over Mr. Burke's house and landed in between Mr. Burke's house and Mr. Leon's house. At this time she saw the defendant's back facing the steering wheel, and thought he was dead and she managed to climb out of the truck. She noticed Mr. Burke's house was on the ground before she was taken to hospital.

[6] Mr. Leon Williams aka "Bucks" arrived and noticed the house where his father used to live shattered up. He stated that there was an Isuzu truck hooked up on his personal concrete decking, and that his father's house was five to six feet away. He noticed his father being carried away from the house. He asked the defendant who was driving and the defendant indicated that he was. Mr. Williams indicated that the accident did not bring any differences between them, as they get along as normal.

[7] An investigation was conducted by Detective Corporal Rodney Crosby, PC Rawle Gilbert and Inspector Christopher Andrews. Inspector Andrews was in charge of the police garage and inspected the white truck owned by the defendant. In his report he stated that he could not carry out any test on the vehicle as a result of the damages sustained in the accident, but noted that the defendant indicated that the truck was serviced two weeks before the accident. The damages to the truck included the cab being twisted and bent, the windshield smashed, left side front door twisted, dashboard broken, the tyres of which some were showing ply. The right front side tyre showed ply and the other was ninety five percent used, the left side tyres were sixty percent used and one was seventy percent used. This vehicle had six tyres, two front and four rear and the boxing of the truck was also bent.

[8] PC Gilbert observed that the truck had three smooth tyres and the cab and tray were completely damaged. He was also informed that the defendant was not the holder of a driver's licence and the truck was licenced but not insured. PC Gilbert noted that the defendant stated that he had two drinks and was talking with his girlfriend when the accident occurred. The defendant was very calm, cooperated and showed genuine remorse after being arrested and charged.

[9] Detective Crosby interviewed the defendant and he stated that he didn't drive the truck much and that it was insured but he could not remember which insurance company he took out the insurance with. He stated that he had a driving licence in

Canada but had lost it, therefore he came to Grenada without a licence. He admitted driving the truck, collecting his girlfriend, going for KFC, and on the way back he was dazzled by the lights, he then heard a noise and thought that something had knocked him and checked his mirrors before realizing that he was heading for the bushes on the left side of the road. The defendant stated that everything happened so quickly that he could not believe it, he hit "Bucks" house and did not know what happened after that. The defendant stated that the police showed him a red bus that his truck had hit and that was the noise that he had heard prior to the accident.

Maximum Sentence for Causing Death by Dangerous Driving on Indictment

[10] The Laws of Grenada states:

"That any person who causes the death of another person by the driving of a motor vehicle on any road recklessly, or at a speed or in a manner dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the road, the amount of traffic that was actually on the road at the time, or might have been reasonably expected on the road at the time, commits an offence and shall be liable on conviction on indictment to imprisonment for a term of ten years and shall be disqualified by the court from the date of conviction for a period of not less than seven years from holding or obtaining a driving licence."

Sentencing Principles

[11] I have considered all of the sentencing principles as set out in the well known and cited case of **Desmond Baptiste v The Queen**[1] being, retribution, deterrent, prevention and rehabilitation.

[1] Criminal Appeal No. 8 of 2003.

General Considerations

[12] This Court has considered some of the previous decisions within the OECS and also considered the United Kingdom's definitive guidelines on causing death by driving offences which came into force in 2008[2]. The guideline applies to those who are to be sentenced and are eighteen years and older and are first time offenders, convicted after a trial, and who are not considered to be dangerous offenders.[3]

[13] This Court is of the view that there are three levels of seriousness. The first, Level 1 is the most serious encompassing driving that involved a deliberate decision to ignore or a flagrant disregard for the rules of the road and disregard for the serious danger being caused to others. These Level 1 offences as stated in the UK Guidelines are characterized by a prolonged, persistent and deliberate course of very bad driving and/or consumption of substantial amounts of alcohol and/or drugs leading to gross impairment and/or a group of determinants of seriousness which in isolation or smaller number would place the offence in Level 2. Where an offence involves both determinants of seriousness identified, particularly if accompanied by aggravating factors such as multiple deaths or injuries, or a very bad driving record, then the sentence may move towards the maximum that the law allows.

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[2] This guideline came into effect by virtue of section 170(9) of the Criminal Justice Act, in which the Courts in the UK must have regard to any relevant guideline. This guideline applies to sentencing any offender convicted of any of the relevant offence herein who are to be sentenced on or after 4th August 2008.

[3] In some OECS jurisdictions, there are specific statutory provisions dealing with dangerous offenders, and this will have to be considered, but Grenada does not have a specific legislative definition of dangerous offender. A dangerous offender may be subject to any law be described as a person who is 18 and over, who is convicted of a serious and violent offence, and the court considers that there is a significant risk to members of the public of serious harm committed by the offender of further serious and violent offences. The Court may in its opinion consider the current offence for which sentence is to be passed and any other offences associated with it to determine whether the offender is dangerous within the meaning of the word.

[14] Level 2 offences can be classed as driving which creates a substantial risk of danger and can be characterized by greatly excessive speed, racing, or competitive driving, or gross avoidable distraction[4] such as reading or sending text messages or using a cellular phone over a period of time, or driving over a period of time whilst ability is impaired as a result of drugs and/or alcohol, failing to take prescribed medication or as a result of a known medical condition or a group of determinants of seriousness which taken in isolation or a smaller number would place the offence into Level 3.

[15] Level 3 offences are caused by driving that created a significant risk of danger characterized by driving above the speed limit, or driving at a speed which is inappropriate for the prevailing conditions, or driving when knowingly deprived of inadequate sleep or rest or knowing that the vehicle has a dangerous defect or is poorly maintained or is dangerously loaded. Other factors include a brief but obvious danger arising from a seriously dangerous manoeuvre or driving whilst avoidably distracted or failing to have proper regard to vulnerable road users.

[16] The question has been raised as to the difference between dangerous driving, careless driving and driving without due consideration. As a means of explanation this court, has referred itself to the Sentencing Guidelines Council definitive guideline on causing death by driving, Annex A, which states that a person is to be regarded as driving dangerously if the standard of driving falls far below what would be expected of a competent and careful driver and it would be obvious to a competent and careful driver that driving in that way would be dangerous. Examples of the types of driving behaviour likely to result in this offence being charged include:

[4] See R v Browning [2002] 1 CAR(S) 377; The use of a mobile phone to read and compose text messages while driving is a highly perilous activity. Even the use of a hand-held mobile phone by a driver whilst moving, a much too common feature of driving today, is self-evidently risky. But the risks of reading and composing, text messages appears to us of a wholly different order and to be to use the Mance LJ. words, of the most "blatant nature."

- Aggressive driving (such as sudden lane changes cutting into a line of vehicles) or Racing or competitive driving or Speed that is highly inappropriate for the prevailing road or traffic conditions
- Disregard of traffic lights and other road signs which, on an objective analysis, would appear to be deliberate
- Driving a vehicle knowing it has a dangerous defect or with a load which presents a danger to other road users
- Using a hand-held cellular phone or other hand-held electronic equipment when the driver was avoidably and dangerously distracted by that use
- Driving when too tired to stay awake or where the driver is suffering from impaired ability such as having an arm or leg in plaster, or impaired eyesight

[17] Careless driving is driving that "falls below what would be expected of a competent and careful driver" and a person is to be regarded as driving without reasonable consideration for other persons "only if those persons are inconvenienced by his driving". Examples of the types of driving behavior likely to result in an offence of careless driving or driving without due care and attention being charged are:

(i) Careless Driving

- Overtaking on the inside or driving inappropriately close to another vehicle
- Inadvertent mistakes such as driving through a red light or emerging from a side road into the path of another vehicle
- Short distractions such as tuning a car radio

(ii) Driving without due care and attention

- Flashing of lights to force other drivers in front to give way
- Misuse of any lane to avoid queuing or gain some other advantage over other drivers
- Driving that inconveniences other road users or causes unnecessary hazards such as unnecessarily remaining in an overtaking lane,

unnecessarily slow driving or braking without good cause, driving with un-dipped headlights which dazzle oncoming drivers or driving through a puddle causing pedestrians to be splashed.

Aggravating and Mitigating Factors

[18] As far as aggravating factors are concerned, the court may consider the following factors such as:

1. Previous convictions for motoring offences, particularly offences that involve bad driving or the consumption of excessive alcohol or drugs before driving
2. More than one person killed as a result of the offence
3. Serious injury to one or more victims, in addition to the death(s)
4. Disregard of warnings
5. Other offences committed at the same time, such as driving other than in accordance with the terms of a valid licence; driving whilst disqualified; driving without insurance; taking a vehicle without the consent of the owner; driving a stolen vehicle
6. The offender's irresponsible behavior such as failing to stop, falsely claiming one of the victims was responsible for the collision
7. Driving off in an attempt to avoid detection or apprehension.

[19] The additional mitigating factors may include:

1. Alcohol or drugs consumed unwittingly
2. The offender was seriously injured in the collision
3. The victim was a close friend or relative
4. Actions of the victim or a third party contributed significantly to the likelihood of a collision occurring and/or death resulting

5. The offender's lack of driving experience contributed to the commission of the offence
6. The driving was in response to a proven and genuine emergency falling short of a defence.

[20] In relation to the levels mentioned above, the UK Sentencing Guidelines Council stated that for Level 1 offences, which are the most serious class of driving offences, that the Court consider a starting point of 8 years imprisonment and have a sentencing range of between 7 – 14 years imprisonment. For level 2 offences, there is a starting point of 5 years imprisonment with a sentencing range of 4 – 7 years imprisonment and for level 3 offences a starting point of 3 years imprisonment with a sentencing range of 2 – 5 years imprisonment. Where the driving is less culpable that for level 3 then the sentencing judge has at their discretion the ability to adjust the sentence downwards as may be appropriate[5].

[21] As stated in Cooksley and referred to in **The Queen v Romauld Clarke**[6],

> "*This offence causes particular difficulty for sentencers. By definition, it is one which always gives rise to extremely serious harm: the death of at least one victim (and in some cases serious injury to others). Understandably this often leads to calls from victims' families, and from the wider community, for tough sentencing. On the other hand, an offender sentenced for causing death by dangerous driving did not intend to cause death or serious injury, even in the extreme case where he or she deliberately drove for a prolonged period with no regard for the safety of others. The Panel believes that new guidelines will help sentencers to strike an appropriate balance between the level of culpability of the offender and the magnitude of the harm resulting from the offence. The Panel drew up its initial proposals on the basis that the outcome of an*

[5] Some Jurisdictions there is the offence of Causing Death by Careless Driving which is less serious.
[6] SLUCRD2011/0021.

offence, including the number of people killed, was relevant to the sentence, but that the primary consideration must always be the culpability of the offender. That was supported by the majority of respondents to our consultation paper, and it remains our view. Two of the detailed points in the Panel's Advice deserve particular mention. One is the significance of multiple deaths. Although the number of people killed is often a matter of chance, there are (as some of our consultees pointed out to us) cases where the offender has knowingly put more than one person at risk, or where the occurrence of multiple deaths was reasonably foreseeable. In such cases, we recommend that the occurrence of more than one death should be treated as a more seriously aggravating factor. The second point is the inclusion of 'driving when knowingly deprived of adequate sleep or rest' in the list of factors that would aggravate the seriousness of an offence. Under previous sentencing guidelines, 'briefly dozing at the wheel' was seen as an example of a 'momentary dangerous error of judgment', indicating a less serious offence. The Panel's view (again supported by consultees) is that falling asleep is more likely to aggravate than mitigate the seriousness of an offence, because drivers do not normally fall asleep without warning, and the proper course of action for a motorist who feels drowsy is to stop driving and rest."

[22] Courts have a duty to protect society from these types of offences being committed and to consider those committing these crimes to determine whether there should be short sharp sentences in which the "clanging of the prison gates" may have worked its magic and prevent those convicted from repeat offending or whether a protracted sentence is required for the public's protection as the person may be a repeat or even a dangerous offender. As re-iterated by Joseph-Olivetti J. in the case of **Wendell Varlack**[7] what was stated in the case of **R v McDonald Williams**[8]

[7] BVI Case No. 27 of 2011.

[8] BVI Crim Case No. 21 of 2005 (unreported).

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

[23] The above passage to my mind once again illustrates the seriousness with which the courts and legislature consider this type of offence and is equally as apt to Grenada as any other jurisdiction. It is abundantly clear that where death does result in these circumstances, often the effects of the offence will cause grave distress to the family of the diseased.

[24] The impact on the family is a matter that the courts can and should take into account. However, as was pointed out by Lord Taylor CJ in Attorney General's References Nos. 14 and 24 of 1993 (**Peter James Shepherd, Robert Stuart Wernet**) [1994] 15 CAR (S) 640 at P644:

"We wish to stress that human life cannot be restored, nor can its loss be measured by the length of a prison sentence. We recognise that no term

of months or years imposed on the offender can reconcile the family of a diseased victim to their loss, nor will it cure their anguish."

Counsel Submissions

[25] This Court has listened carefully to the submissions made by Ms. Greenidge and Mr. Clouden respectively. Ms. Greenidge for the prosecution set out the facts of the case very concisely and accurately, including the findings of the autopsy report. Ms. Greenidge states that the defendant was arrested and interviewed and there seem to be different versions of the events according to the defendant but it is clear that the defendant was driving for some time and knew that he was unlicensed, and may have had at least two drinks. The prosecution accepts that there is genuine remorse from the outset on behalf of the defendant. The victim impact statement sets out that Mr. Leon Williams would like leniency as the defendant is his cousin and knows that the defendant is truly sorry. Ms. Greenidge highlighted that there was cooperation from the defendant and he did plead guilty at the earliest opportunity, in addition to setting out the law and the sentence options of imprisonment and disqualification and further states that the sentence ought to be imposed cumulatively by the use of the word “and” in the legislation.

[26] Mr. Clouden submits that the Interpretation Act s.58(2) where it states alternatively or cumulatively gives the Court a discretion as contemplated by s.(73)(3) of the Criminal Code. He states that Parliament in trying to avoid the mischief of not observing due care and attention whilst on the road, have determined that the penalties can be imposed as alternative to each other. Mr. Clouden submits that this case is one in which a non-custodial sentence can be imposed. He states that there was no intention to speed or cause harm or for that matter to cause death via his driving. The social inquiry report did not reveal anything of significance he states although the defendant admitting that he had two drinks earlier that day. Mr. Clouden highlighted from the report that the defendant was described as a

good man, kind, generous, talkative and a good father with a good heart. The defendant he says has a great deal of genuine remorse and contributed ten thousand dollars towards the funeral costs of the deceased.

Mr. Clouden referred the court to the case of **R. v Day** (1994) 16 Cr.App.R.(S). 193 where a non-custodial sentence was passed, and submits that sentencing in these types of cases where there is no intention to cause harm, and where the accident is unavoidable or inevitable may result in non-custodial sentences. This court does not agree with Mr. Clouden that in this case the accident was unavoidable although the court accepted the defendant's early guilty plea and agreed that the full discount of one third ought to be applied towards any sentence passed.

Social Inquiry Report

[27] The social inquiry report stated that the defendant is now 62 years old with three dependents.

[28] When the defendant was interviewed he was very cooperative and well-mannered and gave detailed answers to all questions. The author of the report was given an insight into the defendant by members of his family and those who knew him in the community.

[29] The defendant was described as a good man, kind, loving, caring and generous. The defendant has a good relationship with his brothers Colin and Robin and daughter Jeanet who asked that mercy be shown to the defendant.

[30] It is clear that the defendant accepts full responsibility for his actions there is genuine remorse on his part as the deceased man was like a father to him. He stated that he would like to gain the forgiveness of the Whitfield family.

[31] Mr. Leon Williams the son of the deceased stated that he had a very good relationship with his father, who was 92 years old at the time of his death. He states that the defendant was like a cousin to him and they care for each other. Mr. Williams has indicated that although he misses his father very much he would like the court to exercise some leniency on the defendant when considering sentence, as he believes that this was an accident and the defendant is truly sorry for what has happened. Mr. Williams also confirmed that the defendant has contributed ten thousand dollars to the family for costs that they would have incurred for the funeral.

[32] The court has considered the following aggravating factors in relation to the offence generally. They include, one death resulted, significant damage to two properties, driving without a licence, defendant's vehicle poorly maintained.

[33] The mitigating factors of the offence include there was no excessive speeding, the defendant was dazzled by bright lights of an oncoming vehicle, the driving was not deliberately or intentionally dangerous, there was no deliberate disregard or warning signs or other road users, fully cooperated with the authorities.

Starting Point

[34] This court having considered the aggravating factors and mitigating factors of the offence only, has determined that the starting point is 3 years imprisonment

[35] The court has also considered the aggravating and mitigating factors relating to the defendant, and they include, his age of 62, a man of previous good character, his admission of the offences, early guilty plea, and genuine remorse, not consuming significant amounts of alcohol.

[36] The starting point will be adjusted downwards by eighteen months based on the aggravating and mitigating factors considered.

Credit for Plea

[37] As the defendant cooperated with the police and admitted the offence at the earliest possible and reasonable opportunity he shall be given the full credit of one third towards any sentence imposed.

Time on Remand

[38] The defendant has not spent any time on remand, therefore there is no time to be credited towards his sentence.

Young and Mature Offenders

[39] A sentencer should be mindful of the general undesirability of imprisoning young first offenders. For such offenders, the Court should take care to consider the prospects of rehabilitation and accordingly give increased weight to such prospects. Where imprisonment is required, the duration of incarceration should also take such factors into account. In the same vein, in cases where the offender is a mature individual with no apparent propensity for commission of the offence, the sentencer may also take this circumstance into account in weighing the desirability and duration of a prison sentence. As with first time offenders, the more serious the offence, the less relevant will be these circumstances[9].

[40] The laws of Grenada[10] stipulate that where a court passes on any person a sentence of imprisonment for a term of not more than three years for an offence, it may order that the sentence shall not take effect, unless during a period specified

[9] Desmond Baptiste v The Queen ibid.
[10] Laws of Grenada, Act No. 29 of 2012 The Criminal Code(Amendment)Act 2012, s.78BB.

in the order, being not less than one year or more than three years from the date of the order, such person commits in Grenada another offence punishable with imprisonment and thereafter a court having power to do so orders the original sentence shall take effect with or without variations of its terms.

[41] In the case of **Cooksley**[11], referring to the case of Brown it was stated:

> "As in the case of sentencing for any offence a sentence of imprisonment should only be imposed if necessary and then for no longer than necessary. In these cases an immediate custodial sentence will generally be necessary. The starting point for causing death by dangerous driving should be a short custodial sentence of perhaps 12 to 18 months. That is the approach that should be adopted even when there is a plea of guilty, though the plea of guilty will justify the appropriate reduction in the length of sentence. This is in relation to an adult offender. We regard as an example of this approach the case of Brown[12]. In Brown the defendant momentarily fell asleep while driving his van in daylight drifted across the road and collided head on with a car travelling in the opposite direction, killing a passenger in it. The mitigating factors were guilty plea, previous good character with an impeccable driving record and the fact that the offender displayed genuine shock and remorse. In addition, the effect on the appellant's life and family was devastating. This court reduced the sentence to 9 months imprisonment."

[42] Brown makes it clear that in order to avoid a custodial sentence there has to be exceptional mitigating features. I have also considered what was stated in the case of **Kimo Liburd**[13] under the heading of question of suspended sentence, and agree that although the court can take into consideration good character and personal circumstances there must be found exceptional circumstances to allow

[11] [2003] EWCA Crim 996.
[12] [2002] 1 CAR(S) 504.
[13] SKBHCR2013/0025.

for suspending a sentence. I find that this case is one in which there are exceptional circumstances which allow me to suspend the sentence.

Conclusion

[43] The sentence that this court imposes on the defendant is twelve months imprisonment suspended for twelve months.

[44] The defendant is also disqualified from driving[14] or obtaining a driving licence for a period of three years.

[45] Two Hundred hours of unpaid work to be completed within twelve months assisting at the home for the elderly. If the defendant breaches this requirement, by failing to attend as and when directed on at least three occasions without good reason then the matter is to be brought back and the court will consider imposing the full suspended sentence.

[14] While those convicted of causing death by dangerous driving are likely to regard disqualification as an onerous part of the punishment for the offence, the main purpose of disqualification is forward-looking and preventative, rather than backward-looking and punitive. A driving ban is designed to protect road users in the future from an offender who, through his conduct on this occasion, and perhaps other occasions, has shown himself to be a real risk on the roads.

[46] This court thanks both Ms. Greenidge and Mr. Clouden for their helpful oral submissions on sentence.

Shiraz Aziz
High Court Judge

By the Court

Registrar