

SAINT LUCIA

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

SLUCRD2014/0026A,0077A

BETWEEN

THE QUEEN

Claimant

and

CALEB ELIJAH ANTOINE

Defendant

Appearances:

Mr. Leslie Mondesir for the Defendant

Mrs. Jenin Samuel-Kisna and Ms. Kadiya Florius for the Crown

Mr. Salim Charles with a watching brief for the Family of the deceased

2016: November 3;
December 19.

[1] **TAYLOR-ALEXANDER J.(Ag)** : The Defendant Caleb Antoine was indicted by the Director of Public Prosecutions on the 25th of February 2016 for (1) Causing the Death of Omatoya Olaogun Morrison by dangerous driving contrary to Section 73 (1) (a) of the Motor Vehicle and Road Traffic Act Cap. 8.01 of the Revised Laws of Saint Lucia 2008 (the Act) and; (2) Dangerous driving contrary to Section 73(1) (b) of the Act. At arraignment on the 28th of April 2016 the Defendant entered a plea of not guilty and the matter was fixed for Case Management Conference on the 6th of June 2016.

[2] The Defendant at the conference relied on ECSC Practice Direction No. 2 of 2015, and requested a sentence indication hearing. On the 21st of July 2015, the court, guided by the written and oral submissions filed by the Crown and the Defence, the law and authorities referred to below indicated its intention to impose a sentence of a fine and/or a suspended sentence together with

remedial or defensive driving classes, whereupon the Defendant requested that the indictment be re-read. The Defendant changed his plea to guilty. Consequent on its indication, the court dispensed with the requirement of a pre-sentence report and fixed the proceedings for sentencing on the 3rd of November 2016.

- [3] The following supplies the sentence and my reasoning.

THE FACTS

- [4] The Crown's case which was accepted and agreed to by the defence can be summarised principally by the witness statements of Maninder Kaur, Raimona Peters, P.C 124 Kerwin Bellas and the interview under caution of the Defendant. The following is a summary of the witness statements. The deceased together with other friends who included Maninder Kaur, Raimona Peters, and "Tobi", who were all students at the Spartan Medical School, had been socialising, dancing and drinking at the "People's night club" in Vieux Fort in the south of St. Lucia, in the wee hours of the 8th of February 2014. Shortly after 3:00 am, the students decided to leave the club. Raimona and Tobi left first and were shortly followed by Maninder and the deceased. Maninder recalls that it was raining when they were at the club. They walked along the industrial estate road heading in the direction of the St. Jude's Highway. They walked together until they got to JNB's hardware. At some point, the deceased and Maninder briefly returned to the club to find the cell phone of the deceased which he had forgotten at the club. At the point when they decided to return to the club, Maninder recalls that she still has sight of Raimona who was heading up the St. Jude's Highway and Toby heading toward Hewanorra Orchard.
- [5] Raimona Peters states that she and Toby walked until they got to the intersection of the St. Jude's Highway and Hewanorra Orchard, at which point they waited for about five minutes for the deceased and Maninder. Toby turned off into Hewanorra Orchard where he lived and Raimona continued walking up the St. Jude's Highway. Raimona noticed that the road was wet. She walked along until she came to a pile of sand near the side of the road when a non-descriptive vehicle, passed her at a fast speed, and some sand flew in her face. No other vehicle passed her again until she got to her home.

- [6] Maninder and the Deceased left the club a second time. Maninder states that she and the deceased walked up the St. Jude's highway passing the intersection at the Home Depot on the right side of the road facing Vieux Fort. She and the deceased were walking side by side off the pitched surface of the road. Her next recollection was of her talking to Dr Ben of their school while she lay on the road.
- [7] P.C 124 Bellas arrived on the scene shortly after the accident. He made observations of the road at the time of it being smooth, pitched and wet. He recalls that it was still dark, but the area was well lit with lamp posts. He observed two persons lying on the ground one of whom was the deceased. The deceased was positioned on the left side of the Industrial estate road facing the La tourney Mall and the female was on the right side of the road. He noticed a concentration of blood around them. He also noticed that the car driven by the Defendant was at the intersection of the St. Jude's Highway and the Industrial Estate road facing the direction of Augier. It had damage to its front, back windscreen and rear end. The vehicle had impacted a wall. He cautioned the Defendant at the time who told him that he was heading to Cedar Heights where he lived and he slowed down, applying his brakes and the vehicle began to skid off the road. He tried to avoid hitting the pedestrians by shouting, but his windows were up. The vehicle he said made contact with them. This was the signed statement given by the Defendant at the scene.
- [8] In his interview under caution the Defendant confirmed that he had been at club Legacy where he had one drink, a spice rum and cranberry. He left the club at about 3.27 am for home. He stated that his speed was about 35-40 mph. He stated that that the road was wet and it was raining. He stated that just as he passed the Victory church he noticed two pedestrians at the entrance to Home Depot. He then lost control of the vehicle shortly after the Victory Church. At that time he says, the pedestrians were walking close to each other, on the right verge, on the dirt, facing south, a short distance before the junction of the Industrial Estate Road and the St. Jude's Highway. He said his vehicle first collided with a wall and the second impact was with the pedestrians to the left rear door of his vehicle. After the accident, he says he tried to administer CPR to the male pedestrian. Omatayo Olaogun Morrison remained in critical condition until 8.05 p.m., when he succumbed to his injuries.

- [9] Measurements taken at the scene reveal that the Defendant travelled a distance of 152 feet after he lost control of the vehicle, and before it ran off and it travelled a further 27 feet before impact with a wall. After hitting the wall the vehicle again veered off hitting the pedestrians. The distance from the impact with the wall and where the female pedestrian lay was 79 feet and of where the male pedestrian (the deceased) was is 108 feet. The left front tire created a drag mark of 36 feet 7 inches to its final stop.

PRACTICE DIRECTION NO. 2 OF 2015

- [10] This Practice Direction established a procedure to give effect to the principles in the well-known case of **R v Goodyear** [2005] EWCA Crim 888, by giving a Defendant, upon request, an indication of a likely sentence he would receive were he to plead guilty. A sentence indication should be confined to the maximum sentence to be imposed, if a plea of guilty is tendered at the stage of the proceedings at which the indication was sought. The indication may refer to a sentence of a particular type, a sentence of a particular type within a particular range, or of a particular quantum, a sentence that would not be imposed, a combination of sentences. Practice Direction No.2 of 2015, has been in effect from the 22nd of July 2015.

THE LAW

- [11] Section 73 and 106 of the Motor Vehicle and Road Traffic Act provides that:—

“73—(1) A person shall not —

- (a) cause the death of another person by dangerous driving; or*
- (b) drive dangerously on any road.*

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

- (a) to imprisonment for a term not less 5 years and not exceeding 15 years; and*
- (b) in addition to the sanction specified in section 106.”*

“106— (1) If a person is convicted of a traffic offence or an offence under the regulations, the court may consider the driving record of the person and disqualify the person from driving a motor vehicle or trailer for a definite period of time, if the court considers that the facts of the case or the person’s driving record or both the facts of the case and his or her driving record when taken together, justify the disqualification.”

- [12] On sentencing for an offence under Section 73 of the Act, the court must also have regard to Section 1197 of the Criminal Code, which acknowledges the court’s discretion to impose a fine for indictable offences punishable with imprisonment. It reads:—

“1197. – (1) In the case of any indictable offence punishable with imprisonment, the Court may substitute a fine and impose in default of payment of the fine imprisonment not exceeding the term of imprisonment which may otherwise be imposed as punishment for the offence. “(2) Subject to the provisions of any enactment, such fine shall not exceed eight thousand dollars.”

- [13] In **Thelbert Edward v The Queen** Crim App No.3 of 2006 (unreported) learned Justice of Appeal Barrow explained the effect of Section 1197 thus:—

“.....section 1197 of the Code confers discretion on the court to fine instead of imprisoning. The ability of the court to exercise that discretion is unaffected by whether or not a minimum term of imprisonment is provided. Section 73 (2) of the Act establishes liability to a minimum term of imprisonment; it does not establish that it is mandatory to sentence a person to imprisonment. Mandating that imprisonment shall be for a minimum term is not the same as mandating that there shall be a sentence of imprisonment”

- [14] In **Thelbert Edward** the court was however, clear to state, that legislative intent was not to be undermined and reinforced the view that in the face of the clear legislative intent of section 73 (2) of the Act the court must move away from the position of former years, which was that absent some aggravating feature, a custodial sentence for motor manslaughter is not appropriate. The court took the view that the sentencing of an offender for causing death by dangerous driving required the court to consider whether this was an appropriate case for the imposition of a custodial or a non-custodial sentence. The majority of the Court imposed a fine of \$4,000.00 with no additional period of disqualification from driving beyond the suspension period of almost three years.

- [15] I am guided by the legislation and by the interpretation provided by the court in **Thelbert Edwards**.

CUSTODIAL OR NON-CUSTODIAL SENTENCE?

- [16] Both Counsels for the Defence and the Crown directed me to the authorities of **R v Wendell Varlack** Case No. 27 of 2011 BVI (unreported) and **Robert Charles Cooksley et al v R** [2003] EWCA Crim 996, as stating the principles to be applied in sentencing an offender for causing death by dangerous driving. In **Varlack Joseph-Olivetti J.** stated that the primary factor to be considered is the seriousness of the offence committed. That is determined by assessing the culpability of the offender and balance it against the harm caused or risk being caused by the offence.

- [17] In **Cooksley** the English Court of Appeal held that the primary consideration that must be taken into account in determining sentence must always be the culpability of the offender and that the effects of the offence on the family of the deceased, the impact on the family is a matter that the courts can and should take into account. Lord Woolfe, CJ, however noted with approval the dicta of Lane CJ in **Attorney General's References (Nos. 14 and 24 of 1993) (Shepherd and Wernet)** (1994) 15 Cr. App. (S) 640 at p. 644 as follows:—

“we wish to stress that human life cannot be restored, nor can its loss be measured by the length of a prison sentence. We recognize that no term of months or years imposed on the offender can reconcile the family of a deceased victim to their loss, nor will it cure their anguish.”

- [18] I turn now to the evidence disclosed by the case file. The only explanation for the accident is offered by the Defendant himself. He states that he was driving between 35 and 40 mph. He states that the road was wet and he caught a skid. There is evidence by Raimona Peters that the only vehicle that passed her on the road at some distance before the accident was a vehicle that passed her at fast speed. It is unknown whether that vehicle was in fact the Defendant's vehicle and it is a matter for speculation what a “fast speed” was. One of the two pedestrians who survived the accident has no recollection of the accident at all. It is only to the Defendant evidence therefore, we can turn to determine his culpability. Both Raimona Peters and the investigating officer confirmed that the road was in fact, wet. The Defendant offered evidence that he had had one drink, a rum cocktail. This has not been disproved or otherwise challenged by the evidence, not is there evidence that the Defendant was drunk. Without the benefit of additional evidence or expert testimony which the crown has not relied on, this court cannot challenge the explanation offered by the Defendant nor can it make a determination based on the measurements taken at the scene. I also had the opportunity to review the Pre-sentence report helpfully prepared by probation services after the sentence indication hearing which referred to the Defendant as having a previously impeccable driving record and his family and members of his community expressing surprise at him being involved in a vehicular accident, given what they know of his character.
- [19] I considered the aggravating factors identified in **Cooksley** and appreciate that these are not exhaustive. The evidence of the Defendant is that he had one drink. Cooksley refers to having a couple of drinks as an aggravating factor. Without evidence of inebriation I am unable to reply on

this as an aggravating factor. I have considered as aggravating factors the death of the Deceased and the fact that there was another person injured in the motor vehicular accident as an outcome to the accident.

- [20] Based on the evidence of the Crown at the stage of arraignment I found there to be a low degree of culpability.

THE EFFECT OF THE ACCIDENT ON THE FAMILY OF THE DECEASED

- [21] I had the benefit of hearing for the parents of the deceased who supplied statements on the impact of the loss of their son on their life and the life of their entire family. The pre-sentence report also referred to a statement of the girlfriend of the deceased and from the Spartan School where he was being educated. I also had the benefit of hearing from the parents of the deceased personally, who both travelled from Canada for the sentencing hearing to recount to the court how their lives have been impacted and continues to be impacted by the loss of their only son. The court heard that Omatoya Olaogun Morrison whom his mother affectionately referred to as "Tayo" was a special son and a precocious boy who over the years had made his parents proud. He was an intelligent man with an athletic build, who had a keen interest in sports and in being a Doctor. He was outstanding in soccer and in Tae Kwando at which he earned a brown belt. He also won several local medals in track and field in Canada and in competitions in the United States. Up to the untimely death of his track coach, he was being trained to represent Canada at the Olympics. He gave up track after his coach died and decided to pursue Health Sciences. Tayo, his mother said became passionately interested in Kinesiology in which he pursue a degree and which formed the foundation for his medical career. He was an honour student in French. He also played the piano, and his mother recounted that he could play Chopin and Beethoven with amazing composure. His mother states that he was in love with life and family. She states that heaviness and grief have been life since the loss of her son.

- [22] The parents indicate that their entire family has been impacted by the death as they were all deprived of the opportunity of saying goodbye. Both parents continue to have difficulty sleeping; his mother has difficulty working and suffers from depression. She often wakes at night screaming. Barrington Morrison the deceased's father states that it has been difficult for him to accept the loss of his son. Exercise helps him maintain his sanity. He feels that his family has been given a life

sentence. He agonises watching his wife struggle to complete daily task professionally and domestically and this weighs heavily on him. He expresses deep loss in not knowing the doctor his son would have become. His son's eventual dream was to work with Doctors without borders.

He states that his family has found a sense of purpose in their pain by collaborating with the Spartan School to start an organisation called the Omotayo Head Matters Organisation with its aim being to assist persons with head injuries and to donate equipment to the St. Jude's Hospital. The entire family continues to struggle with the loss and to find ways of coping. I commiserate with the family on their loss.

[23] In determining an appropriate sentence I have also considered the aims of sentencing restated by Byron CJ in **Desmond Baptiste v The Queen et al** Criminal Appeals No: 8, 10, 16, 22, 22, 25, 26, 29, 34, 35, 37 of 2003 of St. Vincent and the Grenadines namely punishment, retribution, deterrence and rehabilitation.

[24] I have also had regard to the direction provided in **Cooksley** and restated by Barrow JA in **Thelbert Edward** where the English Court of Appeal established four starting sentences according to the degree of culpability in the commission of the offence, namely a starting sentence of 12 to 18 months; where there is intermediate culpability, a starting sentence of 2 to 3 years; where there is higher culpability, a starting sentence of 4 to 5 years; and for most serious culpability, 6 years and over. I take as a starting point a minimum custodial sentence of 12 to 18 months.

[25] I have considered and applied the Aggravating Factors referenced earlier and I accept the following as the mitigating factors namely:—

- (a) *The Defendant has pleaded guilty and has obviated the need for trial, which qualifies him for an automatic 1/3 discount on any sentence the Court was likely to impose.*
- (b) *the Defendant has shown remorse;*
- (c) *the good character of the Defendant.*
- (d) *the Defendant has no previous convictions;*
- (e) *the Defendant co-operated with the police;*
- (e) *the Defendant attended to the deceased by administering CPR after the accident.*

[26] I have also considered the sentences given in comparable cases referenced by the Defence and the Crown namely:—

- (a) **Thelbert Edward** *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.' On appeal the Defendant was fined \$4000.00, in default to 1 year imprisonment.

- (b) **R v Jesse Charles** SLUCRD2009/2008, 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 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.
- (c) In **R v Markenzee Hunte** SLUCRD2009/0018, 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 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.
- (d) **R v Wendell Varlack** Criminal Case No.27 of 2011, the Defendant stuck down a student causing her death. Three vehicles travelling in an opposite direction had stopped to facilitate the student crossing the road when the student was half way across the road Varlack passed two of the stationary vehicles without slowing down and struck her. He was oblivious that he had hit her. She was carried on the hood of the vehicle for some 193 feet and then rolled off. Varlack had been noticed staggering and smelling of alcohol. The court found that the Defendant had been travelling at an excessive speed, and was mentally and physically incapacitated. He was unaware that he had hit the deceased or that he had carried her on the bonnet of his vehicle for some time. Despite the mitigating circumstances the court found a high level of culpability and imposed a sentence of 18 months imprisonment.
- (e) **Elvis Richardson** SKBHCR2013/0030. The Defendant was speeding in an uninsured vehicle and fatally struck an 80 year old man who was crossing the road. He volunteered a blood test which revealed that he had been drinking, but it could not be established whether he had exceeded the legal limit. The court imposed a suspended sentence of 12 months.

(f) Other cases on identical indictments from St. Lucia, relied on were, **R v Mathew Adjodha** SLUCRD2007/0029, in which the Defendant was fined \$4,000.00, **R v Romauld Clarke** SLUCRD2011/0021, where the Defendant was fined \$5,000.00, **R v Eric Vaughn Naitram** SLUCRD2011/0214, in which the Defendant was fined 10,000.00 and **R v Roger Cadet** SLUCRD2010/226, in which the Defendant was fined \$10,000.00.

(g) In **Elvis Richardson** Ramdhani J referenced three other unreported decisions of (1) **DPP v Tyrone Nisbett** SKBHCR2004/0029, where the Defendant was convicted in 2004 and ordered to pay \$6000.00 (2) **DPP v Devon Williams** SKBHCR2011/0018 where the Defendant was fined \$20,000.00 to be served in two years or serve two years imprisonment (3) **DPP V Sylvester Allen** SKNHCR2011/0020, where the Defendant was fined \$15,000.00.

[27] Having considered all of these factors, I do not consider this case to be one fit for custodial sentence. The mitigating factors are substantial and provide good reason for the court to apply its discretion to impose a fine in preference to a sentence of imprisonment.

[28] Accordingly, on the two counts of the indictment the Defendant is fined the sum of \$10,000 or in default to serve one (1) year imprisonment. The said fine shall be paid within 6 months. The Defendant suffered automatic suspension of his driver's licence, in effect now for 1 year and 10 months, commencing from the date of charge. I find no justification for a further period of disqualification.

[29] Finally I acknowledge the assistance provided to this Court by both Prosecution and Defence Counsels and I also thank the assistance provided by probation services whose assistance I had initially dispensed with, but whose services were unprecedentedly requested by Counsel with a watching brief, Mr. Salim Charles. Their assistance allowed me to have a better appreciation of the character of the Defendant and of regard had of him by his community.

V. GEORGIS TAYLOR-ALEXANDER
HIGH COURT JUDGE (Ag)