IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 001/2018
IND.0072/2017
BT #0149/2016

BETWEEN:

Colburn Murray Martin

Appellant

- and –

Her Majesty the Queen

Respondent

BEFORE: **The Hon John Martin, Justice of Appeal**
The Hon Sir Richard Field, Justice of Appeal
The Hon C Dennis Morrison, Justice of Appeal

Date of Hearing: Tuesday, 2 April 2019

Appearances: Mr. John Furniss, Attorney for the Appellant
Mr. Kenneth Ferguson of DPP for the Respondent

REASONS FOR JUDGMENT

Transcript of oral judgment dated 2 April 2019

Approved for Release 29 April 2019

FIELD, JA

1. On pleas of guilty to one count of dangerous driving under section 76 of the ***Traffic Law,*** and one count of failing to provide a specimen of breath under section 84(5) of the ***Traffic Law***, this appellant was sentenced on the 30th of April 2018 by Acting Justice Wood in the Grand Court to 18 months' imprisonment on the first count and a two-year

supervision order on the second count to be activated on his release from custody. Under the supervision order, he is to submit to treatment for his alcohol addiction and not to visit any premises holding a liquor licence.

2. The appellant now appeals against the sentence imposed on the dangerous driving count, having been granted bail on the 8th of May 2018, soon after being sentenced.

3. The facts relating to the indexed offence are as follows: At about 7:00 pm on the 2nd of July 2016, having previously consumed a number of cans of beer, the appellant was driving his Chevrolet Silverado motor vehicle on the South Side Road on Cayman Brac where the maximum permitted speed was 40 miles per hour. When having just slowed down from 74 miles an hour to about 58 miles per hour, he drifted across to the other side of the road and collided with a vehicle being driven in the opposite direction by Miss Sharon Austin. The impact of the collision was horrific.

4. Ms Austin was trapped in her car with her feet pinned down by the steering wheel. It was an hour before she was eventually freed by the Cayman Brac fire service. She suffered very serious injuries, including a compound comminuted fracture of her right femur, a 15-centimetre laceration to the lower medial aspect of her left thigh, a dislocated knee and two fractured ribs. She underwent a 9-hour emergency operation followed by 2 subsequent major operations. Her Suzuki motor car was a right off. She was bedridden for 3 months.

5. When the police arrived, they found a number of open cans of beer in the appellant's vehicle. The appellant refused to provide a specimen of breath at the roadside and later refused to provide a specimen of blood, having been taken to the Faith Hospital.

6. In a Victim Impact Statement produced on the day the appellant was sentenced, Ms Austin reported that she continued to suffer pain and to experience physical, emotional and psychological trauma. Her life had been turned upside down. She had needed 24-hour care. She was walking with a pronounced limp and had been badly scarred.

7. At the time of the accident, the appellant was on bail in relation to a charge in the Summary Court of driving whilst under the influence of alcohol. This charge was eventually withdrawn.

8. It was common ground that the appellant had a longstanding drink problem, regarded by the judge, without challenge, as amounting to alcoholism.

9. The sentencing court had the benefit of a social inquiry report on the appellant that noted that he had been drinking from the age of 18.

10. The maximum sentence for dangerous driving is two years' imprisonment and a fine of $3,000.

11. The appellant had entered a reasonably early plea of guilty to a charge of careless driving and did not plead guilty to the charge of dangerous driving until the 8th of January 2018. In light of that failure to enter a guilty plea to dangerous driving at the earliest opportunity, the judge applied a discount of 25 percent to the sentence he was otherwise minded to impose rather than a discount of one-third. The appellant makes no complaint about the discount allowed by the judge.

12. In passing sentence, the judge said that to his mind and from his experience, the case came very close to being the worst possible case of dangerous driving that it was possible to imagine. It involved the following aggravating features: Speeding up to 74 miles per hour in a 40-mile per hour area; the consumption of alcohol prior to driving whilst on bail for a summary charge of driving whilst under the influence of alcohol; and the catastrophic injuries suffered by Ms Austin, who had been trapped in her car for an hour.

13. In the view of the judge, if the appellant had been convicted after a trial, the court would have imposed a sentence of two years' imprisonment, which meant that after applying the 25 percent discount, the sentence was to be one of 18 months' immediate custody.

14. It was submitted to this court on behalf of the appellant that the judge's starting point was too high. It was argued that a maximum sentence should only be imposed in the worst of

cases, and this was not to be characterised as one of the worst of cases that could arise on a charge of dangerous driving.

15. The appellant was 26 years of age and was otherwise of good character so far as the absence of any criminal record was concerned. He had been employed for a number of years by the Cayman Brac fire service, who regarded him highly. His superior officers within the fire service had noted, however, that he had a serious drink problem.

16. Upon being granted bail pending this appeal, a number of severe conditions were imposed. These included having to report to the police three times a week; not going into licensed premises or purchasing alcohol; not leaving Cayman Brac; attendance at alcoholic anonymous sessions; and submissions to random testing.

17. Mr Furniss on behalf of the appellant contended that serious though this offending was, the judge was wrong to characterise it as the worst sort of offending so far as dangerous driving was concerned.

18. Mr Ferguson for the Crown submitted that the judge had, indeed, erred in principle in adopting the maximum sentence as his starting point. He referred us to the case of Anastasia Watson, a case of causing death by careless driving where this court upheld a starting point of 21 months, well short of the maximum sentence applicable to that offence. Mr Ferguson was constrained to accept, however, that each case depends on its own facts, and there had been no element of drink involved in that particular case.

19. Mr Furniss also submitted that the judge had erred in principle in not taking into account the personal mitigation available to the appellant.

20. In our view, when deciding whether a sentencing court has erred in taking a maximum sentence as the starting point, the test is not whether it is possible to imagine a case of even greater seriousness than that before the court. This is because every case is different, and it is nearly always possible to conceive of a worse case than the one on which the court is passing sentence. Instead the approach of this appellate court must be to consider whether the starting point adopted by the sentencing court fell within the permissible

range of serious cases which can be properly characterised as worst cases in respect of the particular offence that has been committed.

21. Adopting this approach, we do not accept that the judge erred in taking two years' imprisonment as the starting point. Both in terms of culpability and harm done, this was a very serious case indeed. To drive at 74 miles per hour along a road subject to a 40-mile per hour speed restriction, having consumed a number of cans of beer and whilst being on bail for a drink driving offence, in our judgment, shows a truly shocking disregard for the safety of other people using the highway.

22. This appellant had a serious drink problem. He knew of that problem and nonetheless had driven his car at those speeds, having consumed a number of cans of beer prior to this driving. And the harm caused to Miss Austin by this conduct has been catastrophic. Her life has been ruined by the terrible injuries and resulting pain and suffering that she suffered as a result of the appellant's criminality.

23. In our judgment, such personal mitigation, as was available to this appellant, counts for virtually nothing towards a reduction to the starting point adopted by the judge.

24. Mr. Furniss had another point. He submitted that the restriction on the appellant's liberty during the period of his bail, which is about 11 months, ought to be taken into account in the ordinary way where, for instance, tagging and other restrictions on liberty are imposed as bail conditions in the period leading to the trial of the defendant. The restrictions imposed on this appellant's liberty were severe. He had to attend sessions of alcoholic anonymous. He could not leave Cayman Brac. He was the subject of reporting to the police, and he was the subject of the possibility of random testing.

25. In our judgment, it is appropriate in this case to give credit for those restrictions on the appellant's liberty. In our judgment, the appropriate credit is approximately half of the period of which he has been the subject of those restrictions, leading us to conclude that it is appropriate to reduce the period of 18 months by 6 months, leading to a sentence of 12 months.

26. Mr Furniss accepted that the court had no jurisdiction to suspend the sentence of imprisonment. Even if such a jurisdiction had existed, this court would certainly not have found that the circumstances of this offending justified a suspension of the sentence. Accordingly, for the reasons that we have given, this appeal succeeds to the extent that the 18-month period of imprisonment imposed by the judge will be reduced to one of 12 months, which will be of immediate effect.

27. To that extent, this appeal succeeds.