

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **CRIMINAL SIDE**

3  
4 **INDICTMENT NO: 0071/2015**

5  
6 **THE QUEEN**

7  
8 **v.**

9  
10 **NICHOLAS PATRICK TIBBETTS**



11  
12  
13 **Appearances:**

**Mr. Greg Walcolm for the Crown**

14  
15 **Ms. Amelia Fosuhene of BRADY for the**  
16 **Defendant**

17 **Before:**

**Dame Linda Dobbs**

18 **Sentence Hearing:**

**15<sup>th</sup> – 16<sup>th</sup> December 2016**

19  
20 **Delivery of Decision:**

**16<sup>th</sup> December 2016**

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22  
23 **HEADNOTE**

24 *Criminal Law – Death by Careless Driving – Sentence – Starting point –*  
25 *Aggravating and Mitigating Factors – Court’s discretion to consider a reduction*  
26 *for time on an electronically monitored curfew.*



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SENTENCE JUDGMENT

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*INTRODUCTION*

- 4 1. Mr Tibbetts pleaded guilty to one offence of causing death by careless driving on 23<sup>rd</sup>  
5 April 2015 contrary to s.79 of the Traffic Law 2011 Revision. A count of doing an act  
6 intending and intended to obstruct justice was not proceeded with.

7

*FACTS*

- 8 2. On Thursday 23<sup>rd</sup> April 2015 around 4.30 a.m., the lifeless body of Mr Donnie Ray  
9 Connor was discovered, by a cyclist, on the side of the eastbound side of Linford  
10 Pearson highway, at the junction with Birchwood drive. The cyclist contacted the  
11 police and police and ambulance were dispatched to the scene. The victim was taken to  
12 hospital. Debris at the scene, including the damaged bicycle of the deceased, were  
13 collected. The scene had all the signs of a hit-and-run accident.
- 14 3. An investigation ensued.
- 15 4. During the course of the investigation police watched CCTV footage which showed a  
16 grey coloured car resembling a Honda Torneo entering from Agnes Way and exiting  
17 Linford Pearson highway shortly after the victim entered that highway from Bobby  
18 Thompson Way. It was noted that when the Honda Torneo entered the highway it did  
19 not have any damage to it, but some two minutes later, by the Kings Gym roundabout,  
20 damage to the nearside of the car, including the headlight, was noted. The officers then  
21 obtained a list of all grey and silver Honda Torneos.

1 5. The officers made checks at each address of owners of such cars. On Sunday 26<sup>th</sup>  
2 April, they went to an address listed for registration of vehicle 138-445 at 53 Kipling  
3 Street. The officers noticed a car in front of the house and two elderly ladies outside on  
4 the front porch. On walking past the car the officers noticed the smell of fresh paint  
5 fumes and also that the colour on the left fender and hood was different from the rest of  
6 the car.

7 6. The officers asked to see the registered owner, Mr Tibbetts. He came out. He was  
8 asked if he had done any work on his car recently as the officers could smell paint  
9 fumes. Mr Tibbetts replied,

10 *“Yes, I crash Wednesday night at Country and Western round about the same time*  
11 *that guy was hit”*

12 7. He was asked what guy. He said he had heard it on the news.

13 8. He was arrested and cautioned and taken to the police station. The car was seized.

14 9. The defendant’s iPhone was seized and messages downloaded which revealed  
15 conversations about Mr Tibbetts having an accident and whether it was connected to  
16 the man who had been killed.

17 10. Further investigations by the police revealed that after the accident the defendant went  
18 to the Red Bay *On the Run* petrol station where he changed the nearside rear wheel  
19 which had been damaged from the accident. CCTV from the petrol station shows the  
20 car entering and pulling up to an air pump and then leaving. The damage to the left  
21 head light and left fender and windscreen was visible.



1 11. The defendant went home but later that morning contacted a friend, Frank Watler Jr.  
2 As a result of the conversation, the defendant contacted Lance Eden to make  
3 arrangements to have his car fixed. The defendant, having rung around for parts,  
4 contacted Danny who sold him the parts for CI\$825. Work began on the car  
5 immediately on the same day.

6 12. The defendant asked a friend Carlos Robinson to help him dispose of the damaged  
7 parts at the dump. They took the windshield and fender but left the hood behind as they  
8 could not fit it into the defendant's car. This was sometime after 10 p.m. on 23<sup>rd</sup> April.

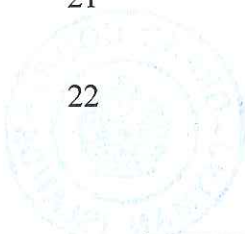
9 13. The post mortem on the victim took place on 28<sup>th</sup> April. The cause of death was blunt  
10 impact trauma to the head, chest and abdomen consistent with being hit by a motor  
11 vehicle.

12 14. Swabs taken from the defendant's car proved a match for the deceased.

13 15. Collin Redden, an accident reconstruction expert, examined the scene of the collision  
14 and the defendant's car. He concluded that the bicycle ridden by the victim had no  
15 lights or reflectors but that the highway lighting was reasonable. Mr Connor (the  
16 victim) was heading eastbound towards the Kings Gym roundabout. The defendant's  
17 car was also heading eastbound. It hit the rear of Mr Connor's bicycle; this threw Mr  
18 Connor backwards onto the left side of the car's bonnet and into the front windscreen  
19 and left-side pillar area of the car. After the initial impact, the bicycle was partly run  
20 over, and dragged causing the front rim and tyre to separate from the front fork.

21

22



1 The defendant's car continued to travel along the hard shoulder heading towards the  
2 guard rail, leaving behind the front rim and tyre from the bicycle, silver paint chip  
3 pieces of headlight lens and the left front fender liner. The rider would still have been  
4 carried by the car – with the rest of the bicycle being dragged under the left side rocket  
5 panel area.

6 The Honda continued to travel towards the open lot before veering to the right, back  
7 onto the highway. As it did so, the left rear car tyre ran over the bicycle damaging the  
8 outside sidewall, causing the tyre to deflate and causing the bicycle to finally rest by  
9 the side of the guardrail. The rider, at the same time, was also projected off the  
10 nearside of the car – which ripped the nearside rear rain guard from the window frame.  
11 This was found just west of the final resting place of the bicycle. The deceased landed  
12 on the edge of the hard shoulder just near the bicycle handlebar. Upon examination, the  
13 damage to the car tyre showed that the tyre was damaged from the outside and not the  
14 inside – the latter being consistent with a blowout. The damage also indicated that the  
15 car was driven some distance with the flat tyre, causing the lip of the rim to cut into the  
16 sidewall.

17 16. The defendant was interviewed on 27<sup>th</sup> April 2015. A prepared statement was  
18 presented by the defendant's attorney but as the defendant was not feeling well, the  
19 interview was cut short.



1 17. The interview resumed on Thursday 30<sup>th</sup> April. The attorney read out the prepared  
2 statement. The defendant said that he had taken some Benadryl for his allergies which  
3 can sometimes make him drowsy. He went out and had some rum and lots of water. He  
4 believed that he was fit to drive and did not feel tired when he started his journey  
5 home. He remembered taking the turn to Linford Pearson Highway but he did not  
6 recall hitting anyone or being in an accident. He only remembered the sound of a horn  
7 and bright lights from a vehicle behind him. He did not know if he had hit anyone. He  
8 must have fallen asleep as he started to have trouble controlling his car in the vicinity  
9 of the Country and Western Bar, when he realised that he had blown his tyre. He went  
10 to the Red Bay petrol station where he noticed that there was significant damage to his  
11 car and he was confused about how it could have happened. He changed the tyre and,  
12 when he got home, parked his car in his front garden facing the street with the damage  
13 visible. He still did not know at that time whether he had hit the man. He found out  
14 about a man being hit on a website the next day – but he wasn't worried because he  
15 didn't think that he had hit anyone. He then heard that a silver car was involved and he  
16 wondered if it were him. He spoke to people about going to the police He knew the  
17 right thing was to go to the police and he was intending to do so on the Monday but  
18 was arrested before he had the chance to do so.

19 18. He was asked why he had rushed to mend his car and he replied that it was his only  
20 means of transportation. He was not trying to conceal the damage. When asked why he  
21 had taken the damaged parts to the dump at night himself – he replied – they are mine,  
22 I can do what I want with them. Asked why he had not reported the matter to the police  
23 once he had known someone was dead - he replied that he was going to go on Monday  
24 but he was arrested on Sunday.



**REPORTS AND OTHER DOCUMENTS**

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19. There is a Social Inquiry Report (SIR) dated 7<sup>th</sup> November 2016. So far as the defendant's background is concerned, despite a somewhat unsettled childhood, he did well at school, and on leaving school, found employment. He has been gainfully employed since 2007 and, until the incident, was employed as an Immigration Officer in the Immigration Department. He met and married his present wife in October 2015. There are no children. He is a church goer and attends regularly. He is also heavily involved in community sports activities in recent times. He has not taken alcohol since he became baptised a year ago. He has no previous convictions.

20. He is assessed at a very low risk of re-offending.

21. There are also numerous testimonials in support of the defendant. The authors all speak very highly of the defendant and how shocked they were to hear of the incident because it was so out of character. All the positive things that can be said about a person have been said about this defendant. His wife speaks of the defendant as a loving, caring and trustworthy person. She describes the deep regret and sadness the defendant has about the accident; she describes the hardship she would face were the defendant to be given a custodial sentence.

22. Another letter of note is one from Mr Moore, the nephew of the victim Mr Connor. He tells of the victim's closeness to his mother. He also spoke of his knowledge of the Tibbetts family. He makes a plea to the court, as someone who personally knows the damage prison in the Cayman Islands can do, for the court to pass a non-custodial sentence.



1 *MITIGATION*

2 23. The defence submit that the SIR and the letters of support show that the defendant, Mr.  
3 Tibbetts, is a man of exceptional character. The incident was wholly out of character –  
4 this is demonstrated, it is said, by his letters of remorse.

5 24. The defence deal with what the prosecution has argued is an aggravating factor –  
6 namely the fixing of the car so quickly. The point is made that Mr Tibbetts left his car  
7 on the road after the incident where anyone could have seen it. He kept receipts for the  
8 work done and discussed with a number of people whether he could have been  
9 responsible for the incident. It is submitted that the WhatsApp messages showed that  
10 Mr Tibbetts wanted to go to the police, but was dissuaded from doing so by his friend  
11 because of the reputation of the police. He was due to go to the police station on the  
12 Monday but was arrested before that time.

13 25. He still has no memory of the incident.

14 26. The defence rely on the defendant's good character, his clean driving record and his  
15 plea of guilty - for which it is submitted maximum credit must be due.

16 27. The defence also submit that a community sentence could be passed in this case – not  
17 least because of the letter from Mr Moore on behalf of the victim's family. Originally  
18 it was submitted that a suspended sentence could be passed, but that submission has  
19 been dropped in light of the legislation.



1 *THE LAW*

2 28. The maximum sentence for causing death by careless driving is 7 years' imprisonment  
3 or a fine of up to CI\$10,000, or both. Automatic disqualification of at least three years  
4 from the expiration of the prison sentence and endorsement of the driving licence also  
5 follows.

6 29. It is to be noted that the UK equivalent carries a maximum of 5 years' imprisonment.  
7 This is relevant when considering the UK Guidelines on causing death by driving.

8 30. My attention has been drawn to a number of cases:

9 31. *R v Campbell*<sup>1</sup>; *R v Palmer*<sup>2</sup>; *R v Jones*<sup>3</sup>; *R v Crew*<sup>4</sup>; *R v Rice*<sup>5</sup>. Reference is also made  
10 to *R v Roache*<sup>6</sup>, a local case. The first two quoted cases were relied on by the defence  
11 to show that community based sentences can properly be passed for cases of death by  
12 careless driving. I have read all the cases.



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<sup>1</sup> [2009] EWCA Crim 2459

<sup>2</sup> [2010] EWCA Crim 1863

<sup>3</sup> [2012] EWCA Crim 972

<sup>4</sup> [2009] EWCA Crim 1539

<sup>5</sup> [2009] EWCA 1967

<sup>6</sup> Dated 15<sup>th</sup> March 2016 (Malcolm J Actg)

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*SENTENCE*

32. It has often been said that the offence of death by careless driving produces one of the most difficult sentencing problems because at the lower end, the driving, if no death had been involved, would incur a modest fine, but yet the consequence of that driving has been a loss of life.

33. Turning to the Guidelines, the first task is to choose an appropriate bracket.

34. The lowest category refers to careless or inconsiderate driving arising from momentary inattention with no aggravating factors; the top level is careless or inconsiderate driving falling not far short of dangerous driving; and the middle level encompasses all other types of driving.

35. The lowest level is clearly inappropriate. The real issue is whether I can be sure that this case should be categorised as falling not short of dangerous driving. If not, then the case falls into the middle category.

36. Although in the Interpretation section of the Traffic Law 2011 examples are given of what constitutes careless and inconsiderate driving, there is no definition of dangerous or reckless driving.

37. I turn therefore to s.2A of the UK Road Traffic Act 1988 for assistance. I quote:





1                   “(1)    For the purposes of sections 1 and 2 above a person is to be regarded as  
2 driving dangerously if (and, subject to subsection (2) below, only if)—

3  
4                   a) the way he drives falls far below what would be expected of a  
5 competent and careful driver, and

6  
7                   b) it would be obvious to a competent and careful driver that driving  
8 in that way would be dangerous.  
9

10                  (2)    A person is also to be regarded as driving dangerously for the purposes of  
11 sections 1 and 2 above if it would be obvious to a competent and careful  
12 driver that driving the vehicle in its current state would be dangerous.  
13

14                  (3)    In subsections (1) and (2) above “dangerous” refers to danger either of  
15 injury to any person or of serious damage to property; and in determining  
16 for the purposes of those subsections what would be expected of, or  
17 obvious to, a competent and careful driver in a particular case, regard  
18 shall be had not only to the circumstances of which he could be expected  
19 to be aware but also to any circumstances shown to have been within the  
20 knowledge of the accused.”  
21  
22

23                  38.    Annex A to the causing death by driving guidelines gives examples of dangerous  
24 driving which includes driving when too tired to stay awake.

25                  39.    What we can glean from the evidence is as follows:

26                  40.    The defendant had on his own admission taken Benadryl before he went out that night.  
27 Thereafter, he was drinking alcohol with friends until about 2.30 a.m. The defendant  
28 himself admitted in his prepared statement that the Benadryl sometimes made him  
29 drowsy. Any prudent driver would be aware of the potentially deleterious effect on  
30 driving of taking such medication and mixing it with alcohol. Having taken Benadryl,  
31 he should not have drunk alcohol and certainly not into the early hours. The defendant  
32 says he had no more than a couple of rums and certainly not enough to take him over  
33 the limit, and he says that he was drinking a lot of water. I find that hard to accept,  
34 given the period of time that he was out socialising.

1 41. Additionally, drivers are expected to take extra care when driving near vulnerable road  
2 users such as cyclists. This obviously was not the case here. The highway was lit up  
3 and his car went straight into the back of the cyclist.

4 42. The defendant thinks that he must have fallen asleep at the wheel. Given that his case  
5 is that he was unaware of any accident occurring, it must have been a very deep sleep –  
6 no doubt assisted by the drinking of alcohol and the taking of Benadryl earlier. He  
7 cannot have thought that he was fit to drive if that were the case.

8 43. I have already set out the findings of the expert. This incident cannot be classified as  
9 momentary inattention. Moreover, having clipped the cyclist and the cyclist having  
10 landed on the trunk of the car, any prudent driver would have stopped the car  
11 immediately. However, it is clear that the car drove on, veering onto the hard shoulder  
12 and into the open space, running over and dragging as it did, the bicycle, and with the  
13 cyclist still on the hood of the car.

14 44. It is difficult to accept that the defendant was unaware of the accident. The sound of  
15 the accident collision together with the cyclist being thrown onto bonnet of the vehicle  
16 would have woken the dead.

17 45. That he was awake and functioning very soon after the accident is clear as he drove  
18 straight into the petrol station to change his damaged tyre. He cannot have failed to  
19 notice the damage to his car, with pieces missing, yet he did not return to the scene to  
20 check out what had happened; he drove home and very soon thereafter on the same day  
21 caused repairs to be done to the car and disposed of most of the broken parts the same  
22 night. He did not report the matter to the police even though he knew that a person was  
23 seriously injured and then later died.



1 46. The fact that he risked being caught on CCTV, that he kept receipts for the repairs and  
2 discussed the possibilities of being involved with friends and family do not lead  
3 inexorably to the conclusion that he was unaware of the accident at the time or shortly  
4 thereafter.

5 47. In my judgment this case falls within the category of driving that falls not far short of  
6 dangerous driving.

7 48. The starting point therefore is 15 months' custody with a range of 36 weeks to 3 years.  
8 I bear in mind that the guidelines refer to cases following conviction and also that the  
9 maximum sentence is less in the UK.

10 *AGGRAVATING FACTORS*

11 49. The use of alcohol, having taken Benadryl and the lack of attention to vulnerable road  
12 users, have been taken into account when determining the seriousness of the offence.

13 50. There is one aggravating factor and that is the fact that the defendant did not stop after  
14 the accident, not even when he knew for sure that he had been involved in an accident  
15 when he was at the garage shortly after. He compounded this by getting the car  
16 mended immediately and disposing of most of the damaged parts. This of course  
17 makes the task of the police more difficult.

18 51. The defence argue that this should not be taken into account because of the risk of  
19 double counting due to the fact that the defendant faces a charge in the Summary Court  
20 of leaving the scene after an accident. I disagree. The prosecution and/or the Summary  
21 Court can ensure that the defendant is not penalised twice for this aspect.



1 *MITIGATING FACTORS*

2 52. So far as mitigation is concerned – the defendant is a man of hitherto impeccable  
3 character. He is a person who is highly regarded in the community and a person who  
4 has held down a job since he started working. He has a clean driving licence. He has  
5 shown remorse and has been deeply affected by this incident, although despite his plea  
6 of guilty, he still distances himself from the incident – claiming not to remember it. To  
7 his credit, he has stopped the use of alcohol, ensuring hopefully that an incident like  
8 this will not reoccur.

9 53. He has pleaded guilty and is therefore entitled to a full discount of one-third.

10 54. The law does not allow the court to pass a suspended sentence in cases of this nature.  
11 The stark alternative is a non-custodial penalty or an immediate sentence of  
12 imprisonment. The court has to follow the spirit of the guidelines. The letter from Mr  
13 Moore, compassionate though it was, cannot be justification for the court operating  
14 outside the guidelines in this particular case. The sentencing cases relied on to support  
15 a community-based penalty, do not help. *Palmer*<sup>7</sup> was a case in the lowest bracket,  
16 namely momentary inattention with no aggravating features. In *Campbell*<sup>8</sup> the Court  
17 of Appeal of England and Wales reduced the category from the middle to lowest  
18 bracket on the basis that the judge had failed to take into account the evidence of the  
19 defence expert on the issue of speed, and also had failed to give proper credit for a plea  
20 of guilty.

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<sup>7</sup> *supra*  
<sup>8</sup> *supra*



1 55. Taking into account the aggravating factor the starting point is increased to 18 months.  
2 Giving as much credit as I can for the mitigating factors the figure is reduced to 12  
3 months. With full credit for the plea of guilty this leads to a sentence of 8 months  
4 imprisonment. The defendant will be disqualified for 3 years following the expiration  
5 of the sentence and his licence will be endorsed.

6 56. However, this is not the end of this matter as, at this point, an issue was raised by  
7 counsel.

8 57. This is a most unsatisfactory situation.

9 58. Neither counsel in their sentencing submissions or in the period up to the sentence I  
10 imposed at paragraph 55 above, yesterday (the 15<sup>th</sup> December 2016) made reference to  
11 the fact that the defendant had been on a curfew with an electronic tag. It was only  
12 after the court had announced sentence yesterday that defence counsel raised the issue  
13 of credit for time spent on an electronically monitored curfew. It was submitted by the  
14 defence that this would qualify the defendant for half a day's credit per day on curfew  
15 to be deducted from the sentence as per the procedure in the UK. The court adjourned  
16 for counsel to discuss the issue. As a result of their discussions it transpired that there  
17 is guidance in the Cayman Islands Sentencing Guidelines (2015) on the very issue. The  
18 guidance, unlike that of the UK, gives the court a discretion, having due regard to the  
19 practice in the UK.

20 59. Given that neither party was able to provide the court with information as to the details  
21 of the curfew, the court adjourned the hearing in order for counsel to make submissions  
22 overnight on the issue. This they have now done.

23



1

*THE CURFEW*

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60. The defendant was subject to a nighttime curfew (between the hours of 8 p.m. to 6 a.m.) for the period under which the defendant was being subjected to an electronically monitored curfew was between the 1<sup>st</sup> May 2015 and the 16<sup>th</sup> December 2016 - being a period of 1 year, 7 months, 16 days - 596 days.

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6

*The Law*

7

61. Paragraph 12 of the Cayman Islands Sentencing Guidelines, published in October 2015, deals with reduction in sentence for time spent on remand subject to conditions curtailing liberty. The guidance indicates that the Court is instructed to

8

9



*“Consider whether credit should be given for time spent on bail where conditions have been imposed which curtail the liberty of the defendant. This is most likely to be relevant where a defendant has been subjected to a curfew, especially where compliance with that curfew can be verified through electronic monitoring.”*

15

62. Relevant factors to be taken into account in the exercise of discretion include:

16

- *The Total length of time the defendant has been subject to a curfew;*

17

- *The number of hours each day that curfew was imposed during the curfew period;*

18

- *Whether the curfew included daytime hours or was solely a night time curfew (recognising that being indoors at night during, for example, normal sleeping hours may be less of a curtailment of liberty than being indoors during the day);*

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- *Any breach of the conditions of curfew.*

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63. Additionally, In deciding how to exercise its discretion in the absence of statutory provisions in the Cayman Islands, the Court will bear in mind the statutory provisions in England & Wales as set out in s.240A of the Criminal Justice Act (CJA) 2003 (as amended by LASPO 2012 s.109) in relation to electronically monitored curfew.

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26

1 Section 240A of the Criminal Justice Act 2003 as amended reads:

2 “(1) This section applies where—

- 3  
4 (a) a court sentences an offender to imprisonment for a term in  
5 respect of an offence committed on or after 4th April 2005,  
6  
7 (b) the offender was remanded on bail by a court in course of or  
8 in connection with proceedings for the offence, or any related  
9 offence, after the coming into force of section 21 of the  
10 Criminal Justice and Immigration Act 2008, and  
11  
12 (c) the offender's bail was subject to a qualifying curfew condition  
13 and an electronic monitoring condition (“the relevant  
14 conditions”).

15  
16 (2) Subject to subsection (4), the court must direct that the credit period is to  
17 count as time served by the offender as part of the sentence.

18  
19 (3) The “credit period” is the number of days represented by half of the sum  
20 of—

- 21  
22 (a) the day on which the offender's bail was first subject to  
23 conditions that, had they applied throughout the day in  
24 question, would have been relevant conditions, and  
25  
26 (b) the number of other days on which the offender's bail was  
27 subject to those conditions (excluding the last day on which it  
28 was so subject),

29 rounded up to the nearest whole number.

30  
31  
32 (4) Subsection (2) does not apply if and to the extent that—

- 33  
34 (a) rules made by the Secretary of State so provide, or  
35  
36 (b) it is in the opinion of the court just in all the circumstances not  
37 to give a direction under that subsection.

38  
39 (5) Where as a result of paragraph (a) or (b) of subsection (4) the court does  
40 not give a direction under subsection (2), it may give a direction in  
41 accordance with either of those paragraphs to the effect that a period of  
42 days which is less than the credit period is to count as time served by the  
43 offender as part of the sentence.

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45 (6) Rules made under subsection (4)(a) may, in particular, make provision in  
46 relation to—  
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- (a) sentences of imprisonment for consecutive terms;
  - (b) sentences of imprisonment for terms which are wholly or partly concurrent;
  - (c) periods during which a person granted bail subject to the relevant conditions is also subject to electronic monitoring required by an order made by a court or the Secretary of State.

10  
11 (7) In considering whether it is of the opinion mentioned in subsection (4)(b)  
12 the court must, in particular, take into account whether or not the offender  
13 has, at any time whilst on bail subject to the relevant conditions, broken  
14 either or both of them.

15  
16 (8) Where the court gives a direction under subsection (2) or (5) it shall state  
17 in open court—

18  
19 (a) the number of days on which the offender was subject to the  
20 relevant conditions, and

21  
22 (b) the number of days in relation to which the direction is given.

23  
24 (9) Subsection (10) applies where the court—

25  
26 (a) does not give a direction under subsection (2) but gives a  
27 direction under subsection (5), or

28  
29 (b) decides not to give a direction under this section.

30  
31 (10) The court shall state in open court—

32  
33 (a) that its decision is in accordance with rules made under  
34 paragraph (a) of subsection (4), or

35  
36 (b) that it is of the opinion mentioned in paragraph (b) of that  
37 subsection and what the circumstances are.

38  
39 (11) Subsections (7) to (10) of section 240 apply for the purposes of this section  
40 as they apply for the purposes of that section but as if—

41  
42 (a) in subsection (7)—

43  
44 (i) the reference to a suspended sentence is to be  
45 read as including a reference to a sentence to  
46 which an order under section 118(1) of the  
47 Sentencing Act relates;

48  
49 (ii) in paragraph (a) after "Schedule 12" there were  
50 inserted or section 119(1)(a) or (b) of the  
51 Sentencing Act; and

1 (b) in subsection (8) the reference to subsection (3) of section 240  
2 is to be read as a reference to subsection (2) of this section  
3 and, in paragraph (b), after “Chapter” there were inserted or  
4 Part 2 of the Criminal Justice Act 1991.  
5

6 (12) In this section—  
7

8 “electronic monitoring condition” means any electronic  
9 monitoring requirements imposed under section 3(6ZAA) of the  
10 Bail Act 1976 for the purpose of securing the electronic  
11 monitoring of a person's compliance with a qualifying curfew  
12 condition;  
13

14 “qualifying curfew condition” means a condition of bail which  
15 requires the person granted bail to remain at one or more  
16 specified places for a total of not less than 9 hours in any given  
17 day; and  
18

19 “related offence” means an offence, other than the offence for  
20 which the sentence is imposed (“offence A”), with which the  
21 offender was charged and the charge for which was founded on  
22 the same facts or evidence as offence A.]”  
23

24  
25 64. The prosecution rely on the cases of: *R v Barrett*<sup>9</sup>, and *McGill v HM Advocate*<sup>10</sup>.  
26

27 65. The defence rely on *R v Hoggard*<sup>11</sup>, *R v Shephard*<sup>12</sup>, *R v Brown*<sup>13</sup>, *R v Love*<sup>14</sup>.  
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<sup>9</sup> [2009] EWCA Crim 2213

<sup>10</sup> [2013] HCJAC 150

<sup>11</sup> [2013] EWCA Crim 2014

<sup>12</sup> [2012] EWCA Crim 1523

<sup>13</sup> [2013] EWCA Crim 1064

<sup>14</sup> [2015] WL 474478

*PROSECUTION SUBMISSIONS*

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3 66. The prosecution submit that The Cayman Islands gives the court a discretion and does  
4 not impose a mandatory regime. Regard has to be had to the UK procedure. That does  
5 not mean that the court has to slavishly follow the UK procedure. It means that the  
6 court can have regard to how the UK regime calculates the period and take into  
7 account the circumstances which pertain where the courts have exercised the limited  
8 discretion in the UK not to credit the full period. At the end of the day, it is in the  
9 Court's discretion whether to allow full, partial or no credit at all.

10  
11 67. It is submitted that full credit for the time spent should not be given because he was  
12 only monitored for 10 hours a day and this was a nighttime curfew when the defendant  
13 would normally be at home and his liberty was less restricted. In the alternative, the  
14 prosecution submits, in effect, that the court should start the sentencing exercise again  
15 and apply an uplift to reflect the difference between UK and Cayman Islands  
16 maximum sentences.



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*DEFENCE SUBMISSIONS*

68. The defence submit in short that the UK practice should be followed and that the defendant should be given full credit for the time spent on curfew because there was no breach of curfew. It is also submitted that no increase in sentence should be made in order to accommodate this reduction. The court’s attention is drawn to the fact that the Cayman Islands Guidelines recognise the distinction between a simple curfew and one with electronic monitoring. As already noted a number of authorities were drawn to the court’s attention – largely from the UK and one from the Cayman Islands – to make the point that it would be unjust to do other than give the defendant full credit for the time spent on curfew. Counsel maintained that this court should not deviate from the practice in the Cayman Islands of giving half credit for time spent on curfew. Apart from the case referred to in the submissions, mention was made of a drugs case where the defendant was given full credit plus it is said the Cayman Islands Court of Appeal (CICA) has indicated that giving full credit was appropriate. No cases were cited to me.



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*SENTENCE*

69. Despite the mechanistic approach to sentencing under the Guidelines, a sentence needs to reflect the Court's feel of the case, an intangible which will not find expression in the Guidelines. The guidelines are just that – guidance. The Guidelines recognise that fact by indicating that, when giving examples, the lists are not exhaustive.

70. This case is a particular example. There was no express uplift with regard to the maximum sentence in the Cayman Islands made in the computation. This was deliberate – the Court having a view of what it considered to be the appropriate sentence to be served for the particular facts and circumstances of the offence and the offender.

71. The Court is now faced with a stark choice. To start again as suggested by the Crown as their alternative submission, introducing the uplift, which would have raised the starting point to around 20 months plus, or to consider what, if any reduction should be given for the period on electronic tag, in light of the sentence announced.

72. The defences submit, the court has already passed sentence and therefore cannot increase it. They submit that Courts in the UK have never increased sentences under the slip rule.



1 73. For a number of reasons, the court has decided to do the latter, not because of the  
2 defence submissions, not least because the court was not functus, but largely because  
3 the court has already gone through what it considered to be the appropriate figures. To  
4 introduce the uplift would then involve an artificial exercise of justification and also, in  
5 light of the curfew conditions, if a reduction were considered appropriate, without  
6 indulging in some mental gymnastics, it might possibly lead to a sentence higher than  
7 the court considered appropriate.

8  
9 74. I take the Cayman Islands Guidelines as a starting point. There is clearly a discretion as  
10 to whether, and to what extent, credit should be given. To adopt the defence  
11 submission that the practice of the Cayman Islands is to automatically deduct half the  
12 time on curfew, would take away the discretion clearly set out in the Guidelines. Each  
13 case has to be considered on its own facts – for example the conditions of the curfew  
14 will vary considerably in cases – some being more onerous than others.

15  
16 75. I have considered the UK regime. I note in passing that this case would have been  
17 highly unlikely to attract the statutory regime in the UK, given the offence, the  
18 offender's background, good character and antecedents. Other conditions would have  
19 been imposed to deal with any concerns. I will return to this point at the end.



1 76. The important factor in my judgment is, although there was curtailment of liberty over  
2 an extended period of time, the curtailment of liberty was not substantial. Most of it  
3 was during the night and sleeping hours. The defendant was perfectly able to conduct a  
4 social life in the early evening and weekends and still be at home by 8 p.m. He was  
5 able to go about his daily life without restriction. He was not disadvantaged save for  
6 the inconvenience of wearing a tag. Miss Fosuhene, when the court raised this issue,  
7 said that the defendant had been unable to do work he wanted to do because of the  
8 curfew. There is nothing to substantiate this assertion and I do not take it into account.

9  
10 77. I must bear in mind that there has been no breach of the conditions.

11  
12 78. The defendant may, in light of the incomplete information that was put before the court  
13 initially, have got the impression that half period of the curfew would be deducted.  
14 However, it was clear when the court asked the defendant just before the short  
15 adjournment whether he understood what was going on – he indicated that he did not.  
16 The court also made quite clear when adjourning overnight that the issue of reduction  
17 was to be decided and that there may not be any reduction. There can be no issue of  
18 legitimate expectation.

19  
20 79. The defendant has been on bail for 596 days. Half that period would be 298 days. In  
21 the exercise of my discretion I am prepared to give credit for time spent on curfew but  
22 not to the extent of the half the period spent. This is because I consider, as already  
23 noted that this was not a substantial curtailment of liberty. I refer to the case of  
24 paragraph 6 of the case of *Brown*<sup>15</sup> which said:

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<sup>15</sup> *supra*



1                    *“The purpose of section 240A is to give credit to an offender who has been*  
2                    *sentenced to a term of imprisonment but before starting to serve that term has had*  
3                    *a significant restriction on his or her liberty and by the imposition of an*  
4                    *electronically controlled curfew.”*  
5

6  
7                    80.        It uses the word “*significant.*” I have used “substantial”, but the point is the same. The  
8                    reduction will be one of four and a half (4 ½) months – the equivalent of approximately  
9                    140 plus days, reducing the sentence to 3 ½ months’ imprisonment.

10  
11                    **OBSERVATIONS**



12  
13                    81.        There are a number of matters I wish to raise.

14  
15                    82.        The first is that this is a case, where in my judgment, an electronic tag was not  
16                    necessary. Bail cases give way to custody cases in listing, which means that there can  
17                    be a significant period of time before trial as in this case. This means that the defendant  
18                    is building up credit on grounds possibly of delay but also restrictions by virtue of the  
19                    tag. Tags should be for cases where the defendant is essentially facing house arrest and  
20                    in serious cases. In a case such as this, with a person of previous good character, strong  
21                    family and community ties, the condition of a tag, in my judgment, was not strictly  
22                    necessary.

23  
24                    The objective of the court is apparent – the court wished to ensure that the defendant  
25                    did not go out drinking and driving at night. This could be achieved in a number of  
26                    ways – not least of which is a condition that he should not enter licensed premises or  
27                    drive his car after a certain time of the day. The prosecution should take great care in  
28                    ensuring that any conditions they wish the court to impose are really appropriate for  
29                    the particular circumstances of both the case and the offender.

30

1           There have been cases I understand where the court wished to impose an electronic tag  
2           only to be told that there were no available tags. Use of this measure needs to be  
3           carefully and judiciously applied therefore.  
4

5           83.     A second point that I wish to raise is this: As already noted, the way this case has been  
6           conducted is unsatisfactory. Both counsel should be in a position to alert the court to  
7           matters which are relevant and central to the court's task of sentencing and, in  
8           particular, the defence, where it is a matter that is advantageous to the client. I hope  
9           that this kind of last minute approach will not occur in the future.

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11           84.     I end by saying that none of what has gone before should be taken as under-valuing the  
12           life that was lost through this incident.  
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17     **Dated this the 16<sup>th</sup> December 2016**

18     \_\_\_\_\_  
19     *Linda Dobbs*



20  
21     **Dame Linda Dobbs**  
22     **Acting Judge of the Grand Court**