

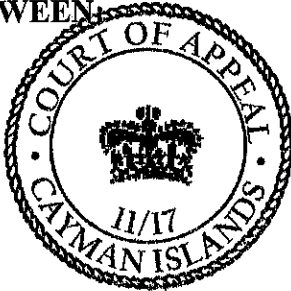
IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 19/2017

IND.21/2017

SC#01179/2017

BETWEEN:



Conroy Nairne

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

BEFORE: **The Rt. Hon Sir John Goldring, President**
 The Hon John Martin QC, Justice of Appeal
 The Hon Sir Richard Field, Justice of Appeal

Date of Hearing: **Wednesday, 25th April 2018**

Appearances: **Mr. Nicholas Dixey of Nelson & Co for the Appellant**
 Mr. Patrick Moran of DPP for the Respondent

JUDGMENT

Transcript of oral judgment 25th April 2018 and Approved
For Released 16th May 2018

MARTIN, J.A.:

1. On 4 August 2017 the applicant was sentenced in the Grand Court to 6 years' imprisonment on a charge of causing death by dangerous driving to which he had pleaded guilty. He was also disqualified from driving for 5 years. He now seeks leave to appeal against the sentence of imprisonment on the ground that it is manifestly excessive.

2. The circumstances giving rise to the conviction were as follows. At about 1:30 in the morning of 14 September 2015 the applicant was driving an Audi A4 motorcar at high speed northwards along West Bay Road in the area of Seven Mile Beach. In the passenger seat was his girlfriend, Jesse Perry, who had just turned 21. Where the road turns sharply

to the right at Public Beach, the car hit the northern kerb and became airborne. As it travelled through the air, it collided with boulders, a traffic sign and a tree. When it hit the tree it was about 14 feet off the ground. It burst into flames and came to rest on its roof with both occupants still inside. They were pulled from the burning vehicle. Ms. Perry was severely burned with second and third-degree burns to 80 percent of her body and she died a week later in a specialist burns unit in Jamaica. The applicant was not severely burned but according to the social enquiry report claimed to have been unable to walk for eight months after the incident.

3. For reasons which do not emerge from the materials before us, the applicant was not interviewed by the police until 1 February 2016. He said that he and Ms. Perry had been at a party on the night of the incident and afterwards had gone out for a drive in the Audi. He claimed that he was driving at or near the speed limit at the time of the collision and that the brakes had failed when he tried to apply them as he reached the area of Public Beach.
4. CCTV footage obtained from cameras in the areas of the Captain's Bakery and St. Matthew's Halls of Residence, both on West Bay Road approximately two miles from where the collision occurred, showed the Audi being driven at approximately 104 miles per hour between those points. Analysis at the scene of the collision established that the Audi was travelling at about 127 miles per hour when it hit the kerb. The maximum speed limit at any point on West Bay Road was 40 miles per hour and the critical curve speed for the bend in the road where the incident occurred was 43.4 miles per hour.
5. Expert evidence adduced by the Crown was to the effect that the brakes had been fully operational at the time of the incident and that there were no mechanical defects which had contributed to the collision.
6. On 3 March 2017 the applicant was charged with causing death by dangerous driving. The delay of a year between interview and charge appears to be attributable to the police investigations and the obtaining of expert evidence. At the first hearing in the Grand Court on 2 June 2017 the applicant entered a plea of guilty to the charge.

7. The judge, Acting Justice Carter, in her full and careful sentencing remarks approached the sentencing exercise in the following way. She noted that the maximum sentence for the offence of causing death by dangerous driving is 10 years' imprisonment. She referred to the Chief Justice's Guidelines, which in 2002 set the tariff for offences of causing death by dangerous driving involving alcohol, speed or other aggravating factors at 5 years' imprisonment. She stated that she had been referred also to the sentencing guidelines in England and Wales ("the E&W Guidelines") where the maximum sentence for the offence of causing death by dangerous driving is 14 years' imprisonment and recorded that counsel for the applicant submitted that this was a level 2 offence within those guidelines resulting in a starting point of 4 years' imprisonment with a sentencing range of 2.4 years to 4.2 years, whereas counsel for the Crown submitted that the offence was a level 1 offence, resulting in a starting point of 6 years' imprisonment with a sentencing range of 5 to 10 years. She remarked that the E&W Guidelines were merely guidelines and that she was not bound to apply them with a differential reflecting the different maximum sentences in England and Wales and the Cayman Islands. She recorded that the Crown had advanced as aggravating factors (a) that there was a prolonged course of bad driving involving a flagrant disregard for the rules of the road; (b) that the applicant must have been aware of the risk that he posed to others by driving in such a manner on this stretch of road at night; and (c) that the applicant was driving at greatly excessive speed. She stated that she had taken into account as mitigating factors the applicant's genuine remorse; the reports and pleas expressed in the social enquiry report and the victim impact statements; references provided on the applicant's behalf which all attested to his positive qualities; the relationship between the applicant and Ms. Perry, who was described as the love of his life; and injuries sustained by the applicant as a result of the collision.
8. The judge observed that by the time the applicant was seen on CCTV passing St. Matthew's Halls of Residence he must already have been travelling at a speed in excess of the speed limit of 40 miles an hour for some time, since his speed at that point was over 100 miles an hour - two and-a-half times the speed limit. The stretch of road on which the applicant was driving at speed for over two miles was one of the busiest stretches of roadway in the

Cayman Islands even at 1:30 a.m. because of the various restaurants, hotels and other places of business located there. In *R v Dilroy Linwood Watler* 112/2014 Justice Quin had said: "*Nobody should be driving a car at 90 miles per hour on any road in the Cayman Islands. It cannot be described as anything other than 'terrifyingly excessive'*". The judge said that she echoed those sentiments, and how much more frightening it was to think that the applicant, with his seemingly unbridled need for speed, was driving at almost 35 miles per hour in excess of what Justice Quin had condemned as "*terrifyingly excessive*". The judge then said this:

"The nature of the defendant's driving, as I have referred to above - that is, driving over the speed limit for over 3.3 kilometres, at speeds in excess of 100 miles an hour along West Bay Road and at three times the limit at the point of impact - must be one of the most serious instances of deliberate bad driving, of a flagrant disregard for the rules of the road and for the danger to be caused to others of which this Court hopes to ever hear. I will not classify it as anything short of level 1 under the UK Guidelines. I find that the appropriate starting point in this case should be 6 years' imprisonment with a range of 5 to 9 years. I find that the speed at which the defendant was travelling was a significant aggravating factor which, in and of itself, warrants a significant increase in the sentence over the tariff. In this case there were other aggravating factors for the Court's consideration. The aggravating circumstances outweigh the mitigating factors and, as such, a significant uplift is warranted. I find the appropriate sentence in this case to be 8 years' imprisonment".

9. Having remarked that the matters advanced by way of mitigation had considerably less effect on sentence where, as in the present case, the culpability of the driver was particularly high, and having applied a 25 percent discount for the guilty plea, the judge arrived at the sentence of 6 years' imprisonment.

10. The grounds on which the applicant applies for leave to appeal are that the judge's starting point of 6 years' imprisonment exceeded the tariff set out in the Chief Justice's Guidelines of 2002; that the sentence significantly exceeded that derived from the guidelines set out in *R v Cooksley*, [2003] 2 Cr. App. R. 18, as adopted by this Court in *Cayasso v R*, CICA 1 of 2008; that the judge had placed the offence in level 1 of the E&W Guidelines by reason of the prolonged course of driving at a terrifyingly excessive speed, but had then treated the same factors as aggravating factors to increase the sentence; and that the judge had given no measurable or discernible weight to the significant mitigating factors. The applicant does not complain that the judge did not apply the full discount for his plea, but he asserts that the proper application of the relevant guidelines would have produced a term of imprisonment no longer than 3 years 8 months, with the result that the 6 year term imposed by the judge was manifestly excessive.
11. We start with the guidelines.
- (1) The Chief Justice's Statements on Tariffs and Guidelines for Sentencing for Certain Offences, promulgated on 16 January 2002, largely restated tariffs set in 1998. In relation to traffic offences, the specified tariff was 5 years' imprisonment for offences of causing death by dangerous driving involving alcohol, speed or other aggravating factors. In the absence of such aggravating circumstances, the tariff was 3 years. The statement contained a general reminder that a tariff means a sentence to be applied in a typical case. Mitigating factors will reduce it and aggravating factors will increase it.
 - (2) In *Cayasso*, a decision of this Court given on 14 August 2008, the Court gave consideration to *Cooksley*, a decision of the Court of Appeal in England and Wales setting out sentencing guidelines for offences of causing death by dangerous driving, and stated that the Court was of the view that the guidelines in it should be adopted by the Grand Court in Cayman. *Cayasso* was reported only as a note in the CILR (2008 CILR Note 14), and its significance appears to have been largely unappreciated.
 - (3) *Cooksley* itself was decided at a time when the maximum sentence for an offence of dangerous driving in England and Wales was 10 years, as it still is in Cayman.

In England and Wales it has since been increased to 14 years' imprisonment. The decision in *Cooksley* was expressly based on guidelines promulgated by the Sentencing Advisory Panel, a precursor (like the Sentencing Guidelines Council) of the Sentencing Council. The Court of Appeal set guidelines for sentencing an adult offender after trial, and at paragraph 32 summarised the position in relation to causing death by dangerous driving as follows:

"We have set out four starting points; no aggravating circumstances, 12 to 18 months; intermediate culpability 2 to 3 years; higher culpability 4 or 5 years; and most serious culpability 6 years or over. We make clear that starting points only indicate where a person's sentencing should start from when seeking to determine what should be the appropriate sentence. There is, however, a danger in relation to the higher starting points, of the sentencer, if he is not careful, double accounting. The sentencer must be careful not to use the same aggravating factors to place the sentence in a higher category and then add to it because of the very same aggravating features".

12. The E&W Guidelines - the Definitive Guideline on Causing Death by Driving - are dated July 2008. By that time the maximum sentence in England and Wales to the offence of causing death by dangerous driving had increased to 14 years' imprisonment. The introduction to the guidelines states, among other things, the following:

"Because the principal harm done by these offences (the death of a person) is an element of the offence, the factor that primarily determines the starting point for sentence is the culpability of the offender. Accordingly, .. the central feature should be an evaluation of the quality of the driving involved and the degree of danger that it foreseeably created. These guidelines draw a distinction between those factors of an offence that are intrinsic to the quality of driving (referred to as "determinants of seriousness") and those which, while they aggravate the offence, are not. The levels of seriousness in the guidelines for those offences based on dangerous or careless driving alone have been determined by reference only to determinants of seriousness. Aggravating factors will have the effect of either increasing the starting point within the sentencing range provided or, in certain circumstances, of moving the offence up to the next sentencing range. The outcome will

depend on both the number of aggravating factors present and the potency of those factors. Thus, the same outcome could follow from the presence of one particularly bad aggravating factor or two or more less serious factors".

13. Five determinants of seriousness are listed; they are awareness of risk (of which the only example given is a prolonged, persistent and deliberate course of very bad driving); the effect of alcohol or drugs; inappropriate speed of the vehicle (including greatly excessive speed and driving above the speed limit); seriously culpable behaviour of the offender, such as driving aggressively or driving while avoidably distracted; and "victim", primarily meaning failure to have proper regard to vulnerable road users. The guidelines then list aggravating and mitigating factors. The only given instance of the former is that more than one person was killed. Mitigating factors are the effect on the offender, the actions of others and the offender's age/lack of driving experience. In relation to the effect on the offender, the guidelines say this:

"Injury to the offender may be a mitigating factor when the offender has suffered very serious injuries. In most circumstances, the weighting it is given will be dictated by the circumstances of the offence and the effect should bear a direct relationship to the extent to which the offenders' driving was at fault - the greater the fault, the less the effect on mitigation; this distinction will be of particular relevance where an offence did not involve any fault in the offender's standard of driving.

Where one or more of the victims was in a close personal or family relationship with the offender, this may be a mitigating factor. In line with the approach where the offender is very seriously injured, the degree to which the relationship influences the sentence should be linked to offender culpability in relation to the commission of the offence; mitigation for this reason is likely to have less effect where the culpability of the driver is particularly high".

14. The guidelines then deal with personal mitigation, summarising the position by saying that evidence that an offender is normally a careful and conscientious driver, giving direct positive assistance to a victim and genuine remorse may be taken into account as personal

mitigation and may justify a reduction in sentence. Three levels of seriousness are then identified in descending order of seriousness:

Level 1, the most serious offences encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others.

Level 2, driving that created a substantial risk of danger.

Level 3, driving that created a significant risk of danger.

15. Level 1 is said to be likely to be characterised by a prolonged, persistent and deliberate course of very bad driving and/or consumption of substantial amounts of alcohol 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.
16. Level 2 is likely to be characterised by, among other things, greatly excessive speed, racing or competitive driving against another driver.
17. Level 1 offences have a starting point of eight years' custody, with a sentencing range of 7 to 14 years.
18. Level 2, a starting point of 5 years' custody and a sentencing range of 4 to 7 years.
19. Level 3, a starting point of 3 years and a range of 2 to 5 years' custody.
20. These all reflect the greater maximum sentence that may be imposed in England and Wales.
21. Finally, the guidelines set out a table of seven additional aggravating factors: previous convictions for motoring offences; more than one person killed as a result of the offence; serious injury to one or more victims, in addition to the death(s); disregard of warnings;

other offences committed at the same time; the offender's irresponsible behaviour such as failing to stop, falsely claiming one of the victims was responsible for the collision, or trying to throw the victim off the car by swerving in order to escape; and driving off in an attempt to avoid detection or apprehension. Additional mitigating factors are also listed, of which the only ones potentially relevant to the present case are that the offender was seriously injured in the collision and the victim was a close friend or relative.

22. We were referred to other examples of sentencing for offences of causing death by dangerous and careless driving in the Cayman Islands and in England and Wales. They do not claim to set sentencing guidelines and we do not find them helpful. Each case must be dealt with on its own facts in the light of the relevant guidelines.
23. Mr. Dixey, for the applicant, in his able submissions contended that whichever set of guidelines was applied, the proper application of each of them resulted in a sentence of about three and-a-half years.
 - (1) Starting with the tariff of five years' imprisonment set in the Chief Justice's Guidelines for offences involving speed, and discounting for mitigation and the guilty plea, produced a sentence of about 3.5 years.
 - (2) Placing the case somewhere in the middle of the third and fourth category of the *Cooksley* guidelines as applied in *Cayasso* produced a starting point of 5 years, and application of the same discount resulted again in a sentence of around 3.5 years.
 - (3) Adjustment of the E&W Guidelines to take account of the lower maximum in Cayman led to a starting point of 6 years, with a range of 5 to 10 years for a level 1 offence. There were none of the identified aggravating factors but the significant mitigating factors meant the case should be placed at the bottom of the bracket. The 25 percent discount for the guilty plea would result in a sentence of 3 years 8 months.

24. In our judgment, these contentions fail to give proper weight to the seriousness of this case. The applicant's driving was quite exceptionally dangerous, characterised as it was by prolonged speeding at over 100 miles an hour at night on a major road and a terminal speed at the time of the collision of 127 miles per hour. The judge's description of it as "*terrifyingly excessive*" was, if anything, overly restrained. On any view, the degree of danger that it foreseeably created over a long distance was vast. To treat this as a case warranting only the basic tariff set by the Chief Justice is to ignore the warning in his guidelines that the tariff applies to a typical case. The case is very far from typical and merits a starting point well in excess of the tariff. Similarly, we consider that the case would fall well within the category of offences of most serious culpability within the *Cooksley* categories.
25. Mr. Dixey's most compelling point concerned what he described as the judge's double accounting. He suggested that the judge had done precisely what the English Court of Appeal had warned against in *Cooksley*; namely, using the aggravating factors to place the sentence in a higher category and then adding to it because of the very same aggravating features. In determining that the circumstances meant the case fell within level 1 of the E&W Guidelines, the judge must have considered that the applicant had demonstrated a flagrant disregard for the rules of the road and an apparent disregard for the great danger being caused to others, having pursued a prolonged, persistent and deliberate course of very bad driving. She must have taken the view that the case was not one merely of greatly excessive speed, otherwise she would have placed it in level 2. Going on then to treat the speed at which the applicant was travelling as a significant aggravating factor which of itself warranted a significant increase in the sentence involved taking the speed into account twice. The other aggravating factors mentioned by the judge, but not identified by her, could only have been those advanced by the Crown; namely, the prolonged course of bad driving and the applicant's awareness of the risk he posed to others. Both of these must already once have been taken into account in determining the relevant level and could not be taken into account again. The fact that none of these factors were identified in the E&W Guidelines as aggravating factors confirmed that they were relevant only to determination of the appropriate level.

26. We accept that, had the judge been applying the E&W Guidelines strictly, it would have been wrong for her to treat the applicant's speed, prolonged course of driving and awareness of risk as aggravating factors. It is possible that her terminology may have been influenced by the methodology of the Sentencing Advisory Panel guidelines adopted in *Cooksley*, which utilised aggravating and mitigating factors as the only means of identifying the category in which a case fell. It is noteworthy that in *Cooksley*, the Court of Appeal of England and Wales pointed out that the series of aggravating and mitigating factors that the Court was adopting "*should not be regarded as an exhaustive statement of the factors. In addition, it is important to appreciate that the significance of the factors can differ. There can be cases with three or more aggravating factors which are not as serious as a case providing a bad example of one factor*".
27. But whether or not that is the explanation of the judge's terminology, the real question is whether or not her starting point of eight years was justified. As it seems to us, the fundamental problem with Mr. Dixey's submissions is that they allow no room for an assessment of the relative seriousness of cases falling within any level or category. Even the most serious cases, falling within level 1 of the E&W Guidelines, may display varying degrees of flagrant disregard of the rules of the road and of the great danger caused to others. Prolonged, persistent and deliberate courses of very bad driving may take different forms. The E&W Guidelines recognise this: albeit in the context of weighing aggravating and mitigating factors, they point out that the degree to which an aggravating factor is present (and its interaction with any other aggravating and mitigating factors) will be immensely variable. But the logic of Mr. Dixey's argument is that, once an offence is placed within a particular category or level, it must attract the same starting point as all other cases falling within the same category or level and can only be increased by the presence of identified aggravating factors. We do not accept that the guidelines are to be applied so rigidly. It is a common mistake in the application of sentencing guidelines to assume that once a series of factors is sufficient to place the offence within a guideline category, those factors become irrelevant in the application of the sentence bracket within that category. Their nature, viewed as a whole, may be such as to bring the offence not only into the

category but into the upper bracket of that category. There is no double counting in taking account of the factors as relevant both to the determination of the category and to the determination of the appropriate position of the offence within the sentencing bracket.

28. In our judgment, the judge was entitled to take the view that this case was of such seriousness as to warrant a starting point greater than the basic tariff or the starting point suggested by the *Cooksley* guidelines or the E&W Guidelines. We do not consider that her starting point of eight years was wrong in principle or manifestly excessive. It was well short of the statutory maximum, but properly reflected the exceptional nature of the case.
29. Mr. Dixey also submitted that the judge had given no discernible discount for the mitigating factors and the applicant's personal mitigation since her discount of 25 percent for the guilty plea accounted for the whole difference between her starting and ending points. We do not accept that submission. The judge's approach was, as she said, that the matters advanced by way of mitigation had considerably less effect on sentence where the culpability of the driver was particularly high; and that approach was justified by the terms of the E&W Guidelines, which state in terms that mitigation is likely to have less effect where the culpability of the driver is particularly high.
30. For these reasons, we are of the view that the sentence of six years' imprisonment was not manifestly excessive. We give leave to appeal but dismiss the appeal.
31. We add this. It will be apparent from what we have said, that the current state of the guidelines for this offence is less than satisfactory. We understand that the guidelines are under review, but until new ones are promulgated, it is difficult for a sentencer to know which ones to apply. The Chief Justice's Guidelines are still in force, and set a basic tariff; but the approach to identification of relevant sentencing considerations, and the public attitude to offences of causing death by driving, have advanced substantially since 2002. The *Cooksley* guidelines offer a more nuanced approach to sentencing that is arguably consistent with the 2002 guidelines, and have been endorsed by this Court; but the methodology underlying them is not in accord with the modern approach in England and

Wales. It seems to us that for the time being the best approach is to apply the current E&W Guidelines by analogy, always bearing in mind that the maximum sentence is greater in England and Wales than in this jurisdiction, but then to check that the proposed sentence is not wholly at odds with the sentence that would result from application of the Chief Justice's Guidelines and those set out in *Cooksley*. We hope that this elaborate exercise will soon be superseded by the adoption of new guidelines tailored to conditions in Cayman.

