COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp. No. 35 of 2022

B E T W E E N

NELSON JOHNSON

Appellant

AND

DEPARTMENT OF PUBLIC PROSECUTIONS
THE COMMISSIONER OF POLICE
DEPUTY CHIEF MAGISTRATE DEBBYE FERGUSON

Respondents

BEFORE: **The Hon Sir Michael Barnett, P**
The Hon Mr. Justice Evans, JA
The Hon Madam Justice Bethell, JA

APPEARANCES: **Mr. Osman Johnson, Counsel for the Appellant**

Ms. Darnell Dorsette, Counsel for the Respondents

DATES: **20 April 2022; 23 May 2022; 2 June 2022; 16 June 2022**

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Criminal appeal - Extension of Time - Killing in the Course of Dangerous Driving –- Appeal against sentence – Whether sentence unduly severe – Sections 44(1), 45(1), 46 & 47 of the Road Traffic Act – Section 7(2) of the Criminal Procedure Code

On 25 July 2021, a traffic accident occurred on East Sunrise Highway in Grand Bahama involving a vehicle driven by the Appellant. The Appellant made a right turn onto East Sunrise Highway to travel South but failed to ascertain his way clear, which resulted in a collision with a motorcycle driven by the deceased. The deceased sustained serious injuries and later succumbed to those injuries.

The Appellant was charged with killing in the course of dangerous driving. Initially, the Appellant pleaded not guilty but changed his plea to guilty. The Appellant was convicted and sentenced to 32 months imprisonment at the Bahamas Department of Corrections. The Appellant filed an application to extend the time to appeal against the sentence imposed by the Magistrate as being unduly severe.

Held: Application for Extension of time allowed. Sentence of 32 months quashed and a sentence of 4 months substituted.

According to Police Cpl 2709 Donovan Taylor's report, the collision assessment reveals that the Appellant "failed to ascertain his way clear before turning across East Sunrise Highway and entered the path of Mr. Yul Marche causing the collision and ultimately his death." The Police report does not, in the Court's view, disclose any indication that the Appellant drove in a manner dangerous to the public. There was no allegation of speeding or driving in a reckless manner. In the Court's view this is more consistent with careless driving.

The question for the Court's consideration is whether the Magistrate imposed a proper penalty in the circumstances of this case. The Court is of the view that the sentence imposed by the learned Magistrate in the circumstances of this case is unduly severe based on the authorities. Accordingly, given the circumstances, the Court has determined to quash the sentence imposed and substitute a sentence of four months effective from the date of conviction.

Cooper v COP SCCrApp. No. 38 of 2005 considered
Decarlo Rolle v COP MCCrApp. No. 105 of 2010 considered
Director of Public Prosecutions and Andre Pedro Valdes SCCrApp. No. 183 of 2019 considered
Pinder v. Commissioner of Police SC [1996] BHS J. No. 116 considered

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REASONS FOR DECISION

Judgment delivered by The Honourable Mr. Justice Evans, JA:

The Appeal

1. The Appellant filed a Notice of Appeal in this matter on 7 March 2022 wherein he sought appeal against sentence only. The salient portions of the aforesaid Notice provided as follows:

> **"TAKE NOTICE THAT the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above named Appellant on appeal from the whole of the Ruling and/or Decision of the Deputy Chief Magistrate Debbye Ferguson, dated December 28th 2021, whereby it was decided that the Appellant be sentenced and committed to the Bahamas Department of Correctional Services for a period of thirty-two (32) months on his guilty plea to the offence of Killing in the course of reckless or dangerous driving, and the Appellant prays to the Honorable Court of Appeal, FOR AN ORDER THAT:**
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> **1. The learned Deputy Chief Magistrate's Decision as to sentence dated the 28th day of December 2021, be set**

aside wholly or in such part as to the Honourable Court of Appeal deems just;

2. An Order that the Appellant be and is hereby discharged from custody at the Bahamas Department of Correctional Services forthwith;

3. ALTERNATIVELY, such relief as the Honourable Court of Appeal deems just pursuant to Article 28 of the Constitution of The Bahamas, 1973."

2. The grounds on which the Appellant sought to rely were set out as follows:

"1. The learned judge erred in law and in practice by failing to consider properly or at all the Appellant's personal history and circumstances, lack of prior convictions for offences of a similar nature and/or category, lack of pending matters before the Courts and/or lack of prior convictions for Road Traffic Offences, in its determination to sentence the Appellant to thirty-two (32) months in custody at the Bahamas Department of Correctional Services on his guilty plea for Killing in the course of reckless or dangerous driving. In all these circumstances the sentence rendered is unduly severe by any interpretation and must be set aside accordingly.

2. The learned judge erred in law and in practice by failing to recite the election to the Appellant to have the matter heard before the Magistrate's and/or Supreme Court at his arraignment. The learned judge ought to have explained to the Appellant that the matter for which he was charged could be tried before the Magistrate's and/or Supreme Court and should have allowed the Appellant the opportunity to elect the forum, with the result being that the decision itself is unsafe and/or unsatisfactory.

3. The learned judge erred in law and in practice by failing to adopt the discretionary power as to financial penalties in sentencing which is allowed by Section 44 of the Road Traffic Act, Chapter 220 and ought to have imposed a financial penalty and/or fine on the Appellant in accordance with the law.

4. The learned judge erred in law and in practice by failing to consider properly or at all the individual circumstances relevant to the Appellant's case, the condition and use of the road, the accidental nature of what is alleged to have transpired in the matter and the lack of any aggravating features and/or circumstances which would justify a custodial sentence of thirty-two (32) months with regard to Section 44 of the Road Traffic Act, Chapter 220.

5. The learned judge ought to have held that the individual circumstances of the case, the accidental nature of what is alleged and the lack of aggravating features and/or circumstances do not warrant and/or justify any custodial sentence and/or a custodial sentence significantly lower than thirty-two (32) months.

6. The learned judge erred in law and in practice by failing to consider properly or at all the requisite sentencing guidelines for the offence of Killing in the course of reckless or dangerous driving and especially as they pertain to first time offenders like the Appellant. The learned judge ought to have held that the Appellant was entitled to leniency and/or a reduction in any sentence levied by the Court due to his status as a first time offender.

7. The learned judge erred in law and in practice by failing to adopt properly or at all the common law principles and position of the Courts as it concerns penalties and/or sentences handed down in recent decisions concerning Killing in the course of reckless or dangerous driving in this jurisdiction.

8. The learned judge ought to have applied the ratio(s) from recent decisions in the domestic Magistrates' Courts in which fines and/or other non-custodial penalties were applied to Defendants who plead guilty and/or were convicted of the offence of Killing in the course of reckless or dangerous driving.

9. The learned judge erred in law and in practice by failing to consider properly or at all the availability of alternative sentencing and/or penalty options as it concerns Killing in the course of reckless or dangerous

driving. The Learned Judge ought to have held that the Appellant was eligible to receive a fine, community service, an order for restitution and/or a separate penalty not involving a custodial sentence and with reference to Section 44 of the Road Traffic Act, Chapter 220.

10. The learned judge erred in law and in practice by failing to adopt properly or at all the requisite credit which is always given to Defendants who enter a guilty plea before the commencement of trial proceedings. The learned judge ought to have held that the Appellant was entitled to a reduction in any sentence levied by the Court and in lieu of an early guilty plea

11. The learned judge erred in law and in practice by sentencing the Appellant to thirty-two (32) months in custody at the Bahamas Department of Correctional Services, a sentence which by any interpretation can be considered unduly severe."

3. After hearing full submissions from the parties we allowed the appeal and substituted a sentence of four (4) months which was the time the Appellant had already spent in custody. We also promised to put our reasons for our decision already made in writing and this we do now.

Background facts

4. On Sunday, 25 July 2021, at about 8:00 p.m., a traffic accident occurred on East Sunrise Highway. The vehicles involved were a grey 2012 Ford Fusion, licence plate SG0826, registered to Freelance Auto and driven by the Appellant. The Appellant made a right turn on East Sunrise Highway but "failed to ascertain his way clear" and collided with a Red and White Honda XR-650L motorcycle, licence plate 0292, registered to Felicia Longley driven east along East Sunrise Highway by the deceased. The deceased sustained "serious injuries" to his head and body and he was transported to the Rand Memorial Hospital for treatment. On Monday, 2 August 2021, at about 9:15 p.m., the deceased succumbed to his injuries.

5. The Appellant was subsequently charged with killing in the Course of Dangerous Driving contrary to Section 44 (1) of the Road Traffic Act, Chapter 220.

6. On 21 December 2021, the defendant appeared, unrepresented, before the Deputy Chief Magistrate in Freeport, Grand Bahama, Ms. Debbye Ferguson, in Magistrate Court No. 1, where he elected summary trial and pleaded not guilty. He was granted bail in the amount of $10,000.00.

7. On 22 December 2021 the Appellant appeared before the court again and changed his plea to guilty. He was then convicted and sentenced to 32 months imprisonment at the Bahamas Department of Correctional Services.

The Extension of time

8. As is noted the Appellant was convicted and sentenced on 22 December 2021 but did not file his appeal until 7 March 2022 and thus was well out of time. However, the Respondents properly conceded that in the circumstances of this case the extension should be granted and the appeal be dealt with. In those circumstances we granted the extension and proceeded to deal with the substantive appeal.

The submissions on appeal

9. Ms. Dorsette who appeared for the Respondents submitted that although it was conceded that the 32 months sentence imposed was unduly severe a custodial sentence of one (1) year would be appropriate. Mr. Johnson on behalf of the Appellant did not agree so the matter proceeded with submissions as to what the proper order should be, the 32 months having been quashed.

10. Sections 44(1) and 45(1) of the Road Traffic Act provides**:**

> **"44. (1) Any person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be guilty of an offence and shall be liable on conviction therefor on information in the Supreme Court to a fine not less than five thousand dollars but not exceeding ten thousand dollars or to imprisonment for a term of four years, or to both the fine and imprisonment."**
>
> **…**
>
> **45. (1) If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be on the highway, he shall be liable on summary conviction therefor to a fine of five thousand dollars or to imprisonment for a term of one year, or to both the fine and imprisonment." [Emphasis Added]**

11. Section 7(2) of the Criminal Procedure Code provides that:

> **"(2) When a magistrate's court presided over by the Chief Magistrate or by a stipendiary and circuit magistrate is exercising the jurisdiction conferred by section 214 of this Code, to try summarily certain cases which are also triable upon information, the court shall have power, where warranted by law, to pass a sentence of imprisonment not exceeding seven years and to impose a fine not exceeding ten thousand dollars upon any person convicted by the court exercising such jurisdiction and shall have and may exercise all other powers vested in the Supreme Court by sections 119 to 124 (inclusive) of the Penal Code".**

12. It appears that certain amendments have been passed relative to this offence but those amendments postdate the trial which is the subject of this appeal and thus have no bearing on this case.

13. We note that Counsel for the Appellant has filed what purports to be 11 grounds of appeal. However, in our view the only real ground which warrants consideration is ground 11 which alleges that:

> '**The learned judge erred in law and in practice by sentencing the Appellant to thirty-two (32) months in custody at the Bahamas Department of Correctional Services, a sentence which by any interpretation can be considered unduly severe."**

14. Mr. Johnson submitted that in the circumstances of this case a fine would have been the appropriate sentence. In support of this submission he referred us to the case of **Director of Public Prosecutions and Andre Pedro Valdes** SCCrApp No. 183 of 2019. In that case, this Court (differently constituted) had for consideration an appeal by the Crown against a sentence by a trial judge in the Supreme Court wherein a convict was fined $2,500.00 (two thousand five hundred dollars) or one year imprisonment on a conviction for manslaughter by negligence contrary to section 293 of the Penal Code. The Court quashed the fine and substituted a sentence of 12 months imprisonment.

15. Isaacs, JA delivering the decision of the Court observed as follows:

> **"27. The appellant submits that the Judge erred by passing a sentence on the respondent that was appropriate perhaps for the offence of killing in the course of dangerous driving but not for the more serious offence of manslaughter by negligence. As evidence of this contention, Counsel for the appellant, Ms. Janessa Murray, adverted our attention to page 29 of the transcript where the Judge made mention of a 2013**

Supreme Court case, *R v Elena Sparta*, 2013 (unreported) she heard and imposed a fine of $8,000 or one year's imprisonment; and possibly using that case as a precedent for sentencing the respondent. The difficulty identified by Ms. Murray was that Sparta involved the offence of killing in the course of dangerous driving. The appellant argued that the "differing elements of the offences, level of culpability required and maximum sentences allowed is distinct and should not have been a consideration for guidance" by the Judge.

28. There is merit in the appellant's complaint. In *R v Brown* [2001] BHS J. No. 43 two police officers were charged with manslaughter by negligence and killing in the course of dangerous driving. The brief facts were that both officers were engaged in an apparent race in their respective patrol cars traveling east on John F. Kennedy Drive, side by side, one of them in the lane for vehicles traveling west. While attempting to return to his proper lane due to oncoming traffic, the driver lost control of his vehicle and crashed into a tree, killing his front seat passenger. The evidence led at the trial suggested that the crashed vehicle was traveling at a rate of speed of at least 67 m.p.h., on a stretch of road that had a speed limit of 45 m.p.h. 29. At the close of the Prosecution's case, a no case to answer submission was made on behalf of both defendants. Isaacs, J (A'g) found that the officer who crashed had a case to answer on both counts; but that the other officer would only be called upon to answer the killing in the course of dangerous driving charge as a prima facie case on the manslaughter charge had not been made out. At paragraph 3, Isaacs, J (A'g) opined:

> **12. "3 Section 310 of Ch. 77 states that "whoever causes the death of another person by any unlawful harm is guilty of manslaughter. If the harm was negligently caused, he is guilty only of manslaughter by negligence". I am of the view that the degree of culpability and blameworthiness involved in this charge is greater than that necessary for a finding of guilt on a s. 44(1) charge."**

16. Mr. Johnson contended that having regard to this Court's imposition of a one year sentence in **Valdes** which related to a more serious offence it was clearly unreasonable for the Magistrate in this case to impose a sentence of 32 months on a conviction for a lesser offence. He submitted that a custodial sentence was not warranted in this case.

17. Whereas we understand the logic of this submission we are also cognizant of the fact that in reviewing a sentence the circumstances of each case must be considered to ascertain whether there are factors which justify the sentence in that particular case. In conducting that exercise in this particular case there was a matter of concern which became evident to us relative to the particular charge to which the Appellant pleaded guilty.

Discussion

18. As noted earlier the Appellant was charged with and pleaded guilty to the offence of killing in the course of dangerous driving contrary to section 44(1) of the Road Traffic Act. The terms of that provision have been set out in paragraph 10 above. However, the emphasis is on persons

> "**who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road,…" [Emphasis Added]**

19. It follows that this definition would cover persons who drive at speeds in excess of the permitted limits; who overtake other vehicles when it is clearly not safe to do so; fail to adhere to traffic lights and safety crossings; and basically driving with deliberate disregard for the safety of other road users. In essence persons who are reckless in that they drive in a manner which they know to be dangerous but do so in any event.

20. According to the report of Police Cpl 2709 Donovan Taylor the determination of the investigation was as follows**:**

> **"Based on the interview of the driver Nelson Johnson, his statement and physical evidence found at the scene of the accident, it is my view that Mr. Johnson failed to ascertain his way clear before turning across East Sunrise Highway and entered the path of Mr. Yul Marche causing the collision and ultimately his death. As a result, Nelson Johnson is at fault for the accident and should be charged with Causing Death in the Course of Dangerous Driving contrary to Section 44 (1) of the Road Traffic Act, Chapter 220." [Emphasis Added]**

21. The details of the Police report does, not in our view, disclose any indication that the Appellant drove in a manner dangerous to the public. There was no allegation of speeding or driving in a reckless manner. The assessment was that he "**failed to ascertain his way clear before turning across East Sunrise Highway and entered the path of Mr. Yul Marche causing the collision and ultimately his death."** This, in our view, is more consistent with careless driving.

22. Section 46 of the Road Traffic Act provides that:

> **"46. If any person drives a vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence and liable on summary conviction therefor to a fine of two hundred dollars."**

23. Section 47 of the Road Traffic Act is significant and is in the following terms:

> **"47. Any person charged in any court —**
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> **(a) with an offence under section 44 of this Act (which relates to killing in the course of reckless or dangerous driving) may be convicted either of that offence, <u>or without further charge</u>, of an offence under section 45 of this Act (which relates to reckless or dangerous driving), <u>or of an offence under section 46 of this Act (which relates to careless driving);</u>**
>
> **(b) with an offence under section 45 of this Act, may be convicted under that section, or without further charge of an offence under section 46 of this Act; and shall be liable to be punished accordingly." [Emphasis Added]**

24. Section 47 in our view provided the Magistrate with the ability to convict the Appellant under section 46 without the need for further charge or amendment if the facts dictated that course of action.

25. It is important to note that the Appellant appeared unrepresented before the Magistrate and after initially pleading not guilty, he reappeared the following day and the Magistrate's notes reveal that the charges were read to him again and he pleaded guilty. The record does not reflect that the facts were put to him for his agreement. Ms. Dorsette submitted that the presumption is that they were read to him and he does not assert otherwise. The real difficulty, however, is that even if we accept that they were read we do not know the contents thereof.

26. In these circumstances all that we have is the report from the Police who investigated the accident which concludes that the Appellant "**<u>failed to ascertain his way clear before turning across East Sunrise Highway and entered the path of Mr. Yul Marche causing the collision and ultimately his death."</u>**

27. We note here that the Appellant has not appealed his conviction and this is not surprising as he was convicted on his guilty plea. The question for our resolution is what was the proper penalty to be imposed in the circumstances of this case? We are of the view that the concession made by Ms. Dorsette on behalf of the Crown is properly made and that the sentence imposed by the learned Magistrate in the circumstances of this case is unduly severe. The authorities show this to be so.

28. In the case of **Pinder v. Commissioner of Police** SC [1996] BHS J. No. 116 The Appellant was convicted of two counts of killing in the course of dangerous driving contrary to section 44(1) of the Road Traffic Act, Ch 204: one count alleging driving at a speed dangerous to the public; the other alleging driving in a manner dangerous to the public. On the offence of killing in the course of driving in a manner dangerous to the public the appellant was sentenced to a fine of $5000.00 or 3 months in prison and, in addition, his driver's licence was suspended for 6 months.

29. We note also the case of **Cooper v COP** SCCrApp. No. 38 of 2005 a case of killing in the course of dangerous driving. The facts were that around 8.30 p.m. on Friday, 23 January 2004, a collision occurred between the car driven by the appellant and the tour bus driven by Mr. Karl Ferguson at Seahorse Road in Freeport, Grand Bahama. As a result of that collision, Mrs. Dottie Lou Powell, a passenger in the taxi, was killed and other passengers as well as the taxi driver were injured. On 28 April 2004, the appellant was charged with the offence of killing in the course of dangerous driving, contrary to section 44(1) of the Road Traffic Act (Ch. 220). At the conclusion of the trial the learned Magistrate convicted the appellant of the charge and three weeks later, sentenced her to a fine of $5,000.00 or one year's imprisonment in default of the fine. The decision was affirmed on appeal.

30. Finally, the case of **Decarlo Rolle v COP** MCCrApp. No. 105 of 2010 another case of killing in the course of dangerous driving. The appellant was driving along with five passengers from Freeport to East End. Whilst driving the appellant ran off the road and into the nearby bushes. As a result of the accident three of the passengers were killed. The appellant was convicted of three counts of killing in the course of dangerous driving and was sentenced to one year on each count to run consecutively. On appeal the Appeal was allowed and sentences varied to one year to run concurrently.

Conclusions

31. We have not been provided with a ruling from the Magistrate which sets out the rationale for the sentence which she imposed. In our view she did not take proper advantage of the facts which were provided in the Police report. If she had done so she would not have imposed the sentence which she did.

32. We do not accept the submission of Ms. Dorsette that a sentence of one year would be appropriate in this case. The facts do not support such a finding. The case of **R v Elena Sparta** 2013 (unreported) on which she relies does not assist as the primary penalty in that case was a fine of eight thousand Dollars ($8,000.00) and the one year imprisonment would only apply if the fine was not paid.

33. Mr. Johnson at one point also submitted that we should consider a fine rather than imprisonment. The difficulty with that proposition is that by the date of the hearing the Appellant, although then on bail, had already spent four months in custody. In our view, to impose a fine would expose him to potentially more time in prison. This, in our view, would be unfair as the four months he has already spent would be adequate to satisfy the demands of a proper penalty in the circumstances of this case.

34. It was in the above circumstances that we determined to quash the sentence imposed and substitute a sentence of four months effective from the date of conviction. Based on the information provided to us he has already served that time and we therefore ordered his immediate release form any further penalties.

Disposition

35. In summary therefore, we have granted the extension of time within which to appeal against sentence. As we have heard full submissions, inclusive of the Crown's concession, we allow the appeal and quash the sentence of 32 months imposed and substitute therefor the sentence of four months imprisonment. We direct that as he has already served the four months he be released with immediate effect.

The Honourable Mr. Justice Evans, JA

36. I agree.

The Honourable Sir Michael Barnett, P

37. I also agree.

The Honourable Madam. Justice Bethel, JA