

SEFANAIA MARAU

v.

THE STATE

[HIGH COURT, 1991 (Fatiaki J) 14 February]

Appellate Jurisdiction

Sentence- causing death by dangerous driving- guidelines- aggravating and mitigating factors- Penal Code (Cap. 17) Section 238.

Crime: procedure- bail pending appeal- when appropriate- Criminal Procedure Code (Cap. 21) Section 315.

The Appellant who was convicted of causing death by dangerous driving was sentenced to an immediate term of imprisonment but shortly thereafter the sentencer granted him bail pending appeal. Allowing the appeal the High Court discussed the proper approach to sentencing for this offence and emphasised its seriousness. The Court also deprecated the practice of granting bail pending appeal save in exceptional circumstances.

Cases cited:

Archaiya v. R 10 FLR 117

Boswell and Ors (1984) 6 Cr. App. R 257

Guilfoyle (1973) 57 Cr. App. R. 549

Hayat Mohammed v. R 9 FLR 53

I. Fa for the Appellant

S. Senaratne for the Respondent

Appeal against sentence imposed in the Magistrates' Court.

Fatiaki J:

This is an appeal against a sentence of 12 months imprisonment and 2 years disqualification imposed on the appellant after he was found guilty of an offence of Causing Death by Dangerous Driving in the Suva Magistrates' Court on the 15th of June, 1990.

The Court record reveals that later that same day sometime after the sentence was passed, the appellant was released on bail by the trial magistrate in the sum of \$300 pending the filing of his petition of appeal.

With respect to the learned trial magistrate his utilisation of Section 315 of the Criminal Procedure Code in these circumstances appears somewhat incongruous.

Section 315 is a provision which ought to be exercised judicially and with care.

A

B

C

D

E

F

G

It is not any easy way out for a magistrate who imposes a sentence that he later regrets or feels was too severe.

A It must be remembered that when an application for bail pending appeal is being considered the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing or has been sentenced to serve an immediate custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case.

B The discretion given by the section can only be exercised "..... if in the circumstances of the case (the court) thinks fit". It goes without saying that the occasions must be rare where a court which imposes an immediate custodial sentence after trial considers in the absence of any apparent or recorded reason(s) that the circumstances of the case warranted the pre emptory release of the accused on bail pending the filing of a petition of appeal.

C Needless to say the release of an appellant before he has even begun to serve any part of an immediate custodial sentence imposed on him is likely to engender (not unnaturally I might add) in such an appellant, the hope or expectation that the custodial sentence will ultimately be altered to one which does not entail any loss of liberty.

D Magistrates would also do well to bear in mind the headnote to the case of Hayat Mohammed v. R 9 FLR 53 and the dictum of MacDuff C.J. when he said at p.54 of the predecessor to Section 315:

E "It is clear from the wording of the section that an order that the execution of the sentence or order against which an appeal is pending be suspended has no application in the case of a sentence of a fine or of an order of disqualification under the Traffic Ordinance. The qualification 'if such person is not released on bail' restricts the suspension to a sentence or order entailing a person's detention in custody."

F Furthermore no time limit was set within which the petition was required to be filed as it should have been and in the result the appellant's petition of appeal against sentence on the single ground that it was "..... too harsh and excessive in the circumstances" was not lodged until 2 weeks after his release.

G So much then for Section 315 of the Criminal Procedure Code.

I turn next to deal with the appellant's appeal against sentence. However before doing so it should be noted that this was a contested case in which the appellant was represented throughout by counsel.

In sentencing the appellant the learned trial magistrate said :

The evidence in the case reveals that a boy aged 11 years was knocked down and subsequently died. The accused by driving his vehicle in a built-up area at a fast speed showed scant regard for the safety of other road users. A young life has been lost as a result. This Court will fail in its duty if it does not impose a custodial sentence to deter others from driving on the public roads at a fast speed and in a dangerous manner.”

A

It is clear from the Judgment of the learned trial magistrate that he found no actual fault in the control by the appellant of the vehicle or in the manner of his driving other than “driving at a fast speed” and whilst that distinction does not undermine in anyway the appellant’s conviction (see: Archaiya v. R. 10 FLR 117), there can be no doubting its relevance to the question of sentence.

B

It is also clear from the evidence led at the trial that the accident occurred at a junction to a residential area at a time and on a day when the particular stretch of road was or might reasonably be expected to be abnormally busy (it being the float procession day of the annual Hibiscus Festival).

C

Causing Death by Dangerous Driving is an offence for which the legislature has provided a maximum penalty of imprisonment for 5 years and although there are reported decisions of the Courts in this country where sentences of imprisonment have been upheld on drivers found guilty of the offence (see: 13 FLR 174; 16 FLR 1; 18 FLR 167; 19 FLR 1 and 20 FLR 350), experience and statistics indicate that a custodial sentence is the exception rather than the rule.

D

If I may say so there appears to be a serious misconception amongst drivers perhaps reinforced by sentences passed by the Courts, that persons convicted of traffic offences are not really a danger to society or “criminals” in the popular sense of the word. Last year alone there were as many as 86 deaths on our roads and if the existing trend continues unabated this year the road death toll will exceed 100. No other area of human activity has given rise to such appalling fatality figures, human suffering and disability yet the attitude continues.

E

It is trite to say that a motor vehicle is a potentially lethal instrument and any driver who fails to realise that what he is doing at the wheel does create a risk when such a risk would be obvious to any ordinary bystander and kills in the process, is *prima facie* deserving of severe punishment involving in many cases an immediate loss of liberty.

F

It is clearly time that our Courts treated such offences and offenders with the seriousness that the legislature intended them to be regarded and also to reflect the concern of the general public about these matters.

G

Having said that, what then are the factors that should guide a court in arriving at an appropriate sentence for an offence of causing Death by Dangerous Driving? The English Court of Criminal Appeal has attempted to lay down sentencing

guidelines in 2 notable decisions : Guilfoyle (1973) 57 Cr. App. R. 549 and Boswell and Others (1984) 6 Cr. App. R. (Sentencing Series) 257.

A In Guilfoyle Lawton L.J. in delivering the judgment of the Court said at pp. 551 and 552 :

B The experience of this Court has been that there have been many variations in penalties. Some variations are inevitable because no two road accidents are alike, but there are limits to permissible variations and it may be helpful if this Court indicates what they are.

C Cases of this kind fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment, and secondly, those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness. A sub-division of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs.

D Offenders, too, can be put into categories. A substantial number have good driving records, a fair number have driving records which reveal a propensity to disregard speed restrictions, road signs or to drive carelessly, and a few have records which show that they have no regard whatsoever for either the traffic law or the lives and safety of other road users.

E In the judgment of this Court an offender who has been convicted because of momentary inattention or misjudgment and who has a good driving record should normally be fined and disqualified from driving or obtaining a driving licence for the minimum statutory period or a period not greatly exceeding it, unless, of course, there are special reasons for not disqualifying. If his driving record is indifferent, the period of disqualification should be longer, say two to four years, and, if it is bad, he should be put off the road for a long time.

F For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, a custodial sentence with a long period of disqualification may well be appropriate, and, if this kind of driving is coupled with a bad driving record, the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed."

G Then in Boswell the learned Chief Justice Lord Lane identified the following 9

aggravating and 5 mitigating factors in cases of causing death by reckless driving.

Aggravating factors were:

- | | | |
|-----|--|---|
| (1) | The consumption of alcohol or drugs. This may range from a couple of drinks to a 'motorised pub-crawl'; | A |
| (2) | A driver who races; competitive driving against another vehicle; grossly excessive speed; showing off; | |
| (3) | The driver who disregards warnings from his passengers; | B |
| (4) | A prolonged, persistent and deliberate course of very bad driving; | |
| (5) | Other related offences committed at the same time, i.e. driving without ever having held a licence, driving whilst disqualified, driving while a learner while unsupervised and so on; | C |
| (6) | Previous motoring convictions, particularly offences involving bad driving or excessive consumption of alcohol, i.e. a man who shows that he is determined to continue to drive badly despite past experience; | |
| (7) | Where several people have been killed as a result of the offence; | D |
| (8) | Bad behaviour at the time of the offence, eg failing to stop, or worse, trying to throw the victim from his car bonnet in order to escape; and | |
| (9) | Causing death in the course of reckless driving in an attempt to avoid detection or apprehension;" | E |

The factors that mitigate the sentence were:

- | | | | |
|---|-----|---|---|
| " | (a) | a 'one off' piece of reckless driving momentary reckless error of judgment, briefly dozing at the wheel or failing to notice a pedestrian at a crossing; | F |
| | (b) | a good driving record; | |
| | (c) | good character generally; | |
| | (d) | a plea of guilty would be taken into account in favour of the defendant; and | G |
| | (e) | the effect of the offence on the defendant, shocked or generally remorseful, particularly where the victim or a close friend or relation and the consequent emotional shock was likely to | |

have been great.”

- A Applying those factors to the present case under appeal and conscious that the single aggravating feature in the case was the dangerous speed at which the appellant had driven his vehicle on a busy public road, a short custodial sentence would have been entirely appropriate.

- B However in the unusual circumstances of this case, notably caused by factors beyond the appellant's control, this Court is constrained to order that the sentence of 12 months imprisonment be suspended for a period of 2 years with effect from the 15th of June 1990. The order and length of disqualification however is entirely appropriate in the circumstances and is accordingly upheld.

- C The appellant is warned that if he is convicted of an imprisonable offence during the operational period of his suspended sentence he may be required to serve this sentence of 12 months imprisonment along with any other sentence that might be imposed for his re-offending. In addition, if he has not already surrendered his Drivers Licence to the authorities, the same is hereby ordered to be delivered to the Court within 7 days.

(Appeal allowed; sentence varied.)

D

E

F

G