IN THE COURT OF APPEAL OF BELIZE AD 2008

CRIMINAL APPLICATION FOR LEAVE TO APPEAL NO 17 OF 2007

VICTOR CUEVAS Applicant

v

THE QUEEN Respondent

BEFORE

The Hon Mr Justice Elliott Mottley	President
The Hon Mr Justice Manuel Sosa	Justice of Appeal
The Hon Mr Justice Dennis Morrison	Justice of Appeal

A G Sylvestre for the appellant.
M Moody for the respondent.

2008: 7 and 13 March and 20 June

SOSA JA

1. By an indictment dated 23 May 2007, Victor Cuevas ("the applicant") was charged with the offences of manslaughter by negligence, causing death by careless conduct (the latter offence being charged as an alternative to the former) and driving with an alcohol concentration above the prescribed limit. For reasons not readily apparent to this Court, a short and straightforward matter was spread out over a number of days in the court below. The prosecution led its evidence on two days spaced well apart, namely 25 and 31 July 2007, on which latter date, after what from all indications on the Record was a brief afternoon sitting, the court was adjourned. On 1 August, Mr Sylvestre, counsel for the applicant at trial as well as in the present appeal,

submitted that there was no case to answer on the first and second counts. There then followed an adjournment until 6 August, when the submission was rejected by the presiding judge, Lord J. The trial was again adjourned, following the ruling on the no-case submission, until the next day, when the applicant pleaded guilty to the charge of causing death by careless conduct, and, according to the Record, Ms Moody, prosecuting counsel, informed the judge as follows:

> "My instructions from the DPP are that we will withdraw the first count of Manslaughter by Negligence and the third count of Drove Motor vehicle with alcohol concentration above the prescribed limit."

The prosecution thus clearly elected to refrain from proceeding not only on the count of manslaughter by negligence but also on that of driving with an alcohol concentration above the prescribed limit, which had not been a subject of the no-case submission. After hearing sworn evidence from the applicant, and a mitigation plea by his counsel, the judge sentenced the applicant to a term of one year's imprisonment and made orders for the suspension, effective forthwith, of his driving licence for a period of three years and for the payment by the applicant to the family of Mrs Aura Rosales ("the deceased"), within three years, of compensation in the amount of $10,000.00.

2. On 7 March 2008 this Court heard an application by the applicant for leave to appeal against sentence. That application was refused on 13 March, when the Court affirmed the sentence and promised to give, at a later date, reasons, which it now gives, for having done so.

3. The charges arose out of a traffic accident which occurred on the evening of 25 February 2005 and claimed the life of the deceased. This accident involved three motor vehicles, namely a Geo Prism motor car driven by the applicant, an Isuzu pickup truck driven by one Luis Eck and a Ford F250 pickup truck driven by Jorge Rosales, the widower of the deceased.

4. Three eyewitnesses testified for the prosecution as to the manner in which the applicant was driving on the evening in question.

5. Jorge Rosales gave evidence that at about 6.35 pm, darkness having already fallen, he was driving along the Western Highway "a little above the last [speed] bump coming towards Esperanza", with the deceased and other family members as his passengers, when he saw a dark blue car in front of him. This witness, quite obviously far from fluent in the English language, said that the dark blue car was "riding sideways", giving some demonstration in court as to what he meant by that phrase and adding that it went "over the line in the middle". He went on to say that he saw the car "going in the back again" and then saw "it breaks (*sic*) come on", which we understand, from the context, to

mean that the car's brake lights came on. He next saw the car "pick up again" and go "direct to the next side [of the road]" at the same time that another vehicle was approaching from the opposite direction, that is to say heading towards San Ignacio. What he saw thereafter was "like a fire, like just a big flash". He demonstrated in court how the blue car "went" and "knocked the next one that was coming". Seconds later he heard something knock the side of his pickup and after that, in Rosales's words "I just saw like lights are just like rolling around". When his vehicle came to a stop, he found himself, as he put it, "upside down hanging from the seat belt". Under cross-examination, he made it clear that the vehicle that crashed into his pickup was the one that had been going towards San Ignacio and that "it came into me on the right".

6. Osvaldo Rosales, a brother of Jorge Rosales, gave testimony that he was a passenger travelling in the pickup driven by his brother at the time of the accident. His evidence, as it appears in the Record, is not always easy to follow but includes a sufficiently clear statement (maintained in cross-examination) that "the car that was swerving hit the car that was going towards San Ignacio". He further stated that after the accident: "the car that hit us was behind us in the bushes. The other car that was swerving, I noticed that it was parked away from us". Thus, although unhelpfully referring to the vehicle that was going towards San Ignacio as a "car", he made it plain enough that the other vehicle was the one swerving. In cross-examination, he stated that he

was travelling in the “pan”, that is to say the cargo box, of the pickup truck in question.

7. Luis Eck, the third of the Crown’s eyewitnesses, stated in evidence that he was driving the Isuzu pickup truck in question, carrying several relatives as passengers, on the fateful evening. They were on the Western Highway and heading for San Ignacio when he saw a vehicle approaching in the distance, its headlights emitting high beams. He successively raised and dipped his own headlight beams in a fruitless attempt to cause the driver of the approaching vehicle to dip his or her beams. He reduced his own speed to about 45 miles per hour and took to the edge of the highway. As he drew nearer to it, he noticed that the oncoming vehicle was not on its right hand side of the road but nearer to the middle of it. He could see, to the left of this oncoming vehicle, the lights of other vehicles behind it. He next found himself temporarily blinded by the high beam of the oncoming vehicle’s headlights, but as those lights flashed past he saw something which he is recorded as having likened to “a dash of blue” and he felt something hit the left back end of his vehicle. As a result of having been so hit, the back end of Mr Eck’s pickup went onto the gravel on the side of the highway. Mr Eck thereupon lost control of his pickup, which ended up going from the “bushy gravel” back onto, and across, the highway, where it struck what turned out to have been Mr Rosales’s oncoming pickup. In cross-examination, Mr Eck admitted having told the police on the day following the accident that he “drove onto the road”, after having been hit and gone onto the

shoulder and that “another impact” occurred thereafter. But the Record does not disclose that he admitted the truth of that version.

8. In the portion of the Record next following that which contains the ruling on the no-case submission, the following sentence appears (p 163): “Facts of the case are as per the evidence given by the Prosecution.” Although this sentence is set out below what is undoubtedly a statement attributed by the judge (whose note makes up this portion of the Record) to prosecuting counsel, it in fact constitutes a new paragraph; and, in the circumstances, this Court cannot be sure whether it, too, is meant to be attributed to prosecuting counsel or is in reality an observation made by the judge himself. This sentence notwithstanding, the Record discloses that evidence was taken from the 41-year-old applicant (p 186) and, from what the judge had to say in the course of his sentencing remarks (Record, p 184), such evidence was sworn. The Record gives no indication, however, that this evidence was tested by cross-examination.

9. The core of the applicant’s evidence is contained in the following passage:

> “Traffic was hectic. It was a Friday night. After jumping the last speed bump, there was traffic ahead of me which was going more or less like 20 miles, very slow, just jumped the first speed bump, that vehicle was

> going. I was going a little less, about 15. Since the vehicle ahead of me was going slow, I attempt to overtake but because of the incoming traffic I had to stop like twice from overtaking. I had to swerve back in because of the incoming vehicles. On the last attempt I tried to overtake that vehicle in front of me, I noticed that vehicle breaks (*sic*) lights came on. To avoid hitting that vehicle in the back, the quickest reaction that came to my mind was to swerve to the left. That instance mi (*sic*) happen so quick I could not recall of hitting the other vehicle or do not recall what happened afterwards."

The applicant further stated that he was very sorry that Mrs Rosales lost her life and that he had "never been in court before".

10. We have so far deliberately omitted to mention (for reasons which will become apparent later in this judgment) purported evidence adduced by the prosecution as to the results of a blood alcohol test said to have been carried out by the National Forensic Services, Ministry of Home Affairs. The purported evidence of the relevant witness was that the pertinent specimen of blood was submitted for testing in a labelled test tube, the name on the label being "Victor Gálvez" rather than "Victor Cuevas" which, as already stated, is the name of the applicant. By a document purporting to be a certificate under the hand of a Genoveva J Marín, MSc, of the National Forensic Services, and purportedly admitted in evidence under section 36 of the Evidence Act (Record, p 184),

rather than under section 79 (3) of the Motor Vehicle and Road Traffic Act ("the MVRTA"), the results of this blood alcohol test were set out as follows: "Alcohol level in the … Blood sample was found to be … 180 Milligrams per 100 ml Blood." That, of course, represented a proportion of alcohol in the particular specimen of blood which was well in excess of the limit prescribed by law: see section 81 (2) of the MVRTA.

11. Nowhere in his evidence did the applicant admit or otherwise refer to the allegation of alcohol consumption on his part.

12. The sentencer, having referred in his sentencing remarks to these blood test results, was emphatic in his conclusion that: "That is something that the court has to take into consideration."

13. As he approached the end of his sentencing remarks, the judge is further recorded as having made the surprising statement that "… the court now finds the defendant guilty as he has pleaded since he has accepted the facts given to the court. Those facts are the evidence which actually came out in evidence in court".

14. The grounds of appeal advanced by the applicant in his application for leave to appeal were, following amendment with the leave of the Court, as follows:

"1. The sentence passed is excessive and unduly harsh having regard to the facts of the case.

2. In arriving at the sentence, the learned trial judge erred by taking into consideration factors he ought not to, while omitting to consider factors which was (*sic*) to the appellant's credit."

15. Arguing the second of these grounds first, Mr Sylvestre relied on two principal submissions which he prefaced with a proper acknowledgement that section 108 (1) of the Criminal Code contains ample express provision for the imposition of a sentence of imprisonment on a person convicted of causing death by careless conduct. The first of his principal submissions was that the judge improperly approached his sentencing task by failing to consider the applicant's version of events. The correct approach, in his submission, is that which is set out by the editors of Archbold, Criminal Pleading, Evidence and Practice, 2001 ed, at para 5-22, where it is stated that:

> "Where a defendant changes his plea to guilty during the course of his trial, but his plea is tendered on a basis different from that put forward by the prosecution, it is wrong for the sentencer to sentence the offender on the basis of the version put forward by the prosecution without hearing evidence from the defendant."

This Court finds no fault with the approach set out in this passage from Archbold but fails to see how it can assist the applicant's cause since, while there is no gainsaying that the judge sentenced him on the basis of the version put forward by the prosecution, it is equally clear from what has already been stated above that the judge did take the correct step of first hearing evidence from the applicant. The instant case is unlike that of *Michael George Mottram* (1981) 3 Cr App R (S), cited in Archbold at para 5-22, in that the facts there were that the judge imposed sentence without affording Mottram an opportunity to conclude his evidence-in-chief. The later case of *Michael Archer* (1994) 15 Cr App R (S) is similarly distinguishable, for there Archer was given no opportunity at all to present his own account of the commission of the offence. In the present case, however, the undisputed fact is that the judge heard the evidence-in-chief of the applicant in full. It is not, in our view, of any consequence, in this regard, that, on the Record, there was no cross-examination of the applicant. We are unable to see how, from anything said in *Mottram* or *Archer*, or otherwise, the applicant can begin to argue that the absence of cross-examination meant that his evidence was not heard in its entirety.

16. But to say that the passage from Archbold and the cases of *Mottram* and *Archer* cited by Mr Sylvestre are not on point is not, of course, to suggest that the submission in whose aid they are prayed is itself without merit. That submission, as already stated, is that the judge did not take into consideration

the version of events put forward by the applicant. In that version of events, the applicant made no claim, as has been shown above, to have been driving in a straight line immediately before the accident. His allusion to three attempts to overtake a vehicle in front of him, entailed giving a description of swerving movements by his car which is consistent with what the Rosales brothers and Mr Eck had to say about those same movements. The striking difference between the respective versions of the applicant and the prosecution witnesses is that the applicant's version seeks to describe the movements described by his car as part of an attempt to overtake another vehicle travelling slowly ahead of his car (though apparently unseen by any of the Crown witnesses) rather than, as the Crown case suggested, as the result of his being under the influence of alcohol.

17. As this Court has already noted, the judge stated that he had to take account of that which he admitted as evidence of the results of the blood alcohol test, a point to which we shall return later. Furthermore, he unequivocally declared that the applicant had accepted the version of the facts given by the prosecution. This declaration, however, accorded only with some of the facts, for while the applicant can fairly be said to have accepted that his car was moving along the road in the manner which, among Crown witnesses, was perhaps most fully described by Jorge Rosales, he espoused no part of the Crown's suggestion that he was driving while under the influence of alcohol; and, moreover, he introduced evidence of his own of another motor vehicle

travelling at such a slow pace in front of his that he resolved to overtake it, with the fatal consequences referred to above. In these circumstances, it is, in our view, correct to say that the judge failed to consider, as he was bound to do, the entire version of events advanced by the applicant. To the consequences, if any, of this failure we shall, in due course, return.

18. Counsel's second principal submission to this Court in support of ground 2 was that the trial judge was in further error in admitting in evidence what was tendered by the Crown as the certificate of a forensic scientist in respect of a blood alcohol test notwithstanding the reference in that document to a "test tube labelled with the name of Victor Gálvez". It was the contention of counsel, belabouring the obvious, that, if this document was wrongly admitted, the judge erred in relying on it in determining his sentence. The Court considers, with respect, that it is wholly unnecessary to decide whether the purported certificate was properly admitted. Content to assume, for the sake of argument, that the document was properly admitted, the Court asks itself whether it was open to the sentencer to take it into consideration in arriving at his sentence. This question must unhesitatingly be answered in the negative, but not for the reasons advanced by Mr Sylvestre. As already pointed out above, the applicant pleaded not guilty not only to the charge of manslaughter by negligence but also to that of driving with an alcohol concentration above the prescribed limit and the Crown, not to mention the judge himself, unambiguously accepted both pleas. The only basis on which the sentencer could proceed to pass sentence

upon the applicant was thus limited to causing death by careless conduct. Driving with an alcohol concentration above the prescribed limit could form no part of such basis. The guiding principle finds expression in *David Newland Lawrence* (1981) 3 Cr App R (S) 49, in which the English Court of Appeal quashed a sentence passed by a judge below for the reason that his sentencing remarks suggested that he had not sentenced Lawrence on the basis only of the charges to which he had pleaded guilty, namely cultivation of cannabis plants and possession of cannabis resin, but also on the basis that he may have been in such possession with intent to supply (Lawrence having pleaded not guilty to a charge of possession of a controlled drug with intent to supply). The principle was also applied in *Gary Andrew Booker* (1982) 4 Cr App R (S), another decision of the English Court of Appeal. In that case the prosecution accepted from Booker, who had been indicted on a number of counts, a plea of guilty of attempted arson with intent to damage property. The prosecution thus chose not to proceed with other counts, which included one for attempted arson with intent to endanger life or being reckless as to whether life was endangered or not. Citing remarks by the sentencing judge to the effect that the premises the subject of the charge were crowded at the time and that "the risk was obviously very present", Griffiths LJ, giving the judgment of the Court of Appeal, said, at p 54:

> "For reasons which this Court finds difficult to understand the prosecution were content … to accept a plea to a much less serious offence … But it

is a basic principle of sentencing that a man is entitled to be dealt with upon the basis of the plea that he has tendered and which has been accepted. As the court accepted the plea limited to an intent to damage property and not human life, the Court considers the sentence … to be excessive."

19. Grounds 1 and 2 being interwoven, we proceed at once to consider ground 1, which, as stated above, complained that the sentence was excessive and unduly harsh having regard to the facts of the case. It follows from the conclusions which this Court has reached with respect to ground 2 that the facts of the case are not the "facts" which the judge below had in mind when sentencing the applicant. He did not consider all of the applicant's evidence and he wrongly took into account the results of the blood alcohol test. This raises the question whether, if all of the applicant's evidence is considered and the results of the blood alcohol test are disregarded, a less severe sentence becomes appropriate. The answer to this question, like that to the earlier one, must be in the negative.

20. As can only be abundantly obvious, the Court spoke advisedly in *Cardinal Smith v The Queen*, Criminal Appeal No 35 of 2005, judgment dated 14 July 2006, when it said that causing death by careless driving is "a very serious offence": see para 67 of that judgment. And while there can be no doubt, since the delivery of that judgment, as to the importance of the

aggravating factor of alcohol or drug consumption in the process of deciding whether to visit with a prison sentence any person convicted of that offence, it is essential to note that this Court was not seeking in that judgment to provide guidance with respect to the imposition of a prison sentence in those cases where that aggravating factor is absent or otherwise (as in the present case) not a fit subject for consideration by the sentencer. What we certainly did not say in *Cardinal Smith* was that a custodial sentence would only be appropriate in those cases of causing death by careless conduct in which that factor was present. In the view of this Court, what it now has before it is an example of just such a case. Concentrating, as counsel submitted it ought to do, on the evidence of the applicant in its entirety, what this Court finds is a case of unexplained aggressive driving which, in its view, was appallingly bad. This quality of driving does not, in the judgment of this Court, have to be the result of impaired judgment triggered by alcohol or drug consumption in order to attract especially severe punishment. It would be an absurd situation if an offender, driving so aggressively for no reason worth mentioning in court, could expect leniency from a sentencer when another offender, driving similarly as a result of alcohol or drug consumption, could expect none, where in both cases the driving has had identical fatal consequences. The applicant in this case (for a reason or reasons which, significantly, he chose not to provide to the court below) made, on his own showing, three attempts, in what can only have been fairly quick succession, to overtake a slow-moving vehicle on a Friday night when the traffic on the road, a major highway, was unsurprisingly hectic. He

was plainly “tailgating” the vehicle in front of him at the time and, as a result, found himself in no position, when that other vehicle braked, to take the crucial precaution of making sure that the road ahead was clear for a sufficient distance to enable him to overtake and get back to his proper side before meeting traffic coming from the opposite direction. Driving of this kind demonstrates to the Court a selfish disregard for the safety of other road users. Giving due consideration to the applicant’s version of events, as well as to all mitigating factors, and disregarding the results of the blood alcohol test, this Court came to the firm conclusion that a prison sentence of one year is entirely appropriate in this case and that the sentence of the convicting court is in all other respects condign.

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MOTTLEY JA

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SOSA JA

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MORRISON JA