

JERSEY / JUDGMENT

AG -v- Le Gal [2017] JRC 118 (27 July 2017)

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JUDGMENT

THE commissioner: 1. The defendant stands to be sentenced for causing the death of a three year old boy by careless driving. 2. On 27 th June, 2016, the defendant was driving a VW van westward along Tunnell Street. She said she had turned into Tunnell Street intending to return a pot of varnish to the Paint Pot Shop but, realising that she did not have the pot of varnish with her, she continued westward down Tunnell Street towards her destination, which was the former Odeon Cinema, where she was doing voluntary work for the Freedom Church. She said that she had used Tunnell Street previously and was familiar with it. Tunnell Street is designated at its entrance with a 'No through Road' sign and continuing down that road she passed a 'No entry except for access to premises' sign. She was not accessing premises and she should not therefore have been there. 3. At the end of Tunnell Street there is a 90 degree bend to the right followed shortly by a 90 degree bend to the left into Robyn Place which in turn leads down to Bath Street and the former Odeon Cinema. Adjacent to the second bend is an entrance to the Millennium Park. Before the first bend to the right there is a ramp or gradient change up to what is called 'shared space' where the road and pavement are all at one level with the position of the road being indicated by darker paving stones. At the start of the ramp there is a yellow 'give way' line on the road and before that a 'give way' sign. The give way sign relates inter alia to a passageway from Belmont Road which exits onto the first bend just after the ramp. Those walking along the passageway have a view across the shared road leading to the entrance to the park. Those who are unfamiliar with the area might well think that this raised paved area was part of the park, the view down Tunnell Street being obscured until you emerge out onto the bend itself. 4. The child's mother was walking along this passageway to go to the Millennium Park. She was a visitor to the Island and had not been there before. She had the child with her and she was with her sister, with whom she was staying, and her sister's two children aged 4 and 6 months. The 4-year old asked to be able to go ahead to the park and the child asked to follow her. The sister could see the road ahead was clear and knew that it was access to premises only and so the 4-year old ran ahead with the child following. As the child's mother and her sister emerged out onto the shared area they saw the defendant's van mounting or just about to mount the ramp and starting to turn the corner towards the child who was in the middle of the designated road area. They screamed for the van to stop and rushed after it but it was too late. The defendant had hit and driven over the child, causing catastrophic injuries, from which he died on 30th June, 2016. 5. With assistance of CCTV cameras and expert analysis it can be shown that the defendant would have had the child

directly in her vision for some 3 seconds, some 59 reducing to 37 metres from the ramp, as he crossed the road in front of her before going out of sight around the corner. She was estimated to be driving at about 18 mph. Having mounted the ramp and as she came out of the first bend to the right, the defendant would again have had the child in plain sight right in front of her. He would only have become obscured by the bonnet of the van itself when he was within 0.68 of a metre before being hit. The defendant was not driving fast, her speed around the bend being calculated at 10 mph, it was a sunny summer afternoon and there was nothing mechanically wrong with the VW van. 6. The defendant says she did not see the cousin or the child at any stage and was unaware that she had run over him. She had no recollection of seeing the child's mother and her sister or another witness to the accident, who was standing on the bend waiting for a friend or indeed seeing a cyclist. The witness said as she rounded the bend the defendant was looking to her left towards the child's mother. 7. This is a tragic case in which this young child has lost his life causing devastation to his mother and father and to his aunt. The impact upon them, as made clear in the deeply moving impact statements which were read to the Court, have been profound and life-changing. 8. Causing death by careless driving is a relatively new offence to this jurisdiction and we have no precedent in terms of sentencing. However, there is guidance under the nearly identical offence under the English Road Traffic Act 1988 which, although not binding on this Court, is of assistance and we have had regard to it, as invited to do. 9. That guidance is issued by the UK Sentencing Guidance Council and it says at paragraph 3 of the introduction:- "Because the principle 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, for all offences... the central feature should be an evaluation of the quality of the driving involved and the degree of danger that it foreseeably created." 10. Paragraph 4 then goes on to refer to aggravating factors which: "...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." 11. The guidelines draw a distinction between those factors of an offence that are intrinsic to the quality of driving referred to as the 'determinance of seriousness' and those which, although they aggravate the offence, are not. Of the 'determinance of seriousness' five factors are put forward which have been analysed by the prosecution and we agree that the relevant factor is under the heading "Victim"; failing to have proper regard for vulnerable road-users. Examples given under paragraph 17 are: "cyclists, motorbike riders, horse-riders, pedestrians and those working the road" and for whom a driver is expected to take extra care when driving near them". It goes on to say this at paragraph 18: "The fact that the victim of a causing death by driving offence was a particularly vulnerable road user is a factor that should be taken into account when determining the seriousness of an offence." 12. The guidelines suggest a starting point from which the sentencing court can depart to reflect the aggravating and mitigating factors to reach a provisional sentence with a suggested sentencing range. Once a provisional sentence is identified the court will take into account relevant factors of personal mitigation and the effect of the guilty plea. In relation to causing death by careless driving the

guidelines set out three levels of seriousness each with a suggested starting point and sentencing range. 13. The first category, being the most serious category, is where the offender's driving falls not far short of dangerous. The third and least serious category relates to those cases where the level of culpability is low, involving momentary inattention with no aggravating factors, for example in a case involving an offender who misjudges the speed of another vehicle or turns without seeing an oncoming vehicle because of restricted visibility. Other cases will fall into the second intermediate category. Under the first category the starting point is 15 months' custody with a sentence range of 36 weeks to 3 years' custody; under the second intermediate category the starting point is 36 weeks' custody with a sentencing range of community order, (high), to 2 years' custody, and the third least serious category has a starting point of community order, (medium), with a sentencing range from a low community order to a high community order. The guidelines then set out additional aggravating factors, none of which apply in this case, although those factors are not exhaustive. 14. The prosecution submit that the facts of this case bring it within the first category which is just below dangerous driving which has a starting point of 15 months' custody and a sentencing range of 36 weeks to 3 years' custody. The prosecution says that in this case the starting point sentence could be increased above 15 months to 18 months or 2 years which is the bottom of the sentencing range to the lowest level of offence for causing death by dangerous driving but do not seek to do so. From that the Crown apply a discount of a full one-third i.e. 5 months in respect of the defendant's guilty plea and a further 2 months in relation to her remorse and good character and move for a sentence of 8 months' custody. In terms of disqualification the prosecution seeks 30 months which would take into account any period of imprisonment. 15. In terms of mitigation much has been said by Advocate Jowitt on behalf of the defendant, all of which we have taken into account. She has, of course, pleaded guilty. She has no convictions and is of excellent character it is fair to say, having read the very many positive references which have been provided to us. The defendant does not seek to compare the effect this accident has had on her with the effect it has had on the child's parents but it is clear that this accident has had a devastating effect on her, and her family have also been deeply affected, in particular her children which we do not think it appropriate to elaborate on in this judgment. As the social enquiry report says she has been empathic in her expression of guilt for the child's death and the probation officer has no doubt that her deep remorse is sincere and heartfelt. As it is put very succinctly in the social enquiry report: "...no sentence imposed could punish the defendant any more than she is punishing herself and any outcome will never provide relief to the child's family." 16. We are also conscious of the words of Inman J in the case of R-v-Zhao

[2014] EWCA Crim. 1060 that "no sentence can bring back the departed and no sentence can or should attempt to put a price on life." 17. We were referred to four English cases on which we will comment briefly, conscious that the facts or previous cases will inevitably differ. In R-v-Campbell

[2009] EWCA Crim 2459 the driver pulled out of a side road across a double carriageway driving slowly and cautiously and looking to his right twice before pulling out. He did not see a motorcyclist who was exceeding the speed limit and who collided with his car, suffering fatal injuries. The trial judge said that, as the motorcyclist would have been in his vision

for three hundred metres, this was not momentary inattention, which fell into the third lowest category, placing the driver in the second intermediate category. The trial judge sentenced the driver to 24 weeks' imprisonment, suspended. The Court of Appeal found that in the light of the speed of the motorcycle this was a case of a single misjudgement placing it at the lower end of the second category and allowing more mitigation for the guilty plea concluded that a custodial sentence was not justified. 18. In *R-v-Smart*

[2014] EWCA Crim. 1119 the driver was not speeding or distracted in any way when, without braking or taking any avoiding action, she ran over an elderly pedestrian who was crossing the road, causing him fatal injuries. He had been in her sight for some six seconds but she simply did not see him. The prosecution said this was a second category case but the trial judge put it into the first category and sentenced the driver, who was of excellent character, to 9 months' imprisonment. The Court of Appeal found that the case came within the second intermediate category saying that she was driving in an otherwise perfectly lawful fashion with no aggravating features. Her fault was an unexplained failure to stop or take avoiding action in the six seconds that the pedestrian was in her sight. Although a custodial sentence was still correct in principle, consideration should have been given to a community order. The Court of Appeal also expressed the view that in the circumstances of that case, with the devastating effects of the accident upon the driver (similar in that respect to the defendant) the sentence should have been suspended. 19. In *R-v-Zaho* a driver was waiting to cross the carriageway after the car had turned left into the road he was waiting at, impeding his vision. After a motorcycle had passed, the driver had merged onto the carriageway colliding with another motorcyclist, who was not speeding, again causing fatal injuries. The motorcyclist would have been visible 48 metres away when the driver emerged. The trial judge accepted that this was a case of momentary inattention but found that there were aggravating features which took it into the second category imposing a 9-month prison sentence. The Court of Appeal found that there were no aggravating factors taking it into that category. Whilst the driver's line of sight might have at some point become clear it was impeded by part of the manoeuvre he was performing and it was therefore, in the view of the Court of Appeal, a case of momentary inattention. 20. Finally, in *R-v-Magee*

[2017] EWCA 972 a driver of an articulated lorry parked on the wrong side of the road on a double yellow line to make a delivery. Having made the delivery, the driver then got back into the lorry, pulled out and back across to the correct side of the road colliding with and killing an elderly cyclist. He had not used his nearside mirrors properly or a camera that had been fitted to give sight down to the nearside of the lorry. Placing this in the first category the trial judge imposed a sentence 3 years and the Court of Appeal, while describing that as severe, said it was right in principle. 21. In our view this is a serious case with a high level of culpability on the part of the defendant. This was far from a case of momentary inattention as in *R-v-Zaho* and *R-v-Campbell*. It has similarities with the case of *R-v-Smart* in terms of an unexplained failure to see a pedestrian who was in plain view in front of the driver, but as we said in that case the driver was driving in a perfectly lawful manner

without distraction on a road where she was not expected to take extra care for vulnerable road users. In this case the defendant was on such a road, a shared-road, a road that should only have been used for access to premises and, according to the witness, was looking to her left towards the child's mother when she was actually turning to her right towards the child. She had also failed to see the child at an earlier stage when the child crossed the road in front of her. The facts in R-v-Magee we think are very different and of no assistance to us. 22. We have concluded that this case comes at the top end of the second category and at the bottom end of the first category of the English Guidelines. The defendant was familiar with this road. She knew that it was adjacent to a park frequented by children. She knew that she was not using the road lawfully, in that she was not accessing premises and she was aware that she was going up onto an area that was shared between drivers and pedestrians. The give way sign should have alerted her to people emerging from the passageway to the left, and to the right she would know that there was an entrance to the park to and from which children would be likely to be going. In these circumstances, she should have been taking extra care for vulnerable road users such as the child. 23. We endorse the criticisms made by DC Manners of the design of the road, namely that it made it more difficult for pedestrians to determine the change between the footway and the carriageway and very difficult for someone unfamiliar with it or a child to determine that a vehicle could have been approaching from the right. As you walk down the passageway you are lulled into thinking that the area ahead is part of the entrance to the park and not a road. The design therefore may explain why the child came to be there in the middle of the road in the middle of the shared area but it does not, in our view, excuse the defendant who was familiar with road and its design and who as we have said, should have been taking extra care for vulnerable pedestrians and in particular children on it. We note that the Parish will shortly be removing this shared area. 24. We conclude therefore that a sentence of imprisonment is warranted in this case and notwithstanding the difference in approach with the prosecution as to the place in the categories, we agree with the conclusions of the prosecution as to the starting point and its analysis of the end sentence of 8 months' imprisonment. 25. However, we have considered the material before us carefully and, in view of all of the circumstances of this case, circumstances in terms of the defendant and her family not dissimilar to the case of R-v-Smart , we are going to suspend the sentence for a period of 2 years, as the English Court of Appeal said should have been done in that case. 26. You are sentenced to 8 months' imprisonment, suspended for 2 years. You should understand that if you reoffend during that period of 2 years then you will almost certainly have to serve the sentence we have just imposed. We are also going to disqualify you from driving for 30 months from 19 th June, 2017, and, pursuant to Article 35(1) of the Road Traffic (Jersey) Law 1956 , we order that you remain disqualified from obtaining or holding a licence from the end of that period until you have passed the prescribed test. Authorities UK Sentencing Guidance Council Guidelines. English Road Traffic Act 1988. R-v-Zhao [2014] EWCA Crim. 1060. R-v-Campbell

[2009] EWCA Crim 2459 . R-v-Smart [2014] EWCA Crim. 1119. R-v-Magee [2017] EWCA 972. Road Traffic (Jersey) Law 1956. Page Last Updated: 07 Aug 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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