[2001–02 Gib LR 187]

TELLEZ v. R.

COURT OF APPEAL (Neill, P., Glidewell and Stuart-Smith, JJ.A.): February 28th, 2002

Sentencing—totality of sentences—foreign sentence—foreign sentence being served at time of offence to be taken into account when considering totality

Road Traffic—causing death by dangerous driving—sentence—18 months' imprisonment acceptable sentence after considering aggravation and mitigation—community service inappropriate for this offence

The appellant was charged in the Supreme Court with causing death by dangerous driving and driving whilst uninsured.

The appellant's dangerous driving caused the death of one of his passengers, a friend. It was committed whilst he was on licence from a Spanish prison, where he was serving 4 years' imprisonment for drug smuggling. As he had breached the terms of his licence, both by leaving Spain and committing a further offence, it was revoked and he then had to serve an additional 8 months under close confinement. When he was finally released, he returned to Gibraltar and surrendered to the police.

He was convicted in the Supreme Court on a guilty plea and sentenced to 18 months' imprisonment for causing death by dangerous driving and disqualified from driving for 5 years, but without any separate penalty

being imposed for driving whilst uninsured. The court (Schofield, C.J.) considered a range of aggravating and mitigating factors (including his youth, his remorse at having killed a friend and a good progress report from the Spanish prison) but specifically excluded from consideration the fact that the accused was serving a 4-year sentence in Spain and the effect of the breach of licence on that sentence.

On appeal, the appellant submitted that (a) although the sentence passed for causing death by dangerous driving was in itself correct, the Supreme Court had been wrong not to take the Spanish sentence into consideration, since the totality of the sentences then exceeded what was appropriate for the appellant; (b) the sentence of imprisonment should therefore be quashed and an order of community service substituted; or, alternatively, (c) the court should pass such a sentence as would allow the appellant's immediate release.

Held, varying the sentence:

(1) The totality of the sentences to which the appellant was subject should have been considered and the Supreme Court was therefore wrong not to have taken into account the Spanish sentence. The sentence of 18 months was correct for the offence of causing death by dangerous driving in this case but when considered as consecutive to the Spanish sentence, it created an overall sentence of $5\frac{1}{2}$ years, which was too long for the appellant. The original sentence of 18 months would be quashed and a sentence of 14 months substituted (paras. 16–17).

(2) Community service would not be imposed instead of imprisonment, as it was an inappropriate sentence for an offence of this gravity. In addition, it was no longer practice to substitute a finite sentence for that originally passed so as to allow for the appellant's immediate release (para. 13).

Case cited:

(1) *R.* v. *Boswell*, [1984] 1 W.L.R. 1047; [1984] 3 All E.R. 353, applied.

C. Salter for the appellant.

1 **STUART-SMITH, J.A.:** On November 7th, 2001, the appellant pleaded guilty to two counts on an indictment. The first count was that he caused death by dangerous driving on March 10th, 1999, contrary to s.29(1) of the Traffic Ordinance. Count 2, was using a vehicle, licence number G 80435, on the same date without there being in force a proper policy of insurance, contrary to s.3(1) and (2) of the Insurance Motor Vehicle (Third Party Risks) Ordinance. He was sentenced to 18 months' imprisonment on the first count and disqualified for driving for five years. It appears that there was no separate penalty imposed on the second count.

2 The facts were these. At about midnight on March 10th, 1999, the appellant and three friends, including the deceased Kevin Guerreiro, were at the Pool Palace. On leaving that establishment, they got into a motor car. It was a four-door Ford hatchback, owned by the appellant's father but not insured for the appellant to drive. In the Market Place, the car stopped and picked up a fifth youth. He was asked if he wanted to go for a ride and he agreed. He got into the car. The car headed for the North Mole where after a roundabout there is a straight stretch of road which goes towards the dock side. The car headed in that direction, gathering speed very rapidly, accelerating fast; the appellant applied the brakes too late, the car went into a skid, got out of control and went straight into the sea. Four of the youths, including the appellant, succeeded in getting out of the car, but unfortunately the deceased did not succeed in doing so and his body was not recovered until some hours later.

3 The appellant was interviewed at 5 a.m. He said the brakes must have failed and he could not say what speed he had attained. There was a police investigation of the accident; the car was found to be in good conditions for its age and there was nothing wrong with the brakes. The police calculated that the speed at which the vehicle was going when the brakes were applied was not less than 108 km. per hour, approximately equivalent to 67 miles per hour, and that when the car went over the edge of the quayside into the water, it was still travelling at about 27 km. per hour. It is possible that a more experienced driver might have released the brakes and been able to steer the car to avoid its going into the sea, but the appellant did not do so, the wheels locked in a skid and he was unable to steer the car.

4 The appellant is 24 years old and was born on June 29th, 1977. He has a very bad driving record, having some 38 offences between January 1995 and October 1996. They include such things as driving as a learner driver in places where he should not, carrying a passenger on pillion on a motor cycle when he should not, having no licence, no "L" plates, no insurance and two offences of speeding. The last one was a conviction on March 30th, 2000. It is true that those are relatively minor offences, apart from the no insurance offences; but it demonstrates that the appellant has something of a contempt for the driving laws of this city.

5 The significant feature of this case arises from the fact that on December 12th, 1996, the appellant was sentenced in Spain to four years imprisonment for smuggling cannabis. It was a major importation of cannabis, but it seems probable from the length of sentence imposed on the appellant that his part was a relatively minor one compared with those who must have organized the shipment. After two years of what is called "second degree imprisonment," that is to say close confinement, the appellant was released part of the time and did what was called "third degree imprisonment." That appears to involve him being allowed out on licence for the weekends, three days over the weekend, and one week in four.

6 It was during one of those periods of release—presumably over the weekend—that the appellant came back to Gibraltar and the offence was committed. The terms of his licence that permitted him to be out of prison for part of the time were that he did not leave the jurisdiction of Spain. It seems, however, that the appellant was led into thinking that it was alright for him to return to Gibraltar during the weekend.

7 The result of his arrest in connection with the instant offence was that the Spanish authorities revoked, if that is the word, the third degree imprisonment and re-imposed the second degree imprisonment for a further eight months. That took the appellant to the end of the third year of his sentence in Spain. Thereafter, he was fully released on licence in Spain, but it again being a condition of the release that he did not leave the jurisdiction of Spain and in that way, he completed his four year-sentence in Spain. He returned to Gibraltar on December 14th, 2000, whereupon he surrendered to the police in the city. It was then some months before the trial. Mr. Salter, on behalf of the appellant, makes no complaint of this because in part it was due the defendant's wish to investigate the question of causation of the accident.

8 The appellant in a letter to the court and to the Probation Service has expressed his remorse for what happened. It was a friend of his who was killed in the accident. Moreover, there is now before the court a prison report which indicates that the appellant has been a model prisoner.

9 In passing sentence, the Chief Justice said:

> "This is a very serious offence and it is so regarded by the courts and for an offence of this nature, I say that only a sentence of imprisonment is appropriate. I am sentencing on the basis of the earlier English authorities before the increase in the penalties in England and the case I have particularly in mind is *Boswell*.
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> I take into account in mitigation the defendant's plea of guilty and also his young age. The fact of his further incarceration and the effect of him being in breach of his licence in Spain is not a matter that I take into account, either in his favour or against him for these reasons. The Spanish offence was an entirely different kind of offence. Secondly, a request to omit his licence is a matter between the defendant and the Spanish authorities; and the third reason, that whilst one can take into account that he has been in custody for an extra length of time and the effect that that has had on the disposal of this case. The other side of the coin is of course that he did commit this offence whilst he was in effect on licence, or whatever the term is, in Spain. I do take into account, though, the fact that there has been a delay in dealing with this case which is not of the

defendant's own making and the fact that he has had the matter hanging over his head for a long period of time.

The aggravating features are, of course, the speed. This was an act of sheer recklessness and one can only surmise what was going on in the car. But the defendant must have known where he was in relation to the quay, and to be going at this speed in those circumstances is, as I said, an act of sheer recklessness. And he has an appalling record, albeit for minor offences and nothing major; but he has been disqualified in the past and I have to take into account that he has a disregard for his traffic responsibilities in this jurisdiction."

10 Subject to one matter with which we shall have to deal in a moment, this court entirely agrees with those remarks made by the learned Chief Justice. There were the aggravating features that the judge referred to and he took into account the mitigating factors which he has identified. Under the authority of the case *R.* v. *Boswell* (1), those are respectively aggravating and mitigating factors.

11 The one matter that Mr. Salter has relied upon is the interaction of the sentence for the offence in Spain with that in the instant case. Mr. Salter accepts realistically that, apart from that one matter, he cannot complain of the sentence of 18 months. He submitted to this court that it was the top of the bracket. We do not agree. We do not think that it was by any means at the top of the bracket for this very serious offence. Nevertheless, the learned judge made it clear that he did not take into account the effect of the sentence in Spain.

12 Mr. Salter's submission is this. If the drug offence had occurred in Gibraltar, and the judge had been considering the appropriate sentence to pass on this young man, while he was currently serving a sentence of 4 years for the drug offence, he would have had to consider the totality of the sentence which would be passed as a result of passing a consecutive sentence. Therefore, while a sentence of 18 months was by no means exceptional on its own and could not be criticized, had there been no other sentence involving the judge, if he had been dealing with a situation where both offences had been committed in Gibraltar, he would have had to stand back and look at the overall effect of the sentence. A consecutive sentence of 18 months would in total amount to five and a half years for these two offences in relation to this young man. It seems to this court that had the judge approached the matter in that way, and on the assumption that 18 months was the correct figure, or correct sentence, in the absence of this complicating factor, he would have made some reduction on the overall sentence. This is because although individual sentences may in themselves not be open to criticism, when imposed consecutively, they may in combination be too long for the individual offender.

13 Mr. Salter has urged the court to adopt one of two alternative courses. The first is to quash the sentence of imprisonment and to impose instead a sentence of community service. That would have the result of the appellant being released forthwith, but having to do some time on community service. We reject that submission. In our judgment, a sentence of community service is quite inappropriate for an offence of this gravity. Secondly, Mr. Salter submitted, that the court could pass such a sentence as would allow for the appellant's immediate release. Although that was done at one time in England, it is not a practice which is now permitted. It does not substitute a finite sentence for the one which was originally imposed.

14 It seems to us that there is some force in the submission which Mr. Salter makes in relation to the totality of the offence. It is clear from the Spanish documents that the authorities in Spain, when considering whether the appellant's licence should be revoked, did take account of the fact that he had committed this offence in Gibraltar while on licence; although, of course, they were not purporting to sentence him in any way for this offence.

15 Equally it is clear that the Chief Justice, for the reasons which he expressed, did not take into account the totality principle which I have endeavoured to enunciate.

16 The immediate effect on the appellant's incarceration in Spain was that instead of enjoying 8 months of a third degree imprisonment, involving his absence from prison at the weekends and one week in four, he served closed confinement for those 8 months. The third degree imprisonment meant that, roughly, half of his time was not actually spent in prison. It seems to us that the appropriate course for this court to adopt is to reduce the overall sentence of 18 months to one of 14 months. We emphasize that the original sentence of 18 months was by no means too long for this serious offence and it is only because the Chief Justice has not had regard to the principle of totality and did not consider the overall effect of what is in substance a $5\frac{1}{2}$-year sentence on this young man. There are some grounds for thinking that he has turned a corner in his offending and the prison report suggests that that may be so. In the result we feel able to reduce the sentence to that extent.

17 The sentence in effect of 18 months will be quashed and will be substituted by a sentence of 14 months. There is no appeal in relation to the 5 years' disqualification. To that extent the appeal is allowed.

NEILL, P. and **GLIDEWELL, J.A.** concurred.

Sentence varied.