1984

IN THE COURT OF APPEAL FOR THE CAYMAN ISLANDS

CRIMINAL APPEAL NO. 11/83

BEFORE: The Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Ross, J.A.

JOHN FRANCIS vs. REGINA

Mr. Norman Hill and Mr. Steve McField for the Appellant
Mr. T. Scarborough for the Crown

15th and 19th June, 1984

KERR, J.A.:

This is an appeal from a conviction in the Grand Court before the Acting Chief Justice and a jury on the 5th of December, 1983, for the offence of causing death by dangerous driving. The offence arose out of an accident on the 18th of June, 1983, about 10.00 p.m. on the high-way or main road leading from George Town to West Bay Road. The nature of the crown's case given by Judy Diane Wood was that the defendant who was driving his taxi in the direction of West Bay pulled out to over-take some other vehicle and there was a collision with a car driven by the deceased coming in the opposite direction. The accident occurred in the vicinity of Dyke Road which is in junction with the West Bay Road on the right going to West Bay.

The nature of the defence is, very simple, that the car driven by the deceased came out of Dyke Road, zig-zagged and swerved into this car thereby causing the accident and that as a result of the collision his car went out of control and ended up on the right side of the road.

The Grounds of Appeal fall under two main heads: (1), that the verdict is unreasonable and cannot be supported having regard to the evidence; and the other, that there were

misdirections and non-directions from the learned Acting Chief Justice to such an extent that the Appellant was denied a fair trial, and in the circumstances there was a miscarriage of justice. In support of his contention Mr. Hill with the thoroughness for which he is well known, reviewed the evidence of the witnesses for the Crown pointing to uncertainties and to inconsistencies and to portions of their evidence which tend to support the contentions of the defence, and in the end has earnestly asked this court to say that the evidence is insufficient to maintain the verdict.

I do not propose to go into great detail into all the criticisms because of the main decisions to which we have come, but with regard to the evidence of Judy Diane Wood, she gave evidence to the effect that that night she was driving along the road. At some point she was over-taken by the defendant driving his taxi. The speed she gave at the time was at about 35 m.p.h. She said that after the Appellant over-took her he continued on, and that a car came out of the Islander and turned right towards West Bay, and while in the vicinity of Pink Sands the taxi went to over-take the car and then there was this impact. The car that was coming from what appeared to her to be the West Bay direction spun in a semi-circle, the taxi ended up in the bush on the right side. That is the gist of her evidence in chief.

She was cross-examined and she was unable to say what vehicle was really being over-taken; and as regards her evidence in relation to the car coming in the opposite direction she said she saw no lights and that if the car was coming along on the main road she ought to have seen some light from that car. It is this little part of her evidence Mr. Hill urges support in the contention of the defence.

Now, the next witness considered was Mr. Roland Schwery. He was, from his evidence, a

Casper Milquetoast, a real timid person. According to his evidence he and the deceased were at the Holiday Inn Coffee Shop and Bar sometime about 8.30 p.m., and then they decided for reasons that are not clear that they should have a drink at the Royal Palms, and they set out for the Royal Palms; that the deceased was driving the car with the lights on, travelling close to the left, and they passed the Periwinkle, saw the car over-taking other cars, and there was this collision, but the timid man that he is, it appeared that at some stage before the impact he closed his eyes.

When questioned in cross-examination he is not clear as to whether or not his car had lights but he was definite that they were not coming out of the Dyke Road.

On the aspect of whether or not the car was coming out the Dyke Road there was another witness for the Crown a Constable Martin Winston Bodden, and he said that he turned into the Periwinkle compound which is on the left side of the West Bay Road and he saw the car coming in the opposite direction, and that car was the car driven by the deceased, the Honda, travelling between 30 and 35 m.p.h. He got in the parking lot and while he was in there he heard something and he went down the road and saw the two cars, the Chevrolet Station Waggon of the Appellant and the car that had just passed him. He gave the evidence as to what he saw on the road and the positions of the respective cars. According to him the debris was in the centre of the road and there was glass some way down the road going towards George Town.

Mr. Hill criticised his evidence in that it was impossible for him to see and identify the car and in particular the licence plate having regard to the fleeting glimpse he must have had of that car.

There were in evidence a Sketch Plan by the Investigating Officer, Constable Ebanks, and photographs taken by the photographer. The photographer put in evidence

fifteen pictures taken at the scene some of them taken that night and some in the morning after. We observe that the most was not made of this photographer in that he was not asked to explain fully and interpret the pictures which he was tendering; it was left to the other witnesses and in particular the Investigating Officer, Ebanks, to attempt to interpret these pictures. Naturally on occasions he erred. Mr. Hill has directed our attention to these pictures which in the main showed tyre marks and the mark of some water which came from the car. He says it is not clear nor does the evidence prove whether that water came from the reservoir for fluid, for water or from the radiator itself, and he points to the fact that the water mark touched the mid-line thereby he said indicating that his car was less over the right and more over the left of the white line. He referred to the evidence of Constable Ebanks, the Investigating Officer, who showed his lack of experience in these matters and who admitted that his Sketch Plan was not drawn to scale. Mr. Hill argued that of the Sketch Plan and the photographs, the photographs should be considered the more accurate and that the Sketch Plan showed or attempted to show the water mark and the drag mark inaccurately. Ebanks was closely cross-examined, but he ended up by saying that the nearest point of the right hand tyre mark was seven feet eight inches from the right edge of the road.

It is clear from the photographs and from the evidence of Ebanks and the Sketch that that evidence would not be conclusive one way or the other, and it is reasonable to infer that the jury had to rely on the oral testimony, such as it is, to determine the important issues. These would include:

(1) whether or not the Appellant was over-taking at the time;

(2) what position he was on the right hand side of the road when he was over-taking;

(3) whether or not such over-taking, if they accept it, was the cause of the accident or in the alternative the defence's case that the deceased drove out of Dyke Road without lights and zig-zagged and swerved in the Appellant's car.

Mindful that the burden of proof rests on the Crown we are of the view that notwithstanding such uncertainties and such inconsistencies as were pointed out, the core of the prosecution's case was not broken, it remained intact and it was open to the jury in the light of the oral testimony to accept the crown's case that the Appellant drove dangerously by over-taking in the face of on-coming traffic. As regards his complaint about the summing-up, let us say from the outset that the summing-up was far from impeccable. The question is whether the criticisms are such that we can really say that the comments of the trial judge denied the jury a fair consideration of the vital issues of fact. In that regard, the first complaint was Ground 2, that the learned trial judge failed to adequately put the defendant's case to the jury. In reply to the evidence tendered by the Crown the Appellant made a short statement from the dock, and it is fair to say that the statement is lacking in particularity. We are mindful also of what the statement from the dock, what is its effect on the evidence in its totality and that the jury should give it such weight as they think it deserves. In that statement the Appellant, more or less, corroborated what he told the Investigating Officer who visited him when he was suffering from the injuries he received in the accident. It was a short statement and the relevant part was that at the material time he was driving towards Holiday Inn and before he reached the Dyke Road which is about 20 feet from the Dyke Road a car came right out from the Dyke Road without any light. He says the deceased "zig-zagged and before I realise I get a hit on my right hand fender. My car went over to the right side. I knew nothing more because I was blacked out. I get a hit with the steering wheel in my stomach and also my side."

Now, in support of this ground of appeal and in the course of his argument Mr. Hill referred to the case of Regina v. Lawrence(Stephen) [1981]RTR,p.217, and to the categorising of the essential elements of a good summing-up made by Lord Hailsham when he said:

> "A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."

We would commend this to all trial judges. Be that as it may, we were called upon to examine the trial judge's summing-up in particular reference to his definition of dangerous driving, amongst other things, and a particular passage in that summing-up was criticised rightly by Mr. Hill, and that was that the trial judge told the jury it was not important whether the other party did something wrong. Taken by itself that clearly was putting it much too broadly, but having regard to his summing-up as a whole we think that the jury would have understood him to mean that the fact that there was some negligence on the part of the deceased would not prevent guilt being brought home to the Appellant if his dangerous driving was a substantial and effective cause of the accident. We do not propose to quote these passages extensively, but perhaps it would be necessary to refer to one or two passages - excerpts, where in the course of the summing-up he had this to say:

> "Next, you have to decide whether it was the dangerous driving of the accused, having regard to the manner of driving, that is to say, the way he was driving which caused

"that accident....."

Further:

> ".....there is no dispute that the accused was driving the car that was in collision with Woods' car that night."

Then:

> "And I am going to say that they have to show that it was a substantial cause but not the sole cause. Even though there might have been other causes which contributed to that accident. It doesn't matter that the deceased was also negligent or even did something wrong. I hope you appreciate that, members of the jury. Their main duty is to show that it was a cause of the accident - his method of driving was a substantial cause of the accident. Not important whether the other party did something wrong. But if you feel that the accused's driving was the substantial cause then he would be guilty of dangerous driving."

And he went on to illustrate certain cases of dangerous driving. He went on to say:

> "First, determine as a fact how the accused was driving on that particular occasion. Then ask yourselves: 'Had we seen this driving by the accused would we have said without doubt that that was a piece of dangerous driving having regard to the manner of driving and that the accused was at fault in so driving?'"

Mr. Hill took exception to those passages because he said the trial judge did not explain what 'fault' was, and referred us to a case in which the judgment in it explained the meaning of 'fault', but having regard to the test which he asked the jury to apply it would appear that there could have been no doubt as to their being able to appreciate what 'fault' in that context meant. There were, as he pointed out, certain occasions where the judge expressed his opinion on the evidence quite strongly. I don't propose to go into them, but it is enough to say that he had advised them of their role and that they are supreme

judges of the facts. Accordingly, we do not think that those expressions took away from them the important issues they had to decide. He made it quite plain to them that if they accepted what the defence was saying or had any reasonable doubt about it they should acquit.

In the circumstances we are of the view that notwithstanding the many criticisms levelled at the summing-up there was in the circumstances of this case fair and adequate directions. For these reasons in the main the appeal against conviction is dismissed.

We come to consider sentence. In every case sentence is conditioned by the circumstances of the case. We would not wish to lay down any hard and fast rule with respect to sentence, but we would accept as a common-sense approach that where on a conviction of causing death by dangerous driving there is a reckless disregard for the life and safety of others, a custodial sentence would seem to be the proper sentence; and where, however, there is no such evidence, no evidence of excessive speed, no course of dangerous driving and that it was one short instance where the driver "fell from grace", that we ought to consider imposing a less harsh sentence. We have been adverted to cases where pecuniary penalties have been imposed. We are of the view that in this case there was no reckless disregard, no excessive speed and it was but one moment where the Appellant perhaps in an unguarded moment pulled out to over-take when it was dangerous so to do. We consider his age, we consider that he has had previous convictions, but that the last was in 1977; we consider the evidence as to his good character and that he will be deprived of his means of livelihood by this conviction and the attendant disqualification from holding or obtaining a driver's licence.

The court therefore is of the opinion that a sentence of fifteen hundred dollars with an alternative of three months in default would be adequate, and that to that

extent the sentence has been varied. Accordingly, his disqualification of five years will stand.

Appeal against conviction dismissed. Appeal against sentence allowed and sentence of three years' imprisonment with hard labour set aside and fine of fifteen hundred dollars or three months hard labour substituted.

IN THE MATTER OF JOHN FRANCIS v. REGINA

19th June, 1984

(GUIDE GIVEN AFTER DELIVERY OF JUDGMENT)

ZACCA,P.:

Before parting with this matter the court would like to make two comments. This is not so much with a view to criticism but perhaps to guide the persons who are in charge of the investigating of these types of offences, and perhaps for the benefit of the prosecution, and that is, we are of the view that where Sketch Plans are considered necessary for the conduct of the case and for the assistance of the judge and the jury, and in most of these kinds of cases they are usually very helpful, that these Plans ought to be prepared by persons qualified to draw Sketch Plans so that what they portray may be accurate.

Secondly, we feel that when a police photographer takes photographs and these photographs are being tendered in evidence by a police photographer then the prosecution ought to see that evidence is led from this police photographer, this police witness explaining each and every photograph which he takes so that he may himself point out the positions and directions from which these photographs have been taken, and to explain what each photograph portrays. If this is not done then the purpose of having the photographs taken and calling this witness really does not assist the court.

We hope that in the future these matters will be attended to in the way in which we think that they ought to be done.