IN THE COURT OF APPEAL

TURKS AND CAICOS ISLANDS

APPEAL NUMBER CR-AP 7/2019

BETWEEN

JERMAINE MISSICK

APPELLANT

V

REGINA

RESPONDENT

Coram:

The Hon. Mr. Humphrey Stollmeyer	Justice of Appeal
The Hon. Mr. K. Neville Adderley	Justice of Appeal
The Hon. Mr. Stanley John	Justice of Appeal

Appearances:

Ms. Lara Maroof for the Appellant

Mr. Leonard Franklyn for the Respondent

Date of Hearing: the 18th day of September, 2020

Date Delivered: the 26th day of November, 2020

JUDGMENT

[1] On the 27th day of March, 2019 after a trial before Justice Lobban-Jackson (Ag), the appellant was found guilty of two counts of causing death by dangerous driving and sentenced to a term of three years imprisonment on each count with sentences to run concurrently. In addition, he was suspended from driving for 18 months, the suspension to become effective upon his release from prison.

[2] On the 18th day of September, 2020 after having considered the written submissions of the counsel for the appellant and counsel for the respondent, and having heard their oral submissions, the Court allowed the appeal and ordered a re-trial. We said then that we would give our reasons at a later date. This we now do.

The Background

[3] In the late evening of the 8th day of September, 2016 a calamitous accident occurred on the South Dock Road, Providenciales between a Nissan truck and a motor scooter on which there was a pillion rider. The appellant was driving the Nissan titan pick-up truck in a south westerly direction along the South Dock highway. The motor scooter was travelling in the opposite direction. Both the rider and the pillion rider were seriously injured and succumbed to their injuries at the scene of the accident. There were no eye witnesses to the accident.

[4] The appellant was indicted on two counts of causing death by dangerous driving contrary to **section 25(1) of the Road Traffic Ordinance** ("RTA") which provides as follows:

> "**Subsection 1: a person who causes the death of another person by driving a motor vehicle dangerously on a road shall be guilty of an offence.**
>
> **Subsection 2: for the purposes of Subsection 1, a person is to be regarded as driving dangerously if, and only if:**

(a) the way he drives falls far below what is expected of a competent and careful driver, and;

(b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

Subsection 3: a person is also to be regarded as driving dangerously for the purposes of Subsection 1 if it would be obvious to a competent and careful driver that driving a vehicle in its current state would be dangerous.

Subsection 4: in subsections 2 and 3, where dangerous refers to danger, either of injury to any person, or of serious damage to property. And in determining, for the purposes of those sections, what would be expected of a competent and careful driver in a particular case, regard shall be had, not only to the circumstances of which he would be expected to be aware, but also to any circumstance shown to have been within the knowledge of the accused."

[5] Subsection 3 of the RTA did not apply as there was no suggestion that the vehicle was defective. The appellant was indicted in relation to the manner of his driving.

[6] The prosecution called four witnesses namely, Richard Anding an accident reconstructionist who visited the scene on the 4th day of February, 2017 and who was deemed an expert. Police Constable Reece who played no part in the investigation but gave evidence of a conversation he had with PC Wendy Innocent ("PC Innocent') relative to PC Innocent having seen the scooter without lights earlier that night. Also testifying for the prosecution were David Been, the father of the deceased rider, PC Innocent and Inspector Diamond the investigator.

[7] The accused gave evidence on oath and called one witness Kenneth Iliadis an accident reconstructionist who was also deemed an expert.

The Appeal

[8] In a Notice of Appeal dated the 2nd day of May, 2019 counsel for the appellant listed five grounds of appeal. However, in a subsequent notice intituled "**Amended Grounds of Appeal**" she amended the earlier grounds. At the hearing before us, Counsel indicated that the amended grounds superseded the earlier grounds. Accordingly, the following grounds of appeal were relied upon:

1. The Learned Judge erred in permitting the Crown to adduce evidence from the police witnesses which evidence was prejudicial and not probative of the issues in the trial, namely:

    i. Evidence from PC Innocent that the Appellant had acted aggressively and had to be restrained upon arrest.

    ii. Evidence from PC Innocent that the Appellant smelled of alcohol upon arrest.

    iii. Evidence from PC Innocent that the Appellant had refused to provide a blood sample to Inspector Diamond.

    iv. Evidence from Inspector Diamond that the Appellant had agreed to provide a blood sample to him but when he went to collect it there was no sample available.

2. The Learned Judge incorrectly directed the jury with regard to the prejudicial evidence of PC Innocent and Inspector Diamond and failed to give any or adequate warning.

3. The Learned Judge failed to give the jury appropriate directions in relation to the "identification evidence" from David Been.

4. The Learned Judge erred by failing to caution the jury with regard to the evidence of David Been and the possibility of an improper motive.

In the alternative, the Appellant seeks leave to appeal his sentence on the following ground:

5. The sentence of 3 years imprisonment was manifestly excessive.

[9] The Crown responded as follows:

1. There has been no Substantial Miscarriage of Justice as argued by the Appellant and the finding of the Jury cannot be faulted.

RESPONDENT'S RESPONSE TO GROUND ONE

Wendy Innocent's evidence was in part more prejudicial than probative and affected the fairness of the trial:

(i) Investigation of a double fatal accident must not be seen in a vacuum. One of the first and obvious line of enquiry was the status of the Driver/Suspect even his health. The Officer was one of the first officers on the scene and his evidence is not inconsistent with the Defendant's evidence that he had been earlier drinking.

(ii) The duty of the Officer to secure a defendant by arrest was not unwarranted and the fact that the Appellant was in the officer's view aggressive is a fact to consider as the Appellant did not agree he had committed an offence.

(iii) Refusing to give a blood sample is his right but it cannot be said that the police did not have an open mind to the investigations.

RESPONDENT'S RESPONSE TO GROUND TWO:

THE DIRECTIONS GIVEN BY THE LEARNED JUDGE WERE ADEQUATE:

(i) The Directions would have been confusing to the Jury as that which the Appellant are proposing as the mention evidence were left to the Jury as to evaluate Credibility and it was clear that the Appellant bears no Burden to prove his innocence. Once a witness gives evidence be it for Prosecution or Defence credibility is always an issue.

(ii) It is wrong in principle to speculate what the Jury may have considered irrelevant evidence. It is clear what the Crown's case was and this was reiterated by the Defence and also the Learned Judge and that the offence was driving over the speed limit on the wrong side of the road around a bend in the part of the oncoming motorcycle with a pillion rider at night. The alternative of driving without due care and attention was also left to the Jury.

RESPONDENT'S RESPSONSE TO GROUND THREE AND FOUR:

(i) The evidence of David Been was properly put before the Jury and there was no need to direct the jury on the evidence different than that which was done. It was a fact that the Appellant motor vehicle traversed the said road that night in question and the timing was a matter for credibility of the witness for assessment of the Jury.

(ii) The claim that Mr. Been is a witness with an interest to serve beyond the normal credibility and reliability of his evidence has no merit. Sometimes a direction may achieve the very results we are trying to avoid and the General Direction to the Jury not to speculate and not to have any specific sympathy or prejudice when assessing and weighing up the evidence by experience was adequate direction to the jury.

IN CONCLUSION THERE WAS NO SUBSTANTIAL MISCARRIAGE OF JUSTICE IN THIS CASE AND THE APPEAL OUGHT TO BE DISMISSED AND THE CONVICTION AFFIRMED.

2. The sentence was not manifestly excessive or wrong in principle and ought not to be disturbed. The Maximum sentence is 10 years and disqualification for no less than 12 months. Section 25(6) Road Traffic Ord.

RESPONDENT'S RESPSONSE TO GROUND FIVE:

The Appellant was sentenced to three years on each count to run concurrently with 18 months suspension from driving from the date of release. There are no written Judgments in our Jurisdiction however the prison commitment warrant was available to the court and the closest matter on a factual basis is R v Raphael where the Court of Appeal reduced the sentence of 3 years to two years. The speed was in excess of 87 MPH on the highways just beyond the IGA round about where the victim was standing beside a parked car on the road way at night and threw the victim some distance away in the bushes.

The case of Cooksley & others (2002) is not a binding precedent and the case of R v Raphael is to be preferred in principle.

[10] The case for the prosecution was based primarily upon circumstantial evidence. In summing up, the prosecution invited the jury to infer, from the evidence presented to them, that the circumstances which led to the fatal accident were as follows:

- The appellant was the driver of the Nissan titan pick-up and was travelling in a south westerly direction along the South Dock Road in excess of the speed limit, that is to say 40 miles per hour.
- The motor scooter was travelling in the north-eastern lane.
- The Nissan truck crossed the mid-line and impacted with the scooter.
- The appellant smelt of alcohol at the scene of the accident.
- Shortly before the accident the vehicle was seen by David Been the father of one of the deceased riders, travelling at an excessive speed.
- At the scene of the accident the appellant was aggressive and had to be restrained.

[11] It is useful before addressing the several grounds of appeal to summarise the case for the defendant and the remainder of the prosecution's evidence.

The defendant gave evidence on oath that he was forty years old and had been driving since the age of eighteen years. He had acquired the truck about six months before the accident and had been driving it for the past four months. On the evening of the accident, he left work somewhere between 4:30 pm – 6:30pm. He made a few errands and during that time he had three drinks. He was familiar with the South Dock road and he was travelling at approximately 50-55 miles per hour. He recalled passing David Been's bar at about 50 miles per hour and drove around a curve. Shortly thereafter, he saw an object that was more to the centre of the road. He did not know what it was and so he made the decision to turn more to the right to avoid a collision. The object moved to the right side and he collided with it. The object was unlit.

The grounds of appeal and the evidence

[12] The first complaint related to the evidence of PC Innocent. He was the first officer to attend the scene of the accident and he said that at the scene the appellant was aggressive and had to be restrained upon arrest. That evidence without more was clearly prejudicial to the appellant as it related to post offence conduct and was not probative of anything in issue. It was incumbent upon the trial judge to direct the jury accordingly. This she failed to do.

[13] Post-offence conduct is usually admitted to show that the person "**acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person**". Such evidence is often called "consciousness of guilt" evidence.

[14] Post-offence conduct is a species of circumstantial evidence and as such must lead to a **sure** conclusion of guilt. If the evidence is equivocal and may lead to alternate explanations, it may be misused by the jury. In other words, a jury should not convict on it unless satisfied beyond a reasonable doubt that the guilt of the accused is the only rational inference after considering all the evidence as a whole (**R v Ader 2019 ONSC 4032**). Certain types of post-offence conduct, such as that which has a very low probative value or which may admit of several alternative explanations should not even be put before the jury as the risk of unfair prejudice is high. It was therefore incumbent on the trial judge in this case to carefully instruct the jury to ensure that such evidence, if admitted, is not misused. (**The Law of Evidence in Canada, Fourth Edition pg 381**).

[15] In determining whether post-offence conduct should be admitted the Court must first consider whether the post-offence conduct satisfies the legal prerequisite for admission which is, that it is relevant to the guilt of the accused.

Secondly, the Court must consider the value of the evidence in the context of fairness of the trial and weigh its potentially prejudicial impact against its probative value. In performing this exercise, the Court must consider **all of the competing inferences** that may be drawn from the evidence in order to determine where the prejudicial/probative balance lies.

[16] In **R v White**[1] the Canadian Supreme Court referred to the danger of using post offence conduct to support an inference of consciousness of guilt. The Court observed:

> "***The danger exists that a jury may fail to take account of alternative explanations for the accused's behaviour, and may mistakenly leap from such evidence to a conclusion of guilt. …Alternatively, the jury might determine that the conduct of the accused arose from a feeling of guilt but might fail to consider whether that guilt relates specifically to the crime at issue, rather some other culpable act.***"

[17] In the instant case, the trial judge failed to give the jury any directions with respect to the post-offence conduct of the appellant and accordingly the jury were deprived of guidance on that issue.

[18] The second complaint related to the evidence by PC Innocent that at the scene of the accident the appellant smelt of alcohol and refused a blood sample to Inspector Diamond. Firstly, Inspector Diamond's evidence was to the effect that the appellant agreed to give a blood sample. I agree with counsel for the appellant that the evidence of the appellant smelling of alcohol ought not to have been adduced into evidence as there was no evidence led that the appellant's driving was influenced by the intake of alcohol. Accordingly, the evidence stood alone as no blood sample was taken from the appellant.

[19] When directing the jury on the evidence of PC Innocent and Inspector Diamond this is what the judge said at pages 742 – 743:

[1] (1998) 125 CCC (3rd) 385, 389-9

"**Both officers are saying different things on the same point, which is entirely a matter for you, when you come to assess the witnesses to say which one is credible or not, on that point. You may accept all, or none of a witness' evidence, or you may accept a part of a witness' testimony, and reject the parts you do not accept. A lot depends on how you assess the credibility of the witness, including any witness called on behalf of the defendant.**

In assessing each witness, you take account of their demeanour in the witness box. How did they look when they were giving their evidence? Were their answers straightforward, or were they evasive? Did they appear to you to be telling you the unvarnished truth, or is it your view that it was something less than that? Entirely a matter for you, members of the jury.

On the matter of inconsistencies of one witness or discrepancy as between witnesses, you must bear in mind that it is a matter for you whether you find the inconsistencies or the discrepancy slight, or significant enough for you to determine, using your common sense and collective wisdom, that it goes to the root of some issue you are considering, such that you cannot rely on the witness on that point, or at all".

While no complaint can be made about the above directions, nevertheless, the Learned Trial Judge failed to give the jury any warning about the prejudicial effect of the evidence of PC Innocent as it related to the appellant smelling of alcohol and his refusal to take a blood test. Those issues were prejudicial and could have influenced the mind of the jurors in a negative way.

Excessive speed

[20] Evidence of excessive speed came from the Crown's witnesses Richard Anding and David Been. Anding said that the Nissan was going greatly in excess of forty miles per hour. He was asked in cross-examination about the basis upon which he arrived at that conclusion. He said it was based upon the distance the vehicle travelled post impact. He, however, accepted that there are

recognised ways of assessing speed in accident cases if there is physical evidence to do so. He agreed that there were certain equations that can be used but could not be applied in the instant case. He confirmed that when he said the speed was greatly in excess of forty miles per hour that was not based on calculations but his experience as an accident reconstructionist, and based on the distances the vehicle travelled, post impact. He said he didn't measure the distance from the curve to the point of impact, nor the point of impact to the final resting place of the vehicles. He also compared the accident to previous ones.

[21] The trial judge's direction was along the following lines "**members of the jury unless there is scientific evidence for doing so other accidents have no bearing on this case**". A much more robust direction was required in this case where the crown was placing strong reliance on excessive speed and bearing in mind the concessions made by the witness, Richard Anding, under cross-examination.

[22] Excessive speed may in an appropriate case constitute dangerous driving. However, excessive speed by itself, does not automatically lead to the conclusion that a person was driving dangerously **DPP v Milton**[2] per Hallet LJ.

[23] Before evidence of speed can be given there must be some foundation laid. However, there was no actual evidence of the speed from any witness and accordingly the jury ought to have been so directed.

The only evidence relative to speed in the Crown's case came from Mr. Richard Anding and David Been and their evidence was at variance. That was their opinion. There was no evidence from which an estimate of speed could have been recorded. There was no evidence of what distance had been travelled pre-impact and in what time. Whether a person is driving very fast is a subjective concept and the jury ought to have been given guidance on how to treat such evidence.

[2] [2006] EWHC 242

Evidence of PC Wendy Innocent

[24] Evidence was given by PC Innocent that at the scene he informed the defendant that he was arresting him for the offence of causing death by dangerous driving. That evidence in my view ought not to have been allowed as the defendant was not charged for causing death by dangerous driving until several months later. There was no basis upon which PC Innocent could have been arresting him at that time. He further said, "**the suspect became aggressive, he refuses to follow instruction which is put your hand behind your back**". What exactly PC Innocent meant when he said the defendant became aggressive is unclear and in no way advanced the case for the Crown. There was no basis for the instruction "**put your hand behind your back**". PC Innocent went on to say that at the hospital "**I could observe that Inspector Diamond asked him to give a blood sample and he refused**". That is in direct contrast to the evidence of Inspector Diamond.

[25] It was incumbent upon the trial judge to remind the jury of the evidence of PC Innocent who had given a statement in this matter on 4th March 2017 and that statement made no mention that the defendant smelt of alcohol or had been drinking. However, in a later statement dated 10th October 2018 was the first time that there was a reference to the defendant smelling of alcohol.

Evidence of Inspector Diamond

[26] In answer to a question both from the court and counsel for the accused, Inspector Diamond said that "**the area wasn't well lit**". He also said that at the hospital having cautioned the defendant he asked him what happened and he replied they were on my side and I later asked for his consent to take a blood sample. However, he never received any blood sample.

Evidence of David Been

[27] This witness, the father of Martin Been, who died as a result of the injuries sustained in the accident testified on behalf of the prosecution. He said that he owned a bar and restaurant on the South Dock Road. He attended the bar that evening about 10:15 -10:20 p.m. as a party was scheduled to begin at 11:00 p.m.

He remained outside for a while and as party members began to arrive he was about to go inside when he heard a vehicle coming towards the South Dock Road. He further said "**I saw Jermaine Missick's truck pass speeding**." He estimated the speed to be between 80-90 mph.

[28] After reviewing the testimony of this witness the trial judge summed up in this way:

> "**It is for you to determine, members of the jury having seen the demeanour of the witness, whether you accept any of it, all of it or none of it. Matters entirely for you, using your collective wisdom and common sense of all seven of you**."

[29] In my view, the judge was required to warn the jury that David Been being the father of the deceased, that his evidence may be tainted by reasons of him having an improper motive especially regarding his evidence of speed. The jury should have been further warned that they had to approach his evidence with caution before accepting and acting upon it. It was not sufficient, merely to repeat what he had said in his evidence. The direction which the judge gave to the jury in my opinion was wholly inadequate.

[30] In the case of **Lawrence v The Queen**[3] it was alleged *inter alia* that the trial judge failed to give the jury a warning about the danger of relying on evidence which served the interest of the witness's brother who was an accused. Lord Hodge, in giving the judgment of the Board stated that:

> "[15] In the Board's view there is substance in those criticisms. The Board affirms that a judge has a discretion in the circumstances of the particular case whether to give a warning that a witness's evidence might be tainted by an improper motive (Benedetto v The Queen [2003] 1 WLR 1545 PC, Lord Hope of Craighead at para 31). But, as Lord Ackner stated in R v Spencer [1987] 1 AC 128, 142, "the overriding rule is that he must put the defence fairly and adequately".
>
> [16] The courts have recognised the need for a judge to warn a jury about the possibility of an improper motive in cases where the witness is of bad character. The paradigm is the accomplice…**<u>But the need for such a direction arises from a demonstrated risk</u>**

[3] [2014] UKPC 2

of the witness's having an improper motive for his evidence. That risk is not confined to persons shown to be of bad character (emphasis mine).

[17] There must be evidence which supports the possibility that a witness's evidence is tainted by an improper motive. In Pringle v The Queen Lord Hope stated (at para 31):

> "The indications that the evidence may be tainted by an improper motive must be found in the evidence. But that is not an exacting test, and the surrounding circumstances may provide all that is needed to justify the inference that he may have been serving his own interest in giving that evidence. Where such indications are present, the judge should draw the jury's attention to these indications and their possible significance. He should then advise them to be cautious before accepting the prisoner's evidence"

[18] What, if anything, the judge needs to say will depend on the circumstances of the particular case. In R v Spencer Lord Ackner (at 141D-E) rejected the use of formulaic warning and stressed that the good sense of the matter be expounded with clarity and in the setting of the particular case.

Ground three

[31] Ground three which related to the learned trial judge's failure to give the jury appropriate directions in relation to the "identification evidence" from David Been was withdrawn by counsel for the appellant.

Conclusion

[32] Having come to the conclusion that the inconsistencies and misdirection's were such that they rendered the verdict of guilty unreasonable, we allowed the appeal.

[33] Mr. Franklyn for the Crown urged upon the court to exercise its powers under section 7 (1)[4] and apply the proviso.

Section 7(1) states:

[4] Chapter 2.01, Court of Appeal Ordinance

"**Provided that the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the Court considers that no substantial miscarriage of justice has actually occurred**".

[34] We were not persuaded that no substantial miscarriage of justice had actually occurred and accordingly directed our minds to the question whether there should be a re-trial.

[35] The court considered that the interest of justice required that a new trial be ordered. In so ordering, the court had regard to what was held by the Judicial Committee of the Privy Council in **Dennis Reid v The Queen**[5] where the Board said:

"**The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury. There are, of course, countervailing interests of justice which must also be taken into consideration. The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: it is for the prosecution to prove the case against the accused. It is the prosecution's function, and not part of the functions of the court, to decide what evidence to adduce and what facts to elicit from the witnesses it decides to call. In contrast, the judge's function is to control the trial, to see that the proper procedure is followed, and to hold the balance evenly between prosecution and defence during the course of the hearing and in his summing-up to the jury. He is entitled, if he considers it appropriate, himself to put questions to the witness to clarify answers that they have given to counsel for the parties; but he is not under any duty to do so, and where, as in the instant case, the parties are represented by competent and experienced counsel it is**

[5] Privy Council Appeal No. 37 of 1997

generally prudent to leave them to conduct their respective cases in their own way." (emphasis mine)

[36] For the reasons set out above, the Court allowed the appeal, quashed the conviction and set aside the sentence.

Dated this 26th day of November, 2020

/s/ S. John, JA

I agree.

/s/ C. Humphrey Stollmeyer, JA

I too agree.

/s/ K. Neville Adderley, JA