The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 17 of 2009

Between:

LUKE DAVID ARMSTRONG

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Evans, J.A.
Stuart-Smith, J.A.

Date of Hearing: **16 March, 2010**
Date of Judgment: **18 March 2010**

Appearances: Mr. S. Froomkin QC for the Appellant
Ms. C. Clarke for the Respondent

Reasons for Judgement

Stuart-Smith, J.A.

Introduction

1. On the 13th November 2009 the appellant was convicted of causing death by dangerous driving (Count 1), two counts of causing injury by dangerous driving (Counts 2 and 3), and one count of driving without the appropriate license (Count 4). He was sentenced to fifteen months imprisonment and three years'

disqualification with twelve demerit points on Count 1; five months imprisonment with twelve demerit points on Count 2; six months imprisonment with twelve demerit points on Count 3 and one month imprisonment on Count 4. He appealed against his convictions on Counts 1, 2, and 3. At the conclusion of the hearing we announced our decision to allow the appeal. We now give our reasons.

The Issue of Law

2. The appeal raised an important question as to the proper directions to be given to the jury on a charge of causing death by dangerous driving contrary to section 34 of the Road Traffic Act 1947 (the Act) or dangerous driving contrary to section 36 of the Act.

The Facts

3. At about 1:30 a.m. on Sunday 5th April 2009 the appellant was driving a white Ford Ranger truck index number HA366 in a westerly direction along South Road, Warwick. He was alone in the truck. Coming in the opposite direction was a Chevrolet motor car, index number 43455, driven by Winston Conrad Burrows. The car was owned by Evelyn Rewan who was a passenger in the back of the car; also sitting in the back of the car was Honest Masawi. Burrows had not driven the car before.

4. A collision occurred near the centre of the road. Both vehicles were seriously damaged and the car caught fire. Burrows died as a result of the accident; the two passengers were injured.

5. The appellant left the scene of the accident but was arrested near his home at about 6:00 a.m. that morning. His breath was said to smell of alcohol; but there was no evidence that his ability to drive was impaired by drink or drugs.

6. The deceased driver had a paralyzed left arm which was the result of a previous accident. His blood alcohol level was 179 mg/100 ml (over twice the legal limit)

and he had cocaine and cocaine derivatives in his system. The combination of alcohol and cocaine would produce a "severe effect on his driving".

7. There were no eye witnesses as to the manner in which either vehicle was been driven prior to the accident. There was no evidence of excessive speed on the part of the appellant.

8. There was apparently no evidence of the width of the road, but it is clear from the photographs taken soon after the collision that there was ample room for two vehicles to pass safely. At the place where the collision occurred, the road bends to the right for a vehicle travelling westward, as the appellant was. There was a solid white line in the centre of the road.

9. The evidence upon which the Crown relied came from two police officers who attended the scene and gave evidence as experts. There was debris scattered over the road, mainly near the centre or eastbound carriage-way. There were gouge marks on the eastbound carriage-way near the centre of the road. There was no evidence as to which vehicle had made these marks. The off side front wheel of the truck had become detached in the collision and was on the white line a few feet west of the gouge marks. The car hubcap was near the white line between the wheel and the gouge marks. There were scrape marks made by the steering arm of the van after the wheel had become wrenched off. They began in the westbound carriage-way and ended under the truck which had veered across and came to rest in the eastbound carriage-way. The car was also on the south side of the road facing the direction in which it had come. The photographs show a piece of debris on the white line. This is the most easterly piece of debris that evidently must have been at or near the point of collision.

10. Officer Carrington was unable to say where the point of impact was; he said the area of impact was where the gouge marks were, being caused by the heavier vehicle bearing down on the lighter one. Inspector Lewis expressed his opinion

that the collision occurred in the eastbound carriage-way. But in cross-examination he said that the gouge marks happened after the initial impact. He said that he could not tell where the initial point of impact was; it could have occurred in either lane, but unlikely (that it was in the westbound lane).

11. It is convenient to consider grounds (ii – iv and vi – viii) together since they all relate to the judge's direction to the jury as to the constituent elements of dangerous driving. The judge directed the jury in accordance with the direction to be found at the decision of the English Court of Appeal in *Regina v Evans* [1963] 1QB 412, cited by the Court of Appeal of Bermuda in *Bradshaw v The Queen* [Criminal Appeal 12 of 1985) at page 8 as follows:

> *This offence, first of all, is not an absolute offence. In order to justify a conviction, there must be not only a situation which, viewed objectively, was dangerous, but there must also have been some fault, some fault on the part of the driver, causing that situation. Fault certainly does not involve deliberate misconduct or recklessness, or intention to drive in a manner inconsistent with proper standards of driving, nor does fault necessarily involve moral blame. Thus there is fault if an inexperienced or a naturally poor driver, whilst straining every nerve to do the right thing, falls below the standard or a competent and careful driver.*
>
> *Fault involves a failure or falling below the care or skill of a competent and experienced driver in relation to the manner of the driving and to the relevant circumstances of the case. A fault in that sense, even though it be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient.*

12. And later at page 23 the judge said

> *…and you have got to make up your minds here whether or not what the accused did was dangerous to the public; that is, dangerous to other users of the road. If it was, then, even although the dangerous driving was caused by slight negligence on his part, he is guilty of the offence of driving to the danger of the public.*

13. The grounds of appeal are as follows:

> *ii) That the learned trial judge erred in law when she directed the jury that if they found that the Appellant "was guilty of some negligence", he was guilty of dangerous driving;*
>
> *iii) That the learned trial judge erred in law in directing the jury as to what was required to be proved before they could convict the Appellant of dangerous driving.*
>
> *iv) That the learned trial judge erred in law in failing to direct the jury that before they could convict the Appellant of the offences involving dangerous driving, they had to be sure that the manner of driving amounted to a marked departure from the standard of care of a reasonably prudent driver;*
>
> *vi) That the learned trial judge erred in law in failing to direct the jury that dangerous driving requires a higher degree of negligence than careless driving;*
>
> *vii) That the learned trial judge erred in law in failing to direct the jury that a momentary lapse of attention was insufficient to establish dangerous driving;*
>
> *viii) That the learned trial judge erred in law in failing to direct the jury that the mens rea involved in dangerous driving involved an objective test, requiring proof of a marked departure from the standard of care of a reasonable driver;*

14. There is a hierarchy of offences caused by the use of motor vehicle on the road, some of which result in death or injury and some do not. The most serious is manslaughter. This is a common law offence and is reserved for the most serious and extreme cases. Section 34 (1) of the Act provides—

> *A person who causes the death of another person by the driving of a vehicle on a road, recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might*

reasonably be expected to be, on the road, commits an offence against this Act.

It should be noted that there are three ways of committing the offence, a) driving recklessly b) at a speed which is dangerous, or c) in a manner which is dangerous to the public. The allegation in this case related to the manner of driving. Section 34 (2) is similar to section 34 (1) but relates to actual bodily harm as apposed to death. Section 34 (3) provides that on an indictment for manslaughter the jury may convict of an offence under section 34 (1); section 34 (4) provides that on an indictment under section 34 (1) where causation of death or injury is not established, the jury may convict of an offence under section 36 (dangerous driving) or section 37 (driving without due care and attention or without reasonable consideration of other road users.) It is perhaps worth noting that section 36 (1) relates to driving at a speed or manner which is dangerous, but not recklessly. It is quite clear, therefore, that the statute itself differentiates between dangerous and careless driving.

15. Mr. Froomkin Q.C. on behalf of the appellant submits that the direction in *Evans* fails to make this distinction. This was a point that Lord Diplock made in *REG v Lawrence* [1982] AC 510 at page 524B, he said

> *The Court of Appeal (in Evans) for practical purposes abolished the difference between the standard of driving in careless driving and that involved in dangerous driving where danger to the public did in fact result.*

16. In the United Kingdom the directions in *Evans* proved unsatisfactory and this no doubt lead to the amendment of the law in the Road Traffic Act of 1988 (as amended in 1991) which provides—

> *(1) A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on the road or other public place is guilty of an offence.*
>
> *2 A (1) for the purposes of (1) and (2) above a person is to be regarded as driving dangerously if (and subject to (2) below, only if –*

> *a) the way he drives falls far below what would be 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.*

17. The decision of the English Court of appeal in *Evans* is not binding on this Court. Although it was cited in Bradshaw, the question of dangerous driving was not before the Court of Appeal for Bermuda in that case. The appellant was convicted of manslaughter and the conviction upheld. The court did not have to consider the alternative count of causing death by dangerous driving. However, though the Court cited the passage from *Evans* they did not expressly approve it. In our judgment more assistance is to be obtained from the decisions of the Canadian Supreme Court in *Hundal v The Queen* [1993] 1SCR 867 and *R v Beaty* [2008] 1SCR 49. It is unnecessary to cite passages from the lengthy judgments in those cases. The relevant statutory provisions are similar to those with which we are concerned. We agree with Mr. Froomkin's submission that the following propositions can be derived from those decisions.

i) The trier of fact should be satisfied that to amount to dangerous driving, there should be a marked departure from the standard of driving that a reasonable person would observe in the accused's situation;

ii) A modified objective test must be applied, that is to say the objective test should not be applied in a vacuum but rather in the context of events surrounding the incident.

iii) A momentary lapse of attention cannot satisfy the requirements of his offence of dangerous driving, because that is the sort of thing that can happen to a careful driver.

18. Mr. Froomkin drew our attention to a number of authorities in Australia where the Court's approach is similar to that in Canada. But we do not think it is necessary to review those authorities.

19. We are satisfied that in adopting the *Evans* direction and in particular

i) in failing to tell the jury that the standard of driving had to fall markedly below that of a competent and careful driver;

ii) in directing them that fault, even though it was slight and even though it was a momentary lapse, and

iii) in directing them that "slight negligence" was sufficient,

then the learned judge misdirected the jury, and failed to draw the essential distinction between careless and dangerous driving. Indeed in her helpful and realistic submissions, Ms. Clarke conceded that this was so.

20. In our judgment a suitable direction to the jury in the case of dangerous driving would be to follow the words Section 2(a) (1) of the English Statute which we have set out in paragraph 16. They should also be told that a momentary lapse of attention does not satisfy the requirements of the offence of dangerous driving. Even a careful and competent driver might be affected in that way.

21. Moreover in our judgment if the jury had been properly directed. We do not think they could have convicted the appellant. There was no evidence as to the manner of his driving before the collision; there was no evidence of excessive speed; there was no evidence that his ability to drive was impaired by drink or drugs. There was no evidence that the gouge marks were made by the appellant's truck. The first piece of debris, which must have been at or near the point of impact, was in the middle of the road. Inspector Lewis was unable to say on which side of the white line the point of impact was. All that can be said is that at the moment of collision both vehicles were too close to the centre of the road. There was clear evidence that the deceased's ability to control the car was severely impaired, which might well have caused erratic driving prior to impact or prevented him taking evasive action, if he had seen the appellant's car close to the centre of the road.

22. Ground of Appeal 11

The appellant contends that the judge erred in law when she directed the jury that the state of intoxication of the deceased driver was irrelevant to the issues before them.

What the judge said was "I direct you that this is not relevant if Mr. Burrows was driving on his side of the road and the crash occurred on his side of the road". While it is true that this is conditional on their finding as to where the collision occurred, it must be inherently more likely that a man with only one arm, driving an unfamiliar car, in a condition of such intoxication that it would have had a severe adverse affect on his driving, would be driving in an erratic manner before the collision or would be unable to take moderate evasive action even if the appellant for a momentary inattention was too close to the centre of the road.

For these reasons we allow the appeal on conviction on counts 1, 2, and 3, convictions and the sentences are vacated; and a verdict of acquittal is entered.

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Stuart-Smith, JA

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Zacca, President

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Evans, JA