In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
2020 No: 31

BETWEEN:

THE QUEEN

And

CHARLES JOHNSON

RULING

(REASONS)

Hearing: Friday 14 May 2021
Decision: Friday 1 October 2021
Written Reasons: Tuesday 5 October 2021

Counsel for the Crown: Ms. Takiyah Burgess on behalf of the DPP
Counsel for the Accused: Mr. Richard Horseman of Wakefield Quin Limited

Application for Dismissal (Section 31 of the Criminal Jurisdiction and Procedure Act 2015) / Death by Driving Under the Influence of Alcohol, Section 35(b) of the Road Traffic Act 1947 / Elements of the Offence – Distinction between Influence and Impairment – Criminal Causation

RULING of Justice Shade Subair Williams

Introduction / Background:

1. The indictment in this matter was signed by the Registrar on 22 October 2020 and contained the following single count against the Accused, Mr. Charles Johnson:

STATEMENT OF OFFENCE:

DEATH BY DRIVING UNDER THE INFLUENCE, contrary to section 35(b) of the Road Traffic Act 1947

PARTICULARS OF OFFENCE

CHARLES JOHNSON, on the 3rd day of November 2018, in the Islands of Bermuda, did cause the death of Arthur Wales by driving motor vehicle registration number IN 450, on a road, namely Cut Road, having consumed alcohol of such quantity that the proportion of it in your blood exceeded the prescribed limit.

2. On 14 May the parties were heard remotely by Zoom on the Accused's application for dismissal of the charge under section 31 of the Criminal Justice and Procedure Act 2015 (CJPA) on the grounds of insufficiency of evidence. At the hearing, the Court, having granted leave, received the oral and affidavit evidence of Ms. Pamela Ingham and Ms. Betty Reid in support of the section 31 application. (These witness previously provided witness statements to the police).

3. At the close of the hearing, I advised the parties that I would provide my decision together with oral reasons on the return date set for 17 June 2021. However, by letter dated 16 June 2021, the Court was informed that one of the parties was gravely ill and the hearing was necessarily delisted. The relisted date was thereafter fixed for 1 October 2021 and I have decided, given the passage of time since the hearing, to record my reasoning below in writing.

4. Accordingly, at the 1 October 2021 hearing, I informed the parties of my decision to grant the application for dismissal and stated that these written reasons would follow.

Prosecutor's Objection to the Oral Evidence being heard by an Auto-Visual Link

5. On 29 April 2021 Mr. Horseman advised the Court via email correspondence that he would be seeking to call oral evidence from the two civilian witnesses.

6. Pursuant to my direction a Court administrator wrote to Counsel on 3 May stating:

"*Good day Counsel,*

Further to below correspondence, I write to provide the following directions:

Mr. Horseman, please file a written submission outlining the basis on which you seek leave of the Court to call oral evidence under section 31(4) by close of business on Thursday, 6 May, 2021.

Ms. Burgess, please (i) file a summary of the facts in addition to a summary of the supporting evidence they rely on to establish sufficiency if not already filed (ii) advise whether any contention arises on Mr. Horseman's application to call live witnesses (reasons should be provided to support any objection) and (iii) advise if any objections arise out of witness appearing by Zoom (reasons should be provided to support any objection) by close of business on Tuesday, 11 May, 2021.

Lastly, please be informed that an in-person hearing will not be conducted in any event and as such, if it is determined that the witnesses may be called, but must be called in-person (as opposed to remotely), the hearing will need to be adjourned.

Kind regards…"

7. At the direction of the Court, Mr. Horseman filed submissions outlining his application to call oral evidence in support of his application for dismissal under section 31 of the CJPA. He submitted [2-5]:

"*The Court is referred to paragraphs 14 to 17 of the Defendant's original submissions which detail that there were two eye witnesses who witnessed the cycle traveling at an extremely high speed moments before the collision. Ms. Ingham and Ms. Reid provided affidavit evidence (Tabs 4 & 5) confirming what they saw on the night in question. The police erroneously completed disregarded Ms. Ingham's evidence and never bothered to obtain a statement from Betty Reid despite Ms. Ingham's statement given to police which confirmed her mother was in the car with her. The omission to take a statement from Ms. Reid is indicative of the poor investigation into this matter.*

As mentioned in the original submissions, the Defence believes the Court will find these two ladies extremely credible. While their affidavits set out their evidence, there can be no substitute for hearing the witnesses in person in order to assess their credibility. Ms. Ingham and Ms. Reid are prepared to give evidence by Zoom. As the hearing will be recorded, their oral evidence can be taken fairly quickly and we would anticipate their evidence can be given in the space of 30 minutes. If the Court or the Crown wished to probe their evidence, they would be available to answer any questions posed to them.

In the circumstances where the Crown's case is built solely on the evidence of PC Homer whose expert opinion is that this was a "low speed" impact, the evidence of Ms. Ingham and Ms. Reid is vital evidence that completely undermines the suggestion by Sgt. Homer that this was a low speed impact and also completely undermines the investigation or what may be better phrase as a lack of investigation into the accident.

The test for admitting oral evidence is set out in Section 31(4) of the Act and it states that the Judge shall only grant leave or make an order having regard to any matters stated in the application only if it appears that the interests of justice require the evidence to be admitted. The Defence submits that the evidence of Ms. Reid and Ms. Ingham is so important to the case that is in the interests of justice for this Honourable Court to hear them. The evidence will be short and it will be not be onerous on the court nor take up too much time. While affidavits are of course useful, there can be no substitute for live oral evidence in assessing the credibility and veracity of the witnesses. In those circumstances, the Defence craves leave of the Court to allow Ms. Ingham and Ms. Reid to give their evidence by Zoom on the 14th May."

8. The prosecutor did not object to the Accused's application for the calling of oral evidence. However, issue was taken with the proposal for the evidence to be heard remotely via a Zoom hearing. Ms. Burgess belatedly wrote to the Court on Wednesday 12 May stating:

   "*Please accept my apologies for not meeting yesterday's deadline. I will file my submissions today. However please be advised that the summary of facts and supporting evidence are in the crown's response to the section 31 arguments already filed in January.*

   There is no contention to Mr. Horseman's application to call live evidence at this hearing however we do object to this taken place remotely. I will include the reasons in my submissions."

9. Subsequently, on the same day, Ms. Burgess filed written arguments with the Court. Objecting to the live witnesses giving their evidence remotely, Ms. Burgess submitted [5]:

"*Pamela Ingham and Betty Reid were travelling in the same vehicle some minutes before the collision. Defence counsel seek to rely heavily on these witnesses' accusations that the deceased was speeding before the fatal collision therefore shifting culpability to the deceased rather than the Defendant. Ms. Pamela Ingham has provided two police witness statements with conflicting evidence. It is therefore likely that the crown will seek to challenge her credibility on these statements and wish to do so in person. Neither witness can testify as to the cause of the collision. Further, as this is a road traffic collision, there are photographs that the Crown may seek to put to these witnesses which will present challenges via Zoom*."

10. Ms. Burgess also pointed out that Mr. Horseman never suggested that either of the two witnesses would be outside of Bermuda or otherwise unable to attend an in-person hearing.

11. Ms. Burgess further submitted that technical challenges would likely arise on receiving remote evidence and that the Court would not be able to observe the witnesses full demeanour if the evidence was to proceed by an audio-visual link. She submitted [8-9]:

Technological Limitations
It is our submission that conducting a hearing remotely can possibly present challenges as internet and other necessary technologies can be inconsistent at best. Issues with technology such as delays in audio or video feed would also detract from the courts and counsel's ability to assess the evidence in a case. We submit that additional difficulty may arise when more than one person speaks at once which is common during objections to testimony, or there may be auditory or visual interruptions.

Absence of valuable non verbal Communication
We further submit that allowing the witnesses to give evidence remotely would negate the ability to judge any nonverbal communication. We submit that nonverbal communication is a critical part of assessing a witnesses' credibility. The Crown and Judge would lose the ability to lay eyes on the witness in real time and may miss any nuances in behavior such as speech patterns or other clues relevant to whether the witness is telling the truth. All of these observations are a part of the decision making process in a live hearing.

Summary of the Crown's Case

12. The prosecutor's written summary of the case for the Crown provided as follows [6(a)-(h)]:

"*On Saturday, 3rd November 2018 Arthur George Wales died as a result of injuries sustained in a Motor vehicle Road Traffic Collision that occurred along Cut Road near its junction with Red Coat Lane, St. Georges. At the time the deceased Wales was riding motor cycle registration number BY792, a black Honda CBR and the defendant Mr. Charles Johnson was driving a white Isuzu Truck registration number IN1450.*

Investigations reveal that about 6:53pm the Police received information of a Serious Road Traffic Collision…The police attended…The white Isuzu truck…was facing westerly in the west bound lane facing towards the town of St Georges with minimal damage. The motor cycle …was resting on its offside against the eastern pillar to the entrance of the residence of #17 Cut Road. There was what appeared to be a trail of blood in the east bound lane, which extended to the area where the cycle was resting. There was a helmet located on the side of the road in the east bout lane. The motor cycle was extensively damaged.

Police spoke to the defendant who identified himself as the driver of the truck. He proceeded to explain to the Police how the collision had occurred. He indicated that he made the left turn to exit #8 Cut Road. He was travelling West on Cut Road when shortly afterwards he heard a loud thump, he immediately stopped, got out of the vehicle and saw the victim lying in the road in blood. When he saw who it was he called his name several times. He stated that the victim's eyes were closed and he opened them. The Emergency Medical Technicians arrived shortly afterwards. The defendant was visibly upset as he indicated that he knew the victim, that they were friends and he knew the family. The victim Wales was later transported to The King Edward Memorial Hospital where he was pronounced dead at 7:26pm.

The Police continued to have a conversation with the defendant Mr. Johnson. He was asked if he had been drinking and he replied he had one or two beers, with his sandwich for lunch that day, he was also asked if he consumed anything since the collision and while at the scene. He stated that he had water and tea from a nearby residence. The defendant Mr. Johnson was subsequently arrested on Suspicion of Driving Whilst Impaired by alcohol or drug when cautioned he replied, "I can't believe this, I know him we're friends."

The Autopsy

On the 8th of November 2018 an autopsy was performed on the deceased Wales from which various samples were taken for toxicology studies. The final pathologic diagnosis was Polytrauma Secondary to Road Traffic Collision.

The Government Analyst

On the 18th of April 2019, the Government Analyst examined various samples of the deceased Wales for the presence of Ethanol and drugs. The results concluded that the deceased had 114mg of alcohol in 100 ml of blood and 30ng of THC per ml. The Government Analyst indicates that the presence of Carboxy – THC only indicates that at some point in time cannabis or a containing THC product was consumed, but it is not able to determine when it was consumed.

On the 18th of April, 2019 the Government Analyst examined various samples of the defendant Johnson for presence of ethanol and drugs. The analysis concluded there was not less than 95 milligrams of ethanol per 100 millilitres from the blood sample.

<u>Traffic Collision Investigator</u>

It is the findings of the Traffic Collision Investigator that the main cause of this collision was that the driver, of the truck…, the defendant did not ensure that the road was clear, before entering the main road. The sight distance was enough to see oncoming traffic and make a safe exit. The evasive action taken by the deceased was the reason why the collision occurred in the west bound lane. Had the rider applied his brakes while swerving, it was possible that the cycle could have come to a stop before impacting the rear of [the truck], as the damage profile suggest that it was a low speed impact.

This collision could have been avoided had the driver of the motor vehicle [the truck] exercised care whilst entering the main road, as what is expected of a competent and prudent driver."

13. The Traffic Collision Investigator referred to in the prosecutor's written summary is PC 2379 Mervin Homer who provided a statement dated 10 March 2019. His qualifications and experience as a road traffic accident investigator are outlined in his statement.

14. The prosecutor's reference to the report of the Government Analyst refers to the 18 April 2019 report of the Senior Government Analyst Ms. Nadine Eyvette Kirkos.

15. The Autopsy Report of 31 May 2019 is signed by Dr. Marva Vanessa Phillips Williams.

16. The Crown's case also consisted of an exhibit of photographs of the accident scene taken by Detective Constable 513 Steven David Palmer together with statements of other responding police officers and an Emergency Medical Technicians from the Fire Service Ambulance of the Bermuda Fire and Rescue Service.

17. In addition to the professional witnesses, the Crown also filed written statements of civilian witnesses, none of whom observed the accident when it occurred or the manner of driving by the Accused or the Deceased leading up to the collision.

Summary of the Evidence in support of the Section 31 Application for Dismissal:

18. The Accused filed an affidavit in support of his application but did not give oral evidence in these proceedings. Counsel for the Accused, Mr. Richard Horseman, did elicit oral evidence from two live witnesses who also provided affidavit evidence of their observations.

19. In the affidavit of Ms. Betty D. Reid, she states:

“*I was approached by Richard Horseman to provide an affidavit in connection with the road traffic accident which occurred in the early evening hours on the 3rd November 2018 in which Arthur Wales Jr. died. Mr. Wales was known as "George" to everyone and he is in fact a cousin of mine.*

I do not know the defendant, Charles Johnson. I would say at the outset of my affidavit, I was completely shocked to learn that Mr. Johnson was charged with causing the death of George based on my observations on what happened in the early evening hours of the 3rd November 2018.

I was riding with my daughter, Pamela Ingham, who was driving my car and we were traveling east on Cut Road going to see my granddaughter. We had just come from visiting Johnny Barnes' wife in Paget and it was now early evening and getting dusk. As we came around Cut Road, I noticed a white truck that was stationary seeking to enter Cut Road. We passed the truck and we were probably no more than a couple hundred feet east of the driveway where the truck had stopped when all of a sudden, a motor cycle came speeding around the bend traveling at an extremely high rate of speed. When I say an extremely high rate of speed, he was like a flash of lighting. It seemed to me that he had to be doing no less than 60 miles per hour.

I was just shocked as to how fast the cycle was traveling on Cut Road. Pamela said to me that the person must be crazy to be traveling at such a high rate of speed at that time of evening because you can't see clearly.

We did not hear the collision as we had the windows up and we were listening to and singing gospel music which was playing in the car and we had of course traveled down the road further. When we go to my granddaughter's house, we learned that there had just been a fatal crash and I knew right away it was the rider of the cycle. There were no other vehicles or cycles in the vicinity from the time we passed the white truck and I saw cycle come flying by.

I was sad to learn that the rider of the cycle was my daughter's cousin George and he had passed away.

There is no doubt in my mind whatsoever that the cycle we saw pass us at an extremely high rate of speed was the same cycle involved in the collision. There were no other vehicles in the area at the time.

I have been shown a picture of Cut Road which is taken east of the driveway from which the truck was entering looking west back. See page 1 of my Exhibit "BR 1". While I cannot be precise, I can indicate we were in the area where the red wall meets the white wall when the cycle came screaming by us. The entrance where the truck was looking to enter Cut Road is just at the top of the hill just past the pink pillars.

I have now been shown a second picture which shows a white truck exiting the driveway which is the same driveway I saw the white truck stationary looking to exit on the date of the collision. See page 2 Exhibit "BR 1".

Both my daughter and I feel…
…
I am willing to attend Court to give evidence if required to do so."

20. When Ms. Reid gave her evidence in chief at the hearing before me she stated the following under oath:

"*… as we were traveling down the road [Cut Road] there was a truck stationed, say on the opposite side of myself and just sitting at a gateway- that's all it was doing… and we had just gone past- I think it was red road- onto the white road- round the corner like- and this bike came flying! I mean flying- had to be going more than 60 miles per hour- and um- when I get down to my daughter's house and um – she says- 'Mum, accident up the road'... so my daughter Pamela said to me- before that- before that …*

[Objection by prosecutor on grounds of hearsay. Court allows evidence for a purpose other than truth of content.]

[Mr. Horseman asks witness to repeat the evidence]

As we past the white truck that was stationed on the opposite side of the road at a gate- and as we went round the corner from him- other side of the white truck- this bicycle came flying up the road- it was like it was airborne – you know, it had to be going past 60 mph easily- I know what speed is because I'm traveled in the States and I have an idea what's speed…

[shown photos]

…

Q. Did you see any other vehicles in the vicinity?

A. No other vehicles on the road at all- none behind me and none [inaudible] *– the road was completely empty- no vehicles whatsoever was on that street…*"

21. Under cross examination Ms. Reid accepted that she was unable to recall, after the passage of two years, how far out the truck was protruding out onto Cut Road. Ms. Reid also accepted that she was unable to see if anyone was positioned inside of the truck. She said "*…I don't know if it was man, beast or child sitting in that truck…*" When the prosecutor repeated the question Ms. Reid clarified that she is unable to recall whether or not she saw anyone in the truck and suggested that her daughter might have made that observation.

22. Ms. Reid also agreed that she was in no position to say whether the truck engine was on as her car windows were closed and she and her daughter were singing to the music playing in her vehicle. However when challenged by the prosecutor about her ability to estimate the distance between the truck and the speeding bike after her car drove past the entrance way where the truck was parked, Ms. Reid disagreed and estimated the distance to be a couple of hundred feet:

Prosecutor:	*You said you- you and Pamela traveled down the road further. You can't actually say the distance, um, from the time you passed that bike and the gate with the stationary truck- can you?*
Witness Ms Reid	*Okay, okay, what I did say was I estimated it to be roughly a couple of hundred feet*".
Prosecutor:	*So, you- just to be clear, you crossed the gate- and then probably went an estimate of a couple of hundred feet down the road- and then you saw the bike*
Witness Ms Reid	*Then the bike went past us flying- it was like a flash of lightening- that's how I explained it.*

23. When the prosecutor asked Ms. Reid if she could describe the sound of the bike, Ms. Reid she said:

"*…I don't know what to say about the sound of the bike, I really don't know what to say about the bike, all I can say is that the bike* [inaudible] *was flying so fast, you know, no one could get out of the way. Thank God he wasn't on my side of the road because I wouldn't have been here today*."

24. Ms. Reid agreed that she did not see the collision occur as she was around the bend and out of sight when it would have happened. She said; "*We weren't that far but I can say we were around the bend*."

25. Ms. Reid's daughter, Ms. Pamela Ingham deposed as follows in her affidavit evidence:

"*I was approached by Richard Horseman to provide an affidavit…*

I previously gave the police a witness statement in this matter dated the 13th day of February 2019 which I now produce…

I was driving my mother's car with my mother, Betty Reid, in the car with me. We were traveling east on Cut Road going to see my niece. We had just come from visiting …in Paget and it was dusk at the time.

As we came around Cut Road, I noticed a white truck that was stationary in an entrance looking to exit onto Cut Road. We passed the truck and we were probably no more than approximately two hundred feet or so east of the driveway from where the truck had stopped when all of a sudden, a cycle came flying by at an extremely high rate of speed.

As I said in my statement to the police, I knew if the truck came out, there was going to be a collision as there was no way the cycle would be able to stop. He was traveling way too fast. I recall my mother remarking to me that …. Given the speed of the cycle, we anticipated ...

I did not hear the collision as we had the windows with the air conditioning on and we were listening to and singing gospel music which was playing in the car and we had of course traveled down the road further.

Later that evening I learned that there was a collision and I drove back to the accident site and I spoke to an officer that was there. I then realized that the collision involved the truck. I saw [sic] [It was] *stationary at the entrance to the right of us and the cycle that I had seen coming by.*

In reviewing my witness statement given to the police, I wish to clarify my statement where it is recorded that I stated "I am unable to say if the cycle that was involved was the cycle which my mother and I had seen traveling along Cut Road". I was conveying to the police officer that I did not see the cycle actually strike the truck. I have no doubt, however, that the cycle that cam speeding by us was the cycle involved in the accident even though I did not actually see the collision itself. There were no other cycles that were in the vicinity and the time between seeing the truck and then seeing the cycle fly by was only a couple of seconds later. It had to be that cycle that was involved in the accident as there were no other vehicles on the road.

I have been shown a picture of Cut Road which is taken east of the driveway from which the truck was entering looking west back. See page 3 of my Exhibit "PI 1". While I cannot be precise, I can indicate we were in the area where the red wall meets the white wall when the cycle came flying by us. The entrance where the truck was looking to enter Cut Road is just at the top of the hill just past the pink pillars.

I have now been shown a second picture which shows a white truck exiting the driveway which is the same driveway I saw the white tuck [sic] [truck] *stationary looking to exit on the date of the collision. See page 4 of Exhibit "PI 1".*

In my opinion…

I later learned that the rider of the cycle was my cousin George and he had passed away.

I am willing to attend Court to give evidence."

26. When Ms. Ingham gave her sworn oral evidence, she said the following in evidence in chief in answer to a question about what she observed as she was driving down Cut Road:

"*Okay, I was driving down Cut Road. At the time, we had the windows up, air condition on- we had Gospel music playing, we were singing, right… and on our way as we were driving down- we noticed a – just happened to notice the truck in the driveway- it was dusk, so I didn't see who was in the truck- could have been a male, female- I don't know who- just a truck-….you know, right there- so as we passed the truck, just a little distance past there, like on the evidence of the, um, red wall, just as we were passing the red wall that leads onto the white wall- that's when we saw a bike fly by- I mean like - because I'm a therapist by training- I deal with a lot of emotional issues- I thought this person must have a death wish- it was crazy speed, you know- it was unbelievable speed- especially at a time like that- because of the time of day- because it was dusk and because I know there is a little bit of protrusion out of the wall there where that truck was sitting, that that person flying up there*

should have been cautious enough to know that they should be slow right there, cause they know it's a entrance there where somebody could come- anybody could have came out. Plus a lot of people normally walk down the street home days from the bus stop- so nobody in their right mind should speed at that –that pace- so you know, I just don't…I was like something's wrong with that person – I thought- that's it- something's gonna happen- if that truck comes out- that person's a gonner- there's no way on earth that person could stop, because they were flying so fast- and because I travel a lot- I rent a car all the time- I know what it's like to go 70 mph- I said it had to be no less than 60 and I have a feeling it was way more than that personally- but because I didn't have a –

[Court: *No less than 60 what Madam?*]

Sixty miles per hour- no less than that, because I know what it's like to travel 60-70 miles [mph] *when I travel…*

[Mr. Horseman asks witness to identify the name of the road on which the witness was traveling]

Yes… Cut Road- I was on my way to my niece's house on Cut Road... … as I was running along, taking my time driving, cause we were just taking our time driving down to see her, we noticed the truck that was in that pathway in the ah – the entrance as we passed along, you know- and we knew he would come out after us probably- you don't know what he was going do – but we assumed that-, you know , normally people come out after they see a car go past- he just- I guess, wait waiting his time. And then, like I say, seconds later, this bike went flying! I mean it was flying! past- I mean it didn't make no sense, you know, and I was like oh my gracious- I mean both my mother and I said the same, I mean 'oh my gracious' you know it's like- and I wanted to wind down window- just but I couldn't I mean- I didn't want my mother to hear it cause my father died in a bike accident- you know so that's why see.. something in my mind told me it's going to be an accident- but I didn't – it's like denial and then when I got to my niece's house which is not too far down- we sat on the couch for like a - about a minute or so and my sister got a call said it was a bad accident at the street and my mom and I jumped out and said that's got to be the bike that we saw- it must have hit the truck- so we got in the car and went out there right away cause we knew that we was the only ones in the road at the time- we were the only ones in the road, you know and it's like so- I felt we should go make a statement… and that was that- and then I found out it was my own cousin- his daddy and I are very close- you know it's very emotional to me but you know, he's my cousin- his daddy and my daddy are first cousins…"

27. When cross-examined, Ms. Ingham said that she saw that there was a person in the truck at the time she observed it positioned in the gateway. However, she accepted that she was

unable to say who was in the truck. During this area of cross-examination, the prosecutor, somewhat unfairly, put it to the witness that she had changed her answer. This line of questioning unfolded as follows:

Prosecutor: "*…You couldn't say who was in the truck at the time could you?*

Ms. Ingham: *No*

Court: *She already said that in her evidence in chief that*

Prosecutor: *You couldn't say if the car- the truck was started or start the car?*

Ms. Ingham: *Nope, couldn't say that*

Court: *Sorry, ah Ms. Burgess…, just be clear, when you say 'hadn't started- she couldn't say if it had started' you mean if the engine was on?*

Prosecutor: *Yes*

Court: *Okay, let's be clear…thank you*

Prosecutor: *But Ms. Ingham you later on said in your examination in chief that you guessed the truck was waiting its time*

Ms. Ingham: *Presumption*

Prosecutor: *Right because you can't even say if anyone was in it or if it* was [inaudible] *or even it was trying to come out of – the truck-*

Ms Ingham: *It was a person in the truck- I could see it was a person in the truck, that's all I can say- I could see a figure because it was dusk- so, and because too, I'm not focused so much on a person in a truck- I just could see that there was a person in the truck- but I couldn't see, I didn't observe the face whatever because like I say, I was singing, I was enjoying my day, I wasn't focused on an accident that's going happen, you know, so I wasn't taking down everything, - but I could see a person at the wheel but I didn't notice the face or anything or whatever*

Prosecutor: *Ms. Ingham, I'm going to say that I asked you just now if you could say whether anyone was in the truck and you said no you couldn't*

Ms Ingham: *Okay, well I retract that then*

Prosecutor: *So you're now changing your evidence?*

Ms Ingham: [Witness audibly sighs] *What I'm trying say is- maybe I got something understood- misunderstood, let me just say what I have to say, okay? There was a person in the truck – I could see a – arms or whatever in the truck. So it wasn't to be like- because it wasn't to be like- because it was dusk- I could see a truck there- I could see a person in the truck- I remember that- but I wasn't really taking note of everything because my focus wasn't on that person, you know? So, that what I want to say*

28. Also during cross examination, Ms. Ingham said that she does not recall if the street lights were on as it was two years ago. She maintained, however, that it was dusk in that the sun was just setting on that Saturday evening. She added that she is a Sabbath Day keeper so she was particularly conscious of this that day. Having been directed to the photograph exhibits and when asked about the positioning of the truck when she saw it that evening, Ms. Ingham explained that the truck was just at the rim of the gate, 'flushed with the entrance' of the gateway.

29. The Defence also placed an expert report before the Court containing opinion evidence from Dr. Froncioni. In that report Dr. Froncioni listed multiple injuries sustained by the Deceased, amongst which included femur, tibula, pelvic and cervical spinal fractures in addition to internal and lacerations, contusions (Dr. Fromcioni did not give oral evidence.)

30. The Court was also shown a report from the Defence of an investigation into the accident conducted by a Mr. Gary Arthur Venning, whose professional qualifications are stated at the conclusion of the report. Mr. Venning, a retired accident investigator who was employed with the Bermuda Police Service for 29 years and served in the UK for 34 years, outlined his background as follows:

"… *I have been involved in accident investigations sin 1979 having completed my initial training in Traffic Accident Investigation at the No. 6 Region Police Driving School, Devizes, Wiltshire, UK. I have also undertaken local courses during my career with the Bermuda Police Service. I was an authorized Police Accident Investigator and served on the Accident Investigation team for approximately 17 years. I have conducted many investigations in both the UK and Bermuda and I am accepted as an expert witness in both Magistrates' Court and Supreme Courts of Bermuda. I am an advanced Police Driver, a former Police Driving Instructor and a former member of the Police Motor Cycle Patrol Section.*

In May 2014, I complete a refresher 'At Scene Traffic Crash / Homicide Investigation Course with the Institute of Police Technology and Management (IPTM) in Jacksonville, Florida."

31. Mr. Venning stated the following opinions, *inter alia*:

"*In my opinion, it is most likely the Honda motorcycle #BY792 was out of sight at the time Mr. Johnson started to pull out of the junction but was travelling at an excessively high speed possibly in the region of 50-60mph (80-97Km/h). This is supported by the fact that an impact speed of at least 25-30mph (40-48Km/h) would have been required to cause the injuries and the fact that the rider had around 4-5 seconds in which to avoid a collision, but despite an uphill gradient and the truck accelerating away at about 5-10mph was unable to do so. This in itself is quite compelling, but is further corroborated by two eye-witnesses, Pamela Ingham and Betty Reid who can attest to the fact that the motorcycle was travelling a high speed a short time from the impact.*

On rounding the bend, and delay in the rider observing or reacting to the presence of the truck would have been using up valuable separation distance. At a speed of 50mph (80Km/h) the cycle would be covering the ground at 73 feet per second and when the rider did finally become aware and react to the presence of the truck, it was likely too close and carrying much speed to take evasive action.

It is very likely that some braking took place before impact otherwise the damage to the cycle would probably have been more severe, however, at the time of impact, it is my opinion that the cycle was still travelling around 25-30pmh (40-48Km/h) and the impact with the rear tailgate was sufficient to cause the fatal injuries.

Unlike the rest of the island, the speed limit in St. George's is 25 km/h (16 mph). Cut Road is a heavily populated area with a narrow 19' single road. It would be unreasonable to expect Mr. Johnson, to anticipate that a motorcycle may be approaching at almost 4 times the speed limit and with regards to his standard of driving, I believe Mr. Johnson acted in a safe and responsible manner.

With respect to the actions of Mr. Wales on Honda motor cycle, #BY792, we need to rely on the physical evidence to gain an understanding of what took place. This can most reliably be achieved by starting at the point of impact.

The physical marks on the rea tailgate of the Isuzu truck indicate this was a rear end collision involving only the left handlebars of the motorcycle and the rider's helmet striking the tailgate. The force of impact was sufficient to cause serious injuries and the ultimate

fatality of Mr. Wales. It is not known what speed would be required to cause these severe injuries, but a practical estimate would suggest the speed would need to be at least 20mph (32Km/h).

We known [sic] *the truck was accelerating away possibly at a speed of 5-10mph (8-16Km.h). This speed must be added, otherwise the impact speed would be considerably less than the required 20mph (32Km/h) to cause the injuries.*

Looking at the whole picture, we have a motorcycle that comes around a bend with a 336' (102 metre) sightline, at least 4 seconds in which to react, a dry road surface which would afford good braking, an uphill slope which would assist in speed loss and a truck that is accelerating in the opposite direction which would have further increased the available stopping distance. However, despite all of these factors that were favourable to the rider, the cycle was still able to impact the truck in the region in excess of 20 mph (32Km/h).

Mr. Wales is also a local resident who lives on Cut Road *and would therefore have been intimately familiar with the area.*

In my opinion, this collision occurred as a result of Mr. Wales riding the Honda motorcycle #BY792 at an extreme speed in the vicinity of 50-60 mph (80-97Km/h), which in a heavily populated residential area with a 25Km/h (16mph) speed limit, would be reckless in the extreme.

As a result of the excessive speed, the motorcycle would have been out of sight around the bend when Mr. Johnson made the decision to emerge from the junction. The available sightline of 336' (102 metres) should have been sufficient to enable the rider of the motorcycle to observe the potential danger and react accordingly and stop before a collision could have occurred, but his failure to do so was likely attributable to a combination of delayed observation and slow reaction which may well have included the result of impairment through alcohol and drugs in addition to the other prevailing factors."

32. At the conclusion of his report, Mr. Venning affirmed his independence as an expert in making the following statement:

"*I confirm that my duty is to the court and not to any particular party to these proceedings and I confirm that I honestly hold this opinion based on the facts ascertained by my investigation*."

The Parties' Competing Arguments

33. Mr. Horseman pointed to the Crown's evidence highlighting that the Deceased had consumed twice the legal limit of alcohol (readings: 131mg/100ml and 157 mg/100 ml) and that the toxicology results showed a presence of THC in his system. Notwithstanding that it is unknown from the evidence when the Deceased would have consumed a THC ingredient, Counsel submitted that the Court could safely find that the Deceased was impaired by the excess alcohol detected.

34. Mr. Horseman criticized PC Homer's conclusion that the accident occurred as a result of a low speed impact and pressed on the following passage from the Mr. Venning's report:

    "*When viewed in its entirety, the damage to the motorcycle appears to be fairly minor and it would therefore be easy to conclude that this involved a low impact collision. However, the reason the damage appears to be minor is due to the fact that only the left handlebar made impact with the truck resulting in minimal damage to the motorcycle. Most of the further damage is likely to have occurred during the collision with the wall and scraping as a result of sliding on the road*."

35. Mr. Horseman described the Deceased's bike as a racing bike and said that evidence showed that he was '*smoking down the road*' (meaning traveling at a very high speed).

36. Opening Dr. Froncioni's report of the Deceased's injuries and his resulting conclusions, Mr. Horseman invited the Court to attach weight to the following passage:

    "*As stated above, the exact speed of collision cannot be determined based on the ISS of the rider. However, I feel confident to state that in my opinion, these injuries resulted from a high-speed impact probably in excess of 65kmph (40mph), that is more than 2 ½ times the legal speed limit…*"

37. Mr. Horseman contrasted Dr. Froncioni's analysis to the Traffic Collision Investigation Report prepared by PC Homer. Specifically, Mr. Horseman pointed out that it can be seen from page 4 of PC Homer's report that the police, unlike Dr. Froncioni, never carried out any assessment of injury pattern sustained by the police.

38. Additionally, Mr. Horseman directed the Court's attention to correspondence between him and the prosecutor confirming that the Deceased's bike was considered a "write off" and is no longer available for examination. Mr. Horseman contended that PC Homer, who holds himself to be well-trained in light bulb inspection, failed to carry out a dashboard inspection of the Deceased's vehicle so to determine whether the Deceased's motor bike lights had been

switched on. From that same report, it can also be seen that the police never ascertained whether a speedometer reading could have been obtained. The absence of this evidence, on Mr. Horseman's arguments, crucially undermined the Crown's case on the line of visibility of the Deceased as he was traveling on Cut Road and more so, the speed at which he was traveling.

39. The police investigation, as Mr. Horseman would describe it, was performed at a very low grade and is further diminished by the evidence produced by the Defence. Mr. Horseman described the police investigator's failure to procure a witness statement from Ms. Reid as remarkable given that the police were aware from Ms. Ingham that Ms. Reid was also present in the car and witnessed the high-speed motor cycle and white truck on Cut Road at a crucially proximate time-frame to the accident question. Mr. Horseman also highlighted that the Crown had been served with Dr. Froncioni's and Mr. Venning's reports since 10 December 2020 and that the Crown had made no attempt to challenge or counter this expert evidence in any material way. Mr. Horseman submitted that a properly directed jury, looking at all of this evidence, could not possibly convict.

40. Mr Horseman highlighted the following passage from the Bermuda Court of Appeal's decision in *Armstrong v The Queen* [2009] Criminal Appeal No. 17 of 2009 [11]:

"*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] 1 Q.B. 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. [Mr. Horseman's emphasis]

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"

41. The above passage was an extract of a direction given by the trial judge at first instance in accordance with the English Court of Appeal case in *R v Evans*. On a fuller review of the

decision in *Armstrong v R* it is clear that the Court of Appeal did not approve *R v Evans* and found that the judge had misdirected himself by importing that direction into his summation which allowed for "slight negligence" to be lumped in the scope of dangerous driving.

42. The approach approved by the Court of Appeal (as it applies to the offence of dangerous driving) was follows [17]:

"…

- *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;*
- *iii) 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*."

43. Mr. Horseman promoted the following observations and conclusion unanimously settled by the Court of Appeal in *Armstrong v R* [21]:

"*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. 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."

44. Ms. Burgess impressed upon the importance of the Court assessing all of the evidence before it without looking at any portion of the evidence in isolation. She further contended that the determination of the section 31 application would ultimately come down to a battle between the experts and that such a conflict of opinions ought only to be resolved by a jury. Crown Counsel added that in any event, the expert evidence of PC Homer ought to be the preferred evidence since he was the expert witness who actually attended the scene of the accident on the day in question. Ms. Burgess further cautioned that the Court had only heard the oral evidence from one side and that it should therefore be resistant to dismissing the charge at this early stage in the proceedings.

45. Addressing the elements of the offence, Ms. Burgess said that neither fault nor impairment is an element of the charge and that a jury would be directed accordingly during a summation. In seeking to make good this submission, Ms. Burgess relied on *R v Hughes* [2013] UKSC 56 which I will consider further below.

The Relevant Statutes

<u>Applications for Dismissal under Section 31 of the CJPA</u>

46. Section 31(1) of the CJPA provides as follows:

> "*A person who is sent for trial under section 23 or 24 on any charge or charges may, at any time-*
>
> *(a) after he is served with copies of the documents containing the evidence on which the charge or charges are based; and*
>
> *(b) before he is arraigned (and whether or not an Indictment has been preferred against him)*
>
> *apply orally or in writing to the Supreme Court for the charge, or any of the charges, in the case to be dismissed.*"

47. The sufficiency test is prescribed by section 31(2):

"*The judge shall dismiss a charge (and accordingly quash any count relating to it in any indictment preferred against the applicant) which is the subject of any such application if it appears to him that the evidence against the applicant would not be sufficient for a jury properly to convict him.*"

48. Under subsection (4) the Court may, in the exercise of its discretion, receive oral evidence at the hearing of the application, so long as the Court is satisfied that the interests of justice require the receipt of any such oral evidence. Subsection (4) provides:

    "*Oral evidence may be given on such an application only with the leave of the judge or by his order; and the judge shall give leave or make an order only if it appears to him, having regard to any matters stated in the application for leave, that the interests of justice require him to do so*."

49. The Court is empowered to disregard any document stating the evidence that a witness would have given if that witness was directed or given permission to give oral evidence but failed to do so.

<u>Video Evidence under the Evidence (Audio Visual Link) Act 2018</u>

50. Pursuant to section 3 the Evidence (Audio Visual Link) Act 2018 applies to any proceeding in or before a court in Bermuda and under the Interpretation section of the 2018 Act "*"audio visual link" means facilities that enable audio visual communication whereby a party or a witness, while not present in the courtroom or other place where the proceeding is being held, is able to be seen and heard…*"

51. Section 4(1) provides:

    "*A party or a witness may, if a judicial officer so directs, give evidence by the use of an audio visual link in any proceeding*."

52. Subsection (2) allows for the Court to make such a direction on its own initiative or on the application of a party or witness.

53. Ms. Burgess referred to the grounds for making an application for hearing audio visual evidence as provided by section 68C(3) of the Evidence Act 1905 ("the Evidence Act"). Under section 4(5) of the 2018 Act the Court <u>*may*</u> direct evidence to be heard by use of an audio visual link on the grounds stated under section 68C(3) of the Evidence Act. Section 68C provides:

"*Directions about alternative ways of giving evidence*

68C (1) In any proceeding, the judicial officer may, either on the application of a party or a witness, or on the judicial officer's own initiative, direct that a party or a witness is to give evidence-in-chief and be cross-examined in an alternative way as provided in section 68E.

(2) An application for a direction under subsection (1) must be made to the judicial officer as soon as practicable before the proceeding is to be heard, or at any later time permitted by the court.

(3) A direction under subsection (1) that a party or witness is to give evidence in an alternative way may be made on the grounds of—

(a) the nature and alleged circumstances to which the proceeding relates;
(b) the age or maturity of the party or the witness;
(c) any physical, intellectual, psychological or psychiatric impairment of the party or the witness;
(d) any trauma suffered by the party or the witness;
(e) the party's or witness's fear of intimidation;
(f) the linguistic or cultural background or religious beliefs of the party or the witness;
(g) the nature of the evidence that the party or the witness is expected to give;
(h) the relationship of the party or the witness to any party to the proceeding;
(i) the absence or likely absence of the party or witness from Bermuda;
(j) the availability, quality and security of the technology to be used;
(k) any other relevant matters, including the effective maintenance of the right of a party to a fair hearing.

(4) The availability, quality and security of technology in subsection (3)(i) shall be verified by the Registrar of the Supreme Court on the advice of the appropriate person qualified to advise on such quality and security.

(5) In giving directions under subsection (1), the judicial officer shall have regard to the nature of the proceeding and the need to ensure—

(a) that there is a fair trial;

(b) the comfort or views of the party or the witness and—

(i) the need to minimise the stress on the party or the witness; and

(ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and

(c) any other factor that is relevant to the just determination of the proceeding."

54. Beyond the above provisions of the Evidence Act, the Court may direct a party or a witness to make use of an audio visual link so long as the Court is satisfied under section 4(6)(a)-(b) of the 2018 Act "*(a) that it is in the interest of the efficient and effective administration of justice for the person concerned to give evidence in the proceeding by the use of an audio visual link; and (b) that an appropriate place is available for receiving evidence by the use of an audio visual link*."

55. Section 4(6)(a)-(b) is to be read with subsection (7) which provides:

"*(7) In giving a direction under subsection (1), the judicial officer shall have regard to the nature of the proceeding and the need to ensure—*

(a) that there is a fair trial;

(b) the comfort or views of the party or the witness, including the need to minimise stress on a party or a witness;

(c) any other factor that is relevant to the just determination of the proceeding."

56. A general criteria for the use of audio visual links is provided under section 5(1) of the 2018 Act. This is a list of factors which the Court must have regard to when giving a direction under section 4(1) for the use of evidence via audio visual communication. The factors are listed as follows:

"…
(a) the nature and alleged circumstances to which the proceeding relates;
(b) the age or maturity of the party or the witness;
(c) any physical, intellectual, psychological or psychiatric impairment of the party or the witness;
(d) any trauma suffered by the party or the witness;
(e) the party's or witness's fear of intimidation;
(f) the linguistic or cultural background or religious beliefs of the party or the witness;
(g) the nature of the evidence that the party or the witness is expected to give;
(h) the relationship of the party or the witness to any party to the proceeding;
(i) the absence or likely absence of the party or witness from Bermuda;

(j) the availability, quality and security of the technology to be used;
(k) the potential impact of the use of technology on the effective maintenance of the rights of other parties to the proceeding, including—

(i) the ability to assess the credibility of the parties or the witnesses and the reliability of evidence presented to the court; and
(ii) the level of contact with other parties or witnesses;

(l) *any other relevant matters, including the effective maintenance of the right of a party to a fair hearing*."

57. In this case no suggestion is made that the Registrar has not verified the availability, quality or security of technology used on the advice of an appropriately qualified person pursuant to section 5(2) of the 2018 Act.

58. Section 6 of the 2018 Act provides an additional criteria for criminal proceedings:

"…
(a) the potential impact of the use of technology—

(i) on the effective maintenance of the right of the defendant to a fair trial; and
(ii) on his rights associated with the hearing;

(b) the ability of the defendant—

(i) to comprehend the proceedings;
(ii) to participate effectively in the conduct of his defence;
(iii) to consult and instruct his counsel privately;
(iv) to access relevant evidence;
(v) to examine the witnesses for the prosecution;

(c) the level of contact the defendant has with other witnesses; and

(d) *any adverse inference that may arise through the defendant or any witness appearing by means of an audio visual link, and whether that adverse inference may be mitigated*."

59. Documents and other exhibits may be put to a witness or tendered electronically or by any other means the Court thinks fit. Section 12 of the 2018 Act provides:

"***Documents and other exhibits when using audio visual link***
12 A document may be put to or tendered by a party or a witness appearing at a proceeding by the use of an audio visual link, or another exhibit may be shown to or tendered by that party or witness—

(a) *by transmitting the document or other exhibit by secure electronic means;*
(b) *by the use of audio visual link;*
(c) *by any other means that the judicial officer thinks fit*."

60. In accordance with section 13, the provisions of the 2018 Act are subject to any other enactment or rule of court which expressly provides for other requirements in the use of audio visual evidence. For this reason, section 70 of the CJPA stands on its own footing:

"*Video conference appearance while on remand*
70 (1) In relation to section 66, 67, 68, 69, and in relation to section 501 of the Criminal Code Act 1907, the person in charge of the accused person may cause the accused person to appear before the Judge of the Supreme Court or the magistrate, as the case may be, by a means set out in subsection (2) for any part of the preliminary proceedings or proceedings in the Supreme Court other than a part in which the evidence of any witness is taken.

(2) The means referred to in subsection (1) are an appearance by the accused person—

(a) by video conference; or

(b) by any other means that allow the Judge of the Supreme Court or the magistrate, as the case may be, and the accused person to engage in simultaneous visual and oral communication.

(3) If the accused person cannot appear by the means set out in subsection (2), the accused person shall be made to appear at a time and by a means as the Judge of the Supreme Court or the magistrate, as the case may be, so orders."

Reasons and Decision:

Reasons for Allowing Witnesses to be heard via Video Screen

61. Judicial Notice is to be taken of the spike of positive COVID-19 cases in April and May 2021 and the continual rising spread of the coronavirus in Bermuda. It is not to be overlooked that the vast majority of cases listed in the Supreme Court in April and May 2021 were adjourned due to various levels of Courtroom and Registry closures. The residual matters which proceeded were mostly heard via an audio visual appearance for health and safety reasons. Zoom hearings have prior to and since which become a standardized mode of the Court hearing process. In this case, the 14 May 2018 hearing would not have proceeded if the Court did not have the alternative option of proceeding by using an audio visual link.

62. Under those circumstances, I was satisfied under section 4(6)(a) of the Evidence (Audio Visual Link) Act 2018 that it was in the interest of the efficient and effective administration of justice to allow the evidence to be heard remotely thereby avoiding a further adjournment of the section 31 application.

63. I further satisfied myself under section 4(6)(b) of the 2018 Act as to the appropriateness of the technology and the place available for the receiving of the remote evidence. Each of the two witnesses appeared via video screen and separately gave their sworn evidence without any notable technical difficulties. (Ms. Reid gave her evidence before and in the absence of her daughter. Once her evidence was completed Ms. Ingham gave her evidence.) I was unhindered in my ability to observe the demeanour of both witnesses during the entire period of their oral evidence, as I would have had they given their evidence in person from the Courtroom.

Decision as to Application for Dismissal of Charge

64. On Ms. Burgess' 12 May 2021 written submission objecting to the oral evidence being heard remotely, she argued that Ms. Reid's and Ms. Ingham's evidence are '*of no use to the court in deciding this section 31 hearing*' [6]. However, among the concluding paragraphs of the same written arguments she submitted [10]: "*It is the function of this Court to consider all of the evidence in its entirety and find that there is sufficiency for it to go to a jury.*"

65. Notably, in this case, the issue of causation was key to the question of sufficiency. To assist me with the meaning of causation in the criminal law context, my attention was directed to the decision of the Court of Appeal of Canada (Province of Quebec) in *R v Cynthia Gaulin* [2017] QCCA 705 [37-52] [footnotes not quoted]:

"*The Court of Appeal for Saskatchewan cited R. v. Carver, a judgment rendered by the Provincial Court of Alberta in 2013. In that judgment, Rosborough, J. found that s.255(2.1) Cr. C. requires proof that the accused caused the accident and stated that a causal link between the accused's blood alcohol level and the accident need not be proved. This line of authority was followed in Quebec by Anouk Desauhier, J.C.Q., in two cases.*

In my opinion, this is the most fitting approach.

I nevertheless believe that more than a temporal link between driving with a prohibited blood alcohol level and the accident is needed.
A double causal link must be established. First, it must be shown that the driver caused the accident. Then it must be demonstrated that the accident resulted in injury to or the death of

a person. The use of the word "cause" indicates that the legislator intended to exclude cases where the driver's wrongful conduct cannot be linked to the accident. The driver must necessarily have been the effective cause of the accident.

This interpretation is consistent with the language of the statutory provision and the legislator's choice when it chose different wording for the new offence in 2008.

This interpretation also ensures that the accused's blameworthy conduct was in relation to the prohibited consequences. Indeed, an accused should not be convicted merely because, while driving with a blood alcohol level over the legal limit, he or she was involved in an accident that cannot be attributed to him or her in any way.

Through his or her conduct or driving, the accused must have acted or failed to act in such a way as to have caused an accident. The accused's driving must be evaluated against that of a reasonable driver.

Some wrongdoing must be attributable to the accused, who therefore must be a significant contributing cause of the accident. On this point, the test adopted by Arbour, J. in R v Nette and by Karakatsanis, J. in R v Maybin are generally used.

In short, the accused must have significantly contributed to causing the accident, granting, however, that his or her driving need not be the sole cause of the accident.

The authors Manning and Sakoff also state that any problems that might arise as a result of the relatively low "significant contributing cause" standard can be offset in sentencing. They add that this the stage of proceedings where any weaknesses in the chain of causation should be considered:

Weaknesses in the chain of causation are regarded as a matter to be assessed as a factor in the sentencing process. … It should be recognized that most problems created by a low casual standard can be rectified, for the most part, in the sentencing process, where the accused's level of moral responsibility can be more sensitively addressed.

Furthermore, a reading of the trial judgment reveals that requiring proof of a causal connection between the blood alcohol content and the death gives rise to an incongruity.

It has long been recognized that the offence of driving with a blood alcohol level exceeding 80 mg of alcohol in 100 mL of blood does not require proof that the accused's abilities were impaired by alcohol. Evidence of a lack of symptoms is irrelevant. …

In his analysis under s. 255(3.1) Cr. C., the trial judge was not required to determine whether the respondent was impaired.

Instead, he had to consider whether:

> *-the respondent was driving a motor vehicle with a blood alcohol level exceeding the legal limit, that is whether she violated paragraph 253 (1)(b) Cr. C,;*
>
> *-she caused an accident, in that she was a significant contributing cause of the accident as a result of her driving, actions or omissions, granting that her driving need not be the sole cause of the accident;*
>
> *-the accident resulted in the death of another person.*

Unlike the offence codified under s. 255(3) Cr. C., for which the legislator requires proof of the causal connection between the impairment and the death of a third party, the connection required in this case is (1) between the accused and the cause of the accident and (2) between the accident and the death of a person. … …"

"

…

66. The Court of Appeal in the Canadian case of *R v Cynthia Gaulin* endorsed a "*relatively low" "significant contributing cause"* test which would seemingly suggest that the evidence of causation against Mr. Johnson is sufficient merely on the evidence of his entering the main road from a side road. However, the United Kingdom Supreme Court, in looking at the question of causation in *R v Hughes* [2013] UKSC 56, approached the question of causation on more restrictive footing. In that case the Court distinguished the test applicable to causing death by driving from the "but for" test applied in personal injury cases in civil litigation. It may be taken from *R v Hughes* that there must be "*something in the manner of* ... [the Accused's] *driving which is open to proper criticism*…." and "…*which contributed in some more than minimal way to the death*." Delivering the judgment of the Court, Lord Hughes and Lord Toulson said [33]:

"*Juries should thus be directed that it is not necessary for the Crown to prove careless or inconsiderate driving, but that there must be something open to proper criticism in the driving of the defendant, beyond the mere presence of the vehicle on the road, and which contributed in some more than minimal way to the death. How much this offence will in practice add to other offences of causing death by driving will have to be worked out as*

factual scenarios present themselves; it may be that it will add relatively little, but this is the inevitable consequence of the language used and the principles of construction explained above."

67. This Court is persuaded by the reasoning in *R v Hughes* as I find their Lordships' approach to causation to be of real assistance in the application of causation Bermuda criminal law. In this case there was no evidence on the Crown's case of Mr. Johnson's manner of driving before the collision. There was no evidence of excessive speed by Mr. Johnson in his pulling out onto Cut Road nor was there any evidence (apart from the fact of the accident occurring) of his manner of driving being open to proper criticism. The mere fact that he was entering the main road is insufficient to establish a *prima facie* case of causation as it would be wrong for a jury to be permitted to speculate that that Mr. Johnson entered the main road in a manner which caused the accident which ensued.

68. Taking the Crown's case at its highest, all that could be said is that Mr. Johnson's truck collided with the Deceased's vehicle as Mr. Johnson entered the main road from a connecting side road. However, this does not support a presumption of causation on the part of Mr. Johnson. It simply means that Mr. Johnson had a duty to exercise particular care in entering the main road where other road users, including the Deceased, had the right of way. It was thus for the Crown to prove that Mr. Johnson failed to exercise that duty of care. The mere fact of an occurrence of an accident thereafter is insufficient in the discharge of this burden. There must be either direct evidence showing Mr. Johnson's manner of driving onto the main road was something to be criticised or circumstantial evidence from which it may be reasonably deduced that Mr. Johnson's manner of entering Cut Road was open to any such proper criticism. It is insufficient for the Crown to only establish that Mr. Johnson was entering the main road.

69. On the prosecutor's submissions, I must not look at the evidence from either side in isolation. Ms. Ms. Burgess said that I must consider all of the evidence before this Court. That is undoubtedly so. In looking at all of the evidence before me, a jury would be bound to accept the cogent and unchallenged direct evidence of Ms Ingham and Ms Reid that a bike was travelling at a dangerously high speed on Cut Road at the same time that a white truck was stationary and positioned at the flush of the entrance of the side road where Mr. Johnson was in fact positioned as he was entering Cut Road. Ms. Reid's evidence was that there was an approximate 200 meter distance between the truck and the speeding bike after her car drove past the entrance way where the truck was parked. The irresistible inference of fact is that the hightailing bike seen by both Ms Ingham and Ms Reid was that which was being driven by the Deceased moments prior to the fatal accident. Accordingly, a jury would have to be directed that any competing inference must be rejected and rendered subordinate to the inference in favour of the Accused.

70. Ms. Burgess argued that the expert opinion evidence would be the ultimate determining factor in assessing the sufficiency of the evidence. I do not accept that submission as it underestimates the value and pivotal power of the direct evidence given by Ms. Reid and Ms. Ingham. Further, the Crown's expert accident investigator did not offer an original or rebuttal opinion as to how the Deceased's myriad of grave injuries is to be interpreted when carrying out a vehicle-speed assessment.

71. PC Homer's opinion evidence is that the fatal accident ensued following a slow pace of travel. That evidence is seriously undermined by the expert opinion evidence of Mr. Venning coupled with Dr. Froncioni's expert opinion about the force required to result in the litany of grievous bodily injuries fatally suffered by Mr. Wales. In my judgment, there is no real possibility that a jury could properly prefer the evidence of PC Homer over that of Mr. Venning and Dr. Froncioni since PC Homer never addressed on his evidence the relationship or link between Mr. Wales' injuries and his speed of travel. After all, PC Homer did not opine that Mr. Johnson was driving erratically or traveling at a high speed in his truck. Moreover, the Crown, having been served with the Defence's expert evidence in December 2020 (i.e. some 5 months prior to the hearing of the application) did not obtain any competitive expert evidence to counter the views and points raised by Mr. Venning and Dr. Froncioni about the extensive and fatal injuries being a strong indicator of the Deceased's speed of travel.

72. Having regard to the evidence of the live witnesses and that of Mr. Venning and Dr. Froncioni together with the evidence that the Deceased had 114mg of ethanol in a 100 ml sample of his blood, it is inherently and most likely that the Deceased's manner of driving was influenced by his consumption of excess alcohol and that he was the bike rider traveling at the alarmingly high speed of travel described on the evidence of both Ms. Reid and Ms. Ingham.

73. As to the question of visibility, the Crown would be unable to prove on its evidence before me that Mr. Johnson's line of visibility would have reasonably allowed him to perceive the oncoming speeding bike before he, Mr. Johnson, fully pulled out onto Cut Road. The evidence shows that the accident occurred at dusk when the sun was just setting. To add to the ambiguity on the question of lighting, there is no evidence before the Court as to the lighting on the Deceased's vehicle before the accident ensued.

74. In my judgment, no properly instructed jury could have safely convicted on the evidence before me, taking the Crown's case at its highest together with the evidence presented by the Defence. For all of these reasons, the application for dismissal was bound to succeed.

Conclusion

75. For the reasons outlined herein, I found that there was insufficient evidence upon which the Accused could be arraigned on the count of causing death by driving while in excess of 80 mg of alcohol in 100 ml of blood.

76. Accordingly the Defence application made under section 31 was allowed and the single charge on the Indictment was dismissed.

Dated this 5th day of October 2021

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THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT