# In The Supreme Court of Bermuda

**APPELLATE JURISDICTION**
**2019: 31**

LEVINCE ROBERTS

Appellant

-v-

FIONA MILLER
(POLICE SERGEANT)

Respondent

## JUDGMENT

*Appeal against conviction in the Magistrates' Court - Causing grievous bodily harm by driving without due care and attention – Meaning of careless driving - Driving while in a state of sleepiness – Requirement for actus reus of offence to be a voluntary and conscious act- Section 37A of the Road Traffic Act 1947*

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| Date of Hearings: | 30 October 2020 and 25 November 2020 |
| Date of Judgment: | 29 December 2020 |
| Appellant | Mr. Michael Scott (Browne, Scott) |
| Respondent | Ms. Shaunté Simons for the Director of Public Prosecutions |

JUDGMENT delivered by S. Subair Williams J

### Introduction

1. This is an appeal against Magistrate Mr. Craig Attridge's finding of guilt against the Appellant on Information 18TR07205 to a charge of causing grievous bodily harm to Mr. Jahron Wilson on 18 June 2018 by driving without due care and attention, contrary to section 37A of the Road Traffic Act 1947 ("RTA").

2. Having heard Counsel for both sides on their oral and written submissions, I reserved judgment which I now provide on the reasoning outlined herein.

## The Evidence

3. The Evidence in this case was not contentious on the facts.

4. On Sunday 17 June 2018 at approximately 10:00pm the Appellant, a part-time photographer and videographer, returned to Bermuda having travelled from Miami, Florida. He left the airport by car and drove to his home in Sandys Parish before heading back out that same night to film a concert at National Sports Centre where he arrived between 11:00pm and midnight. The Appellant remained at the concert until approximately 4:30am (i.e. Monday 18 June 2018) and returned home at around 5:00am.

5. At approximately 7:00am on that Monday morning, only two hours after having returned home, the Appellant left his home again to attend his place of employment as a security guard in St. David's. He was due to arrive for 8:00am to do security work at the carnival parade which at the time was being held in the Clearwater Beach area. He spent a near 12 hour day in St David's and his only sustenance for the day was a single Chew's granola bar.

6. Having left St David's at approximately 7pm in his car, the Appellant headed back towards his home in Sandys. When the Appellant reached the Astwood Park area in Warwick Parish he collided with the Complainant causing him serious injury.

7. In describing the accident to the trial magistrate, the Complainant, Mr. Wilson, stated in evidence that at 7:30pm he left Warwick Long Bay beach on his motorbike and was heading east towards his home in Devonshire Parish, "*cruising well below the speed limit*". On his evidence, he saw the Appellant's car approaching towards his side of the road before the Appellant's car struck him "head on" and knocked him off his motorbike.

8. The witness statement of an independent witness, Mr. Richard Brangman, was read into evidence by the agreement of both sides. Mr. Brangman had an unobstructed view of the accident from his home patio. He corroborated the Complainant's evidence stating that he saw the Appellant's car "*drift over the line into the opposite*" lane. He said; "*…The cycle was heading east and as the cycle came out of the corner the car was directly in front of him and they collided. There was nothing that the cycle could do. After they collided the car continued for about 15 or 20 feet with the rider on the car before it came to a stop. When the car came to a stop the rider was thrown from the car*

*to the ground. The driver of the car jumped out. That's when the commotion happened as other cars stopped and people came out to assist…*".

9. PC 2133 Graeme Bird stated in his evidence for the Crown that he attended the accident scene and spoke with the Appellant who told him that he had fallen asleep and was awakened by the crash. PC Bird described the weather as fair and said that the road was dry and that visibility was good. PC 2027 Rhoda Jones, whose witness statement was also read in by agreement between Counsel, attended the scene of the accident. Her evidence was that the Appellant made himself known to her and told her; "*I'm so sorry, I take full responsibility for the accident, I think I fell asleep. I had been working some long hours*."

10. Below is an extract from the agreed transcript of Mr. Robert's oral evidence of his drive home that evening leading up to the accident:

    "*Okay well as I left St David's I was travelling behind a couple of cars…feeling fine, listening to music…had the windows down…catching you know fresh air. As I was making my way…as I got close to Paget…I found myself feeling like drowsy tired…like I could feel myself getting tired. So I still made my way to South Shore Road…and as I got along Astwood Park stretch just by the…what's those – Guest houses there…I started to nod off… fall off sleep [sic] [asleep] and that's when I made the conscious decision to make my way to Warwick Long Bay…to the parking…and to just rest…take my camera out, because I had my camera with me…and take some pictures just to…you know gather myself again and then to make my way to Somerset. But as I got to the corner of Warwick Long Bay…I had probably fallen asleep before then but what had woke me up was the accident. I immediately put on breaks and got out of the car and attended to Mr. Wilson and also called the ambulance…*
    *…*
    *… So as I was coming out of Long…Astwood Park Stretch I was nodding in and out so…I was con…as we got to that corner I was conscious, I was awake…approaching the bus stop just before Warwick entrance. I remember coming up to that *inaudible* I remember seeing the park and then as we got around that corner I just remember waking up to the bang*."

11. During cross-examination by the prosecutor at trial, the Appellant was asked whether he could have stopped his car at an earlier point prior to the accident. His response, after being prompted by the magistrate to answer the question asked, was this:

    "*As I stated I only…started to …I only really got tired as I got along Astwood Park stretch…so the stretch where the guest houses are… if I would've pulled over there I'm on a straight road…anything could happen to me…I could get hit by a car…the police could come up to me and ask 'what's going on, am I intoxicated [?]'…I didn't want all that hassle so I decided to go…make my way to Warwick Long Bay…in the park where it's safe, cool, calm and collected. And I…that's when I decided…as I...I guess I got*

*past Astwood Park…I noticed that I have got my camera with me…to go take some pictures…so I'm not driving just collecting myself. I'm not in a state of driving and focus I'm walk around [sic] *inaudible*… collecting myself*."

12. The Crown exhibited a KEMH Discharge Summary Report of the Complainant's injuries which included fracture of the left tibia and a fracture and dislocation of his right hip in addition to multiple abrasions over his body.

## The Grounds of Appeal

13. By Notice of Appeal filed on 8 October 2019 the Appellant appealed on three grounds of appeal:

"*1. The Learned Magistrate erred and misapplied the relevant law based on settled legal principle established in 1992 case law including case law established in Bermuda decided case of the Queen v Calin Maybury Reported 2015 in favour of following principles of law decided in an earlier decided case of Hill and Baxter decided in 1952 which was a material misdirection.*

*2. The Learned Magistrate erred in law and that his finding of guilt was against the weight of the evidence, in that the prosecution had not established on the facts that the Appellants [sic] driving was objectively either careless or dangerous, which was a material further misdirection.*

*3. The Learned Magistrate finding that the Appellant decision to drive was careless having regard to the insufficient sleep was contrary to the weight of the evidence including the time spent in sleep on the plane journey and the several hours of sleep at home took insufficient account of a) the distance driven without incident and b) the relevant period of driving just prior to impact.*"

## Analysis of the Law on Causing Grievous Bodily Harm by Careless Driving:

14. Section 37A of the Road Traffic Act 1947 ("the RTA") provides:

*"Causing death, or grievous bodily harm, by careless driving*
*37 Any person who causes the death of, or grievous bodily harm to, another person by driving a vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or public place, commits an offence."*

***The Law on Grievous Bodily Harm***

15. In the recent decision of *Fiona Miller v Dennis Webb* [2020] SC (Bda) 47 App (13 October 2020) I described the meaning of grievous bodily harm as follows [paras 19 and 30-31]:

*"19. The term grievous bodily harm refers only to a measure of bodily harm which is grave enough to seriously interfere with one's health or comfort whereas the term bodily harm refers to any measure of bodily injury which interferes with one's health or comfort. (In R v Chan-Fook [1994] 2 ALL ER 552 the English Court of Appeal treated the word "harm" as a synonym for "injury".) The question as to whether bodily harm is "grievous" is clearly a question of degree.*

*...*

*30. In summary, the meaning of grievous bodily harm as a matter of Bermuda law is primarily guided by the English case law. It means really serious bodily harm and it is not arbitrarily limited to cases of permanent injury or cases requiring treatment or cases which are life-threatening.*

*31. Each case will depend on its own facts. What may be really serious harm to one victim may not be really serious harm to another. The degree of seriousness is determinable only by assessing the level of interference to the particular victim's health or comfort. For these reasons I would warn against over-reliance on charging guidelines as the question of whether the evidence establishes grievous bodily harm will always be tied, at least to some extent, to the victim concerned."*

16. In this case, the Appellant accepts that the harm caused to the Appellant constituted grievous bodily harm.

***The Law on Careless Driving***

17. Section 37B of the RTA outlines the meaning of careless driving:

*Meaning of careless driving or driving without reasonable consideration*

*37B (1) A person shall be regarded as driving without due care and attention if the way he drives falls below what would be expected of a competent and careful driver.*

*(2) In determining for the purposes of subsection (1) what would be expected of a careful and competent driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.*

*(3) A person shall be regarded as driving without reasonable consideration for other persons only if those persons are inconvenienced by his driving.*

*[Section 37B inserted by 2012: 18 s. 8 effective 5 October 2012]*

18. In *Fiona Miller v Dennis Webb* I found the test for assessing evidence of careless driving to contain both subjective and objective elements [para 33]:

"*In assessing whether an accused person's manner of driving fell below the standards of a competent and careful driver, the Court will consider the question both (i) subjectively from the standpoint of what the accused person knew and (ii) objectively so to consider the circumstances which reasonably ought to have been known by the accused*."

19. The question as to whether the test is both subjective and objective is further considered below.

**Driving in a state of sleepiness**

20. Mr. Scott relied on the Australian High Court decision in *Jiminez v The Queen* (1992) 173 CLR 572 where Mr. Michael Jiminez brought an application for special leave to appeal against his conviction of culpable driving for which he was sentenced to six months' imprisonment by way of periodic detention.

21. In the case of *Jiminez* the Applicant and three female companions set out to travel together in his BMW Sedan from the Gold Coast in Queensland to Sydney in New South Wales. Prior to the Applicant's departure for this road trip, he slept for four hours leading up to 9pm and one of the females in his company, Ms. Janelle May Stephanoni, drove for the first 400 kilometres while the Applicant slept further in the car. At approximately 3:30am the Applicant took over at the driver's seat before a serious road traffic collision occurred at around 6:00am. Ms. Stephanoni, who was not wearing a seatbelt at the time, was killed in the accident.

22. When questioned by the police at the scene of the accident, the Applicant said; "I went to sleep". In a subsequent interview with police he said that prior to the accident there was heavy fog obstructing the visibility on the road. However, he also admitted that he lost control of the car when he fell asleep. In an unsworn statement at trial the Applicant said that at the time of the accident he intended to stop at the next main town for breakfast and that he did not feel like sleeping at all. It is reported in the judgment that he said; "*Suddenly my car was off the road. I think I must have closed my eyes for a second. When I opened my eyes the car was off the road and I lost control*."

23. I would pause here to point out that the case *Jiminez* case was not about careless driving. Mr. Jiminez was charged with the offence of culpable driving under section 52A of the Crimes Act 1900 (N.S.W.) Such an offence applies to the criminal responsibility of a driver for causing the death of a passenger of the same vehicle. More importantly, this

statutory provision required Mr. Jiminez to have been driving in a manner dangerous to the public at the time of the impact which occasioned the death of Ms. Stephanoni. Therefore, the *actus reus* for an offence under section 52A is dangerous driving. Section 52A provides as follows:

*"s.52A*
*(1) Where the death of …any person is occasioned through:*

*(a) the impact with any object of a motor vehicle in or on which that person was being conveyed (whether as a passenger or otherwise); …*

*and the motor vehicle was at the time of the impact…**being driven by another person**:*

*(a)-(e)…*

*(f) at a speed or **in a manner dangerous to the public**, the person who was so driving the motor vehicle shall be guilty of the misdemeanour of culpable driving.*

*(2)…*

*(3) It shall be a defence to any charge under this section that the death … was not in any way attributable…to the speed at which or the manner in which the vehicle was driven*."

24. The Crown's case in *Jiminez* was that the Applicant was tired and drowsy and had fallen asleep while driving the car. One of the issues before the Court, however, was whether the *actus reus* of the offence, i.e. the driving of the car, was a conscious and voluntary act, as is the requirement for any criminal offence. The other issue for the jury in that case was whether the sleepy driving was sufficiently contemporaneous with the moment of impact so to satisfy the causation element of 52A.

25. As to both the issue of the voluntariness of an act performed while sleeping and whether the sleepy driving was sufficiently contemporaneous, the Australian High Court (being the highest appellate Court in Australia) said this in *Jiminez* [para 12]:

"*12. I the South Australian case of Kroon (4) (1990) 52 A Crim R 15, at p 18, King C.J. observed that an offence such as culpable driving requires the relevant driving to have been voluntary and that driving while asleep does not constitute a voluntary act. Thus, he said, "a driver cannot be convicted of causing death or bodily injury by dangerous driving in respect of a period during which the driver is asleep". But he went on to say (5) ibid., at pp 18-19 "Every act of falling asleep at the wheel is preceded by a period during which the driver is driving while awake and therefore, assuming the absence of involuntariness arising from other causes, responsible for his actions. If a driver who knows or ought to know that there is a significant risk of falling asleep at the wheel,*

*continues to drive the vehicle, he is plainly driving without due care and may be driving in a manner dangerous to the public. If the driver does fall asleep and death or bodily injury results, the driving prior to the falling asleep is sufficiently contemporaneous with the death or bodily injury (McBride, per Barwick C.J. at 51) to be regarded as the cause of the death or bodily injury. .. The cases must be rare in which a driver who falls asleep can be exonerated of driving without due care at least, in the moments preceding sleep. As King C.J. recognizes, where the question is whether a driver who falls asleep at the wheel is guilty of driving in a manner dangerous to the public, the relevant period of driving is that which immediately precedes his falling asleep. Not only must the period be sufficiently contemporaneous with the time of impact to satisfy the requirement of s. 52A but the driving during that period must be, in a practical sense, the cause of the impact and the death. The relevant period cannot be that during which the driver was asleep because during that time his actions were not conscious or voluntary. And for the reasons which we have given, if the driver's actions upon waking up amount to no more than an attempt to avoid an accident, it cannot be that period of driving*."

26. The legal position applicable to a person sleeping at the driving wheel of a moving vehicle was previously considered by Lord Goddard CJ in *Hill v Baxter* (1958) QB 277 [pp 282-283]:

"*…That drivers do fall asleep is a not [sic] uncommon cause of serious road accidents, and it would be impossible as well as disastrous to hold that falling asleep at the wheel was any defence to a charge of dangerous driving. If a driver finds that he is getting sleepy he must stop.*

*.. I agree that there may be cases where the circumstances are such that the accused could not really be said to be driving at all. Suppose he had a stroke or an epileptic fit, both instances of what may properly be called acts of God; he might well be in the driver's seat even with his hands on the wheel, but in such a state of unconsciousness that he could not be said to be driving. A blow from a stone or an attack by a swarm of bees I think introduces some conception akin to novus actus interveniens. .. In the present case I am content to rest my judgment on the ground that there was no evidence which justified the justices' finding that he was not fully responsible in law for his actions, and that his intention was immaterial as there was here an absolute prohibition*."

27. However, Mason CJ together with five of the other six Justices of Appeal in *Jiminez* expressed the Australian High Court's disapproval of Goddard CJ's judgment if what he was in fact suggesting was that falling asleep at the wheel categorically meant that there would have been an earlier state of drowsiness such that the driver would have been able to bring his vehicle to a prompt and safe stop. To this, the Australian Court said:

"*No doubt it may be proper in many cases to draw an inference that a driver who falls asleep must have had warning that he might do so if he continued to drive or that otherwise he knew or ought to have known that he was running a real risk of falling asleep at the wheel. But it does not necessarily follow that because a driver falls asleep he has had a sufficient warning to enable him to stop... See Dennis v Watt (1943) 43 SR (NSW) 32; Kroon (1991) 52 A Crim R 15*."

28. Mr. Justice Michael McHugh (as he then was in the *Jiminez* case) delivered a concurring judgment in which he agreed with the final orders proposed under the majority judgment and its overall reasoning. However, McHugh J further expressed a view that the question of voluntariness in driving while sleeping was a matter of degree. He queried whether it could be categorically held that the *actus reus* is not established by an act of driving while the person is sleeping, even if that person had fallen asleep for only a second [paras 3-5]. This, on my reading of the passages, was mere supposition.

29. The Crown relied on the Scottish High Court of Justiciary's judgment in *Helen Alexander v John Dunn* [2016] HCJAC 3, constituted by the Lord Justice General as President of the High Court, his deputy, the Lord Justice Clerk, and the Lord Commissioners of Justiciary, Lord Brodie and Lord Drummond Young. In *Alexander v Dunn*, the appellant, Ms Alexander, had fallen asleep while driving. The trial sheriff found that her symptoms of fatigue were onset by menopause. In any event, he convicted her, having also found that by falling asleep while driving her driving had fallen far below the standard expected of a careful and competent driver. He also found that the danger of driving while sleeping would be obvious to a careful and competent driver.

30. On appeal to the Scottish High Court by case stated, the Lord Justice General in the two-page report of the Court's Analysis said, *inter alia*:

"*The sole question is whether the sheriff was entitled to convict the appellant of dangerous driving by reason of her falling asleep. The test for what constitutes dangerous driving is an objective one (Allan v Patterson). It is whether the driving falls far below the standard to be expected of a competent and careful driver and occurs in the face of obvious and material dangers which were or ought to have been observed, appreciated and guarded against (LJG (Emslie) at p. 60). It is no defence for a driver to assert that he did not intend to drive in a manner which was dangerous or that he did not intend to fall asleep at the wheel.*

*The act of driving, which is deemed to be dangerous, still requires to be voluntary. Involuntary actions cannot form the basis for a conviction. Once a driver is asleep, his actions cannot be said to be voluntary, as he lacks consciousness. However, the act of falling asleep, in the absence of special circumstances, is a voluntary act and, when it*

*occurs in the context of driving, will usually be regarded as dangerous. That is because drivers who fall asleep:*

> *"are always aware that they are feeling sleepy, … there is always a feeling of profound sleepiness and they reach a point where they are fighting sleep…".*

*Although that is a passage of testimony quoted from R v Wilson (at p.13), it coincides with human experience (see Attorney General's Reference No. 1 of 2009 at p. 745; Kay v Butterworth). It does not require formal proof. A jury are entitled to infer, from the fact that a driver falls asleep, that, prior to falling asleep, he or she was aware of doing so and ignored the obvious dangers in so doing.*

*There may be special circumstances which make falling asleep involuntary. These include the onset of a medical condition, such as sleep apnoea, narcolepsy or a hypoglycaemic episode (e.g. Farrell v Stirling; Macleod v Mathieson) However, a driver who knows his medical condition, and can foresee that he may fall asleep, will be precluded from relying on that condition. It is for an accused to put any special circumstances in issue, and thereafter for the Crown to establish beyond reasonable doubt that the act of driving was nevertheless voluntary because the special circumstance ought to have been foreseen (Hill v Baxter).*

*The court has had regard to the views of the High Court of Australia in Jiminez v The Queen. However, the decision in Jiminez was based upon a recognition that a driver may have no warning of the onset of sleep (para. 19). There is no basis for such a possibility in this case for the reasons given. The question must be answered in the affirmative and the appeal refused*."

31. Although decided on differing facts, I have found no inconsistency between the statements of legal principle in the judgment of *Jiminez v The Queen* and those stated by the Scottish High Court in *Alexander v Dunn*. The portion of the *Jiminez* judgment to which the Scottish High would have been referring is as follows [para 18-19]:

"…
*18….Perhaps the most obvious example is where a driver is unaware of the defective condition of his vehicle and believes it upon reasonable grounds to be in good working order. And the same issue is raised when, in a case like the present where the dangerous manner of driving is said to consist in the likelihood of going to sleep, a driver claims that he had no warning of the onset of sleep.*

*19. It follows from what has been said above that it was necessary for the prosecution in the present case to establish that the applicant was affected by tiredness to an extent that, in the circumstances, his driving was objectively dangerous. It was open to the jury to draw an inference to that effect from a finding that the applicant went to sleep*

*at the wheel. It was, however, also open to the jury to find that the applicant honestly and reasonably believed that, in all the circumstances, it was safe to drive. Apart from any inference that might be draw from the fact that the applicant had fallen asleep, there was little in the evidence to support a finding that the applicant had felt drowsy or that he had reason to believe that he was tired…. The absence of any warning of the onset of sleep, if the jury found that there had been none, laid a foundation for that being an honest and reasonable belief. Lack of warning as to the onset of sleep is only one of a number of circumstances that may bear on the question whether a driver honestly and reasonably believed that it was safe for him to drive*."

32. In both *Jiminez v The Queen* and *Alexander v Dunn* the Court envisaged the possibility that one might fall asleep while driving without the prior warning of sleepiness. In *Jiminez v The Queen* the Australian High Court accepted that one could defend a charge of culpable driving if it is shown that the driver "*honestly and reasonably believed that it was safe for him to drive*". That Court found that *"it does not necessarily follow that because a driver falls asleep he has had a sufficient warning to enable him to stop*". Similarly, in *Alexander v Dunn* the Scottish High Court referred to "*special circumstances which make falling asleep involuntary*". So there was no significant conflict between these two different jurisdictions of Court on their reasoning on the law of dangerous driving by driving while in a state of sleepiness.

**Comparing the Provisions of the RTA to the Statutory Provisions in the UK and in Australia**

33. In *Alexander v Dunn* the Scottish High Court were bound by the UK statutory meaning of dangerous driving pursuant to section 2A of the Road Traffic Act 1988:

**"*2A Meaning of dangerous driving.***

*(1)For the purposes of sections 1 and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (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.*

*(2)A person is also to be regarded as driving dangerously for the purposes of sections 1 and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous*."

*(3) In subsections (1) and (2) above "dangerous" refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of*

*those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.*

34. Section 36A of the RTA which outlines the meaning of dangerous driving under Bermuda statute law is lifted nearly word for word from section 2A of the 1988 UK Act. The meaning of careless driving in Bermuda under section 37A of the RTA, with which this Court is presently concerned, is also similarly worded to section 36A of the RTA and section 2A of the 1988 UK Act (save only that the threshold for the expected standard of driving is lower). So where the Lord Justice General described the test for dangerous driving to be purely objective in *Alexander v Dunn*, he was referring to a statutory provision which is in material substance identical to careless driving as governed by sections 37A and 37B of the RTA.

35. Prior to the *Jiminez* appeal, the meaning of dangerous driving was outlined in the unanimous judgment of the Australian High Court in *McBride v. The Queen* (1966) 115 CLR 44. The Court was then constituted by Barwick C.J., McTiernan and Taylor JJ. Barwick CJ who described driving in a manner dangerous, which is an element of the offence of culpable driving under section 52A of the Crimes Act 1900 (N.S.W.), as a manner of driving which is "*in a real sense potentially dangerous"* to any other member of the public in the same vicinity. Barwick CJ explained in the leading judgment of the Court that dangerous driving "*requires some serious breach of the proper conduct of a vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others".* He held [paras 11-14]:

*"11. ....But in any case, the jury would need to be told what the expression "dangerous to the public" as used in the section involves. (at p49)*

*12. The section speaks of a speed or manner which is dangerous to the public. This imports a quality in the speed or manner of driving which either intrinsically in all circumstances, or because of the particular circumstances surrounding the driving, is in a real sense potentially dangerous to a human being or human beings who as a member or as members of the public may be upon or in the vicinity of the roadway on which the driving is taking place. It may be, of course, that potential danger to property on or in the vicinity to that roadway would suffice to make the speed or manner of driving dangerous to the public, but the need for death or injury to a person to result from impact with a vehicle so driven may make that question unlikely to arise, though the possibility of its doing so must be acknowledged. (at p50)*

*13. This quality of being dangerous to the public in the speed or manner of driving does not depend upon resultant damage, though to complete the offence under the section, impact causing damage must occur during that driving. Whilst the immediate result of the driving may afford evidence from which the quality of the driving may be inferred,*

*it is not that result which gives it that quality. A person may drive at a speed or in a manner dangerous to the public without causing any actual injury: it is the potentiality in fact of danger to the public in the manner of driving, whether realized by the accused or not, which makes it dangerous to the public within the meaning of the section. (at p50)*

*14. This concept is in sharp contrast to the concept of negligence. The concept with which the section deals requires some serious breach of the proper conduct of a vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others. This does not involve a mere breach of duty however grave, to a particular person, having significance only if damage is caused thereby. These distinctions make it imperative that the jury be specifically directed as to the criteria to be applied and the distinctions to be observed in determining whether any particular speed or manner of driving can have the quality, intrinsic or occasional, of being dangerous to the public within the meaning of the section: and that the particular features of the driving charged as in breach of the section be isolated for the jury and related to these criteria. (at p50)"*

36. As is the case for the corresponding Bermuda law provisions, section 2A under the UK 1988 Act applies to cases where a person's manner of driving which is potentially dangerous in a way which is obvious to competent and careful driver. This does not materially differ from the Australian law position where the Courts are concerned with convicting those whose manner of driving is "*in a real sense potentially dangerous"*. In the Australian cases, dangerous driving requires "*some serious breach of the proper conduct of a vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others".* Under Bermuda and UK statutory law the manner of driving must fall "*far below what would be expected of a competent and careful driver*".

37. The only constructive difference between the statutory provisions on careless driving and dangerous driving is the word "far" in describing the shortfall of the standard expected of a competent and careful driver. So, for cases where the threshold of care is not in issue, the dangerous driving authorities are helpful in construing all of the other aspects of the law on careless driving. Given these other structural similarities, I find that the Australian cases decided under section 52A of the 1900 Act are capable of being as persuasive as the dangerous driving cases decided in the UK under the 1988 Act.

**Whether the Test for Dangerous Driving / Careless Driving is to be determined on a Subjective Test or an Objective Test or Both**

38. In the case of *R v Gosney* [1971] 3 ALL ER., the English Court of Appeal was concerned with section 2(1) of the now repealed Road Traffic Act 1960 which in its relevant portion provided:

"*If a person drives a motor vehicle on a road… in a manner which is dangerous to the public, having regard to all of the circumstances of the case…he shall be liable …*"

39. In Megaw LG's leading judgment (with whom Geoffrey Lane and Kilner Brown JJ agreed) he observed that while the offence of dangerous driving is determinable on an objective test, it also requires proof of fault. He stated [224c-e]:

"*We would state briefly what in our judgment the law was and is on this question of fault in the offence of driving in a dangerous manner. It 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 on the part of the driver, causing that situation. 'Fault' does not necessarily 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, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver. Fault involves a failure; a 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 might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient. The fault need not be the sole cause of the dangerous situation. It is enough if it is, looked at sensibly, a cause. Such a fault will often be sufficiently proved as an inference from the very facts of the situation. But if the river seeks to avoid that inference by proving some special fact, relevant to the question of fault in this sense, he may not be precluded from seeking so to do…*"

40. The Scottish High Court did not cite the English Court of Appeal case of *Gosney* in its judgment. However, in finding that a jury is entitled to infer from a sleeping driver that he or she ignored the earlier warning signs is an implicit agreement that the reasoning in *Gosney* requiring proof of fault is as applicable to section 2(1) of the UK Road Traffic Act 1960 as it is to section 2A of the UK Road Traffic Act 1988.

41. Having recognized the parity in drafting between the dangerous driving and careless driving provisions under section 2A of the UK Road Traffic Act 1988 and sections 37A and 37B of the RTA, I am bound to accept that my narrative in the cases of *Lauren Davis v Fiona Miller* [2020] SC (Bda) 42 App (29 September 2020) [para 11] and *Dennis Webb* [para 33] is incompatible with the Scottish High Court's classification of dangerous driving as an objective test. In *Dennis Webb* I was concerned with the meaning of careless driving under section 37B. I remarked [para 33]:

"*33. In assessing whether an accused person's manner of driving fell below the standards of a competent and careful driver, the Court will consider the question both (i) subjectively from the standpoint of what the accused person knew and (ii) objectively*

*so to consider the circumstances which reasonably ought to have been known by the accused*."

42. In the case of *Allan v Patterson* [1979] ScotHC HCJ_1 the Scottish High Court of Justiciary reasoned that section 2(1) of the now repealed Road Traffic Act 1960 was to be assessed on a wholly objective test when determining whether a person had been reckless. In that judgment the Scottish High Court criticized the Law Commission's description of reckless driving as a subjective and objective test. Having set out the then statutory provision on reckless driving and considered the English case law the Court found that the correct approach to assessing the quality of the driving in question is to do so on the objective standard only:

"

*"A person is reckless if*

*(a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and*

*(b) it is unnecessary for him to take it having regard to the degree and nature of the risk which he knows to be present."*

*The author goes on to say "The test in (a) is subjective and the test of necessity of (b) is objective." It will be appreciated from what we have said that the section is concerned with the quality of a proved course of driving and that there is nothing in its language to indicate that the quality is to be assessed otherwise than objectively. We cannot accordingly approve of the definition as an aid in deciding whether a section 2 offence has been committed. Apart from this it appears to us that the editor falls into the error of failing to appreciate that the proposed definition is apparently intended, as it says, to define a reckless person. What this statute is defining or seeking to define is a manner of driving- a very different matter. The Law Commission's definition is, in any event, one which, if it did not confuse a Judge, would bemuse most juries. Finally, we have only to add that, although we were very properly referred to the English cases of R. v. Clancy 1979 R.T.R. 312 and R. v. Davis (William) 1979 R. T. R. 316, it is evident that in neither was the Court of Appeal called upon to decide whether the relevant test in respect of a section 2 offence is in whole, or even in part, subjective, and, indeed, there is much in the opinion delivered in the latter case by Geoffrey Lane L.J. (as he then was) to indicate that, as we think, the approach must be totally objective*…"

43. The Scottish High Court's designation of a purely objective test under the now repealed UK Road Traffic Act 1960 in *Allan v Patterson* together with the competing views of the Law Commission invites more discussion and analysis than what is needed for the present case. While I accept that the offence of causing grievous bodily harm under section 37A of the RTA is concerned with an accused's manner of driving, I would

point out that section 37B requires the Court to deliberate on both what the accused ought to have known and what the accused actually knew. The subjective elements of the latter are consistent with English Court of Appeal's reiteration in *Gosney* that some degree of fault is required.

***A Five-Step Sleepy Driver Test (Section 37A of the RTA)***

44. Extracting all of the legal principles which apply as a matter of Bermuda law, I would settle on the below five-step test as an aid to assessing evidence against a driver charged under section 37A whose defence is that the act of driving was involuntary by reason of sleep:

    (i) whether the accused driver knowingly operated his/her vehicle while in a state of sleepiness/drowsiness and the time-frame during which this continued;

    (ii) whether a careful and competent driver would have known from those circumstances that such sleepiness/drowsiness presented a real danger of falling asleep while driving;

    (iii) whether the accused driver ignored any reasonable opportunity in all of those circumstances to bring his/her vehicle to an earlier and safe stop, so to avoid the occurrence of the accident which ensued;

    (iv) whether the period during which the accused driver continued to drive in a state of sleepiness/drowsiness while ignoring any such reasonable opportunity/opportunities to park his/her vehicle safely was sufficiently simultaneous to the accident; i.e. whether that manner of driving caused the accident which resulted in the grievous bodily harm to another; and

    (v) whether in all those circumstances, the accused's manner of driving fell below the standard of a reasonably careful and competent driver and, in doing so, caused grievous bodily harm to another.

45. This five-step test does not, in my judgment, offend any of the well-established tenets of criminal law according to which an act committed while asleep is deemed to be involuntary and incapable of constituting the *actus reus*, save for strict liability offences. (See *Gosney* (1971) 55 Cr. App. R 502 where the English Court of Appeal, disapproving of Goddard CJ's remarks in *Hill v Baxter*, held that dangerous driving is not an absolute offence and that a defence of honest and reasonable mistake as to the facts is capable of exculpating the driver.)

## Analysis and Decision

**Ground 1**

*1. The Learned Magistrate erred and misapplied the relevant law based on settled legal principle established in 1992 case law including case law established in Bermuda decided case of the Queen v Calin Maybury Reported 2015 in favour of following principles of law decided in an earlier decided case of Hill and Baxter decided in 1952 which was a material misdirection.*

46. In support of the Appellant's first ground of appeal, Mr. Scott referred me to a transcript of a closing speech by Counsel in the jury trial of *Queen v Calin Maybury* in which no reasoned judgment of the Court had been proffered. Notwithstanding, Mr. Scott cited the Calin Maybury proceedings before this Court and the lower Court as settled law on the issues relevant to the present case. However, I agree with Magistrate Attridge's disregard of these proceedings. References to trial proceedings void of a reasoned judgment are hardly likely to assist any magistrate or judge in separate proceedings where the task at hand is to analyse and resolve disputed submissions on legal principles.

47. Magistrate Attridge was also directed to the *Jiminez* case but he found in his judgment that *Jiminez* was distinguishable on its facts because it related to a charge of culpable driving. I have already outlined the statutory structure on which Jiminez was decided. In summary, I found that the *Jiminez* case is materially comparable to the present case because the Australian High Court was concerned with the offence of culpable driving under section 52A of the Crimes Act 1900 in which the *actus reus* is driving in a manner dangerous to the public. I also observed that the other cases cited (eg. *Hill v Baxter*; *Gosney* and *Alexandra v Dunn*) were also concerned with reckless driving and dangerous driving. Notwithstanding, for the reasons expounded earlier herein [paras 35-37] I have found the *Jiminez* case to be or real persuasive value.

48. The judgment in *Jiminez* (which was decided in the highest jurisdiction of Court in Australia and which was constituted by the then Chief Justice, Sir Anthony Frank Mason, and six other justices of appeal) offers an instructive navigation of the law on *actus reus* and its relationship with voluntariness in the context of driving while feeling sleepy and driving while asleep. Plainly speaking, I found the case of *Jiminez* to be of much assistance for its reasoning on this area of the law. The bottom line position is that there must be a voluntary act of driving in order for the *actus reus* to be established, whether the charge be careless driving, contrary to section 37A of the RTA, or dangerous driving under the RTA or culpable driving contrary to section 52A of the Crimes Act 1900 enacted in Australia.

49. In referring to paragraph 14 of the *Jiminez* case where the Australian High Court referred to *Hill v Baxter*, Mr. Attridge appears in his judgment to have overlooked that the seven-judge High Court in *Jiminez* was disapproving of those same remarks made

by Goddard CJ [para 18 of Mr. Attridge's judgment]. Such disapproval was stated in the majority judgment of the Australina High Court. To this extent, it could appear that Mr. Attridge was endorsing Lord Goddard CJ's remarks without having appreciated that his reasoning was later criticized by both the Australian High Court and the English Court of Appeal in *Gosney*.

50. Notwithstanding, Magistrate Attridge cannot be criticized for having applied the wrong legal principles. He relied mostly on *Alexander v Dunn* where the Scottish High Court properly maintained that the act of driving had to be voluntary and that a driver whose actions were committed whilst asleep was acting involuntarily because of the absence of consciousness. As was found to be the correct legal position in *Jiminez*, the Scottish High Court in *Alexander v Dunn* found that the act of falling asleep while driving, in the absence of special circumstances, is a voluntary and dangerous act.

51. The Court in *Alexander v Dunn* also pointed out that there may be special circumstances which make falling asleep involuntary e.g. a person who drives but is unaware that they have a medical condition such as sleep apnoea, narcolepsy or a hypoglycaemic episode. In any such case, the Defence will be required to put a special circumstance in issue and it will be for the Crown to then discharge its burden beyond reasonable doubt.

52. These are the legal principles that the magistrate was guided by and I find no error in that. For these reasons, the first ground of appeal fails.

**Ground 2**

*The Learned Magistrate erred in law and that his finding of guilt was against the weight of the evidence, in that the prosecution had not established on the facts that the Appellants [sic] driving was objectively either careless or dangerous, which was a material further misdirection.*

53. In assessing the evidence against the Appellant I have applied the five-step test which I outlined earlier herein. It is undeniable on the evidence that Appellant knowingly operated his car while in a prolonged state of falling asleep. On his own evidence he admitted that he was feeling drowsy as he approached Paget Parish but that he nevertheless proceeded to South Shore Road, Warwick Parish. He told the magistrate that he started to nod and fall off to sleep as he reached the stretch of road by the guest houses in the Astwood Park area.

54. I pause here to take judicial notice (as Magistrate Attridge was entitled to do) that the Appellant would have had ample reasonable opportunities to bring his car to a safe and parked position in Paget Parish and along the side of the road at nearly any point from Astwood Park, Warwick Parish and westward. Instead, he made a conscious decision, which was an obvious dangerous gamble, to make his way to Warwick Long Bay. He said he decided to travel further on to Warwick Long Bay because he wanted to avoid "the hassle" of being stopped by the police had he pulled over into a more visible

location. The learned magistrate was correct to reject his defence that he risked being hit by another vehicle had he parked his car at any earlier point. The only reasonable inference to be drawn from the evidence is that the Appellant ignored all reasonable opportunity to stop at a safe location prior to the accident site. The facts established that he stubbornly pursued his hopeless goal to reach Warwick Long Bay Beach.

55. In my judgment, a careful and competent driver would have known from all of the circumstances of this case that continuing to drive while feeling such sleepiness/drowsiness presented a real danger of falling asleep while driving. On all four corners of the evidence, it was proved beyond reasonable doubt that the accused's manner of driving fell below the standard of a reasonably careful and competent driver and, in doing so, caused grievous bodily harm to another.

56. This ground of appeal fails.

**Ground 3**

*The Learned Magistrate finding that the Appellant decision to drive was careless having regard to the insufficient sleep was contrary to the weight of the evidence including the time spent in sleep on the plane journey and the several hours of sleep at home took insufficient account of a) the distance driven without incident and b) the relevant period of driving just prior to impact.*"

57. This ground of appeal fails for the same reasons on which I dismissed the first and second ground of appeal.

## Postscript

58. In the Scottish and Australian authorities cited by this Court, the culpable acts of driving were the act of knowingly driving while in a state of sleepiness. The degree of sleepiness was such that the drivers in question fell asleep while driving. In those cases that charge was one of or akin to dangerous driving rather than careless driving.

59. Generally speaking, the more appropriate charge for a person who knowingly drives while in a state of sleepiness before falling asleep will be *dangerous* driving. So, in this case the Appellant could have more suitably been charged under section 34 of the RTA (Causing grievous bodily harm… by dangerous driving).

## Conclusion

60. For all of these reasons, I find that the conviction was safe and the appeal shall be dismissed on all grounds.

61. Accordingly, I remit this matter to the Magistrates' Court for sentencing.

Dated this 29th day of December 2020

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THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE