JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 142/73

BEFORE: The Hon. Mr. Justice Edun, J.A. (Presiding).
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Robinson, J.A.

REGINA v. ERIC SHAW

Mr. P.T. Harrison for the Crown.

Dr. Adolph Edwards for the appellant.

May 9 and November 29, 1974

ROBINSON, J.A.:

The appellant was tried in the Circuit Court for the parish of St. Ann on October 10, 1973 on an indictment containing two counts for manslaughter; in respect of each count, he was found guilty of the offence of causing death by dangerous driving and sentenced to concurrent terms of 3 years imprisonment on each count and in addition he was disqualified for a period of 12 months from holding or obtaining a driver's licence, the disqualification to commence "at the expiration of sentence." Leave to appeal against convictions was granted by a single judge on April 9, 1974. At the hearing on May 9, judgment was reserved.

There was a collision at around mid-day on February 3, 1973 between a Bedford truck driven by one Mr. Horatio Marsh, and a trailer truck driven by the appellant, whilst these vehicles were being driven in the opposite direction in the vicinity of a bridge on the main road between St. Ann's Bay and Runaway Bay, in which two persons were killed. Mr. Marsh gave evidence to the effect that he was driving his Bedford truck towards Runaway Bay at about 20 to 25 m.p.h. carrying 22 blocks of ice; his sideman Mr. George Clarke was in the back of the truck; that on approaching this bridge, he saw a Chevrolet car coming behind him; the trailer truck, heavily laden with sugar, came around a curve on the Runaway Bay side of the bridge travelling at a very fast rate of speed going in the opposite direction; that this trailer truck proceeded to enter upon the bridge, a narrow bridge, and collided with

his truck, hitting its right rear wheel at a time when his truck was completely off the bridge; that the trailer truck continued across the bridge, hitting out the last upright on the left side of the bridge facing St. Ann's Bay, mounted a bank, and overturned on a Volkswaggen motor car, which was behind the Chevrolet. He said that there was no damage on his (Marsh's) left side of the bridge; visibility from the bridge looking towards Runaway Bay is about 3 or 4 chains and similarly, on the St. Ann's Bay side; two trucks could not pass on that bridge.

Mr. Clarke, the sideman on the ice truck stated that he was sitting on a seat board in the back of that truck on the right side; that he first saw the trailer truck approaching when it had completed the curve and was about 3 chains away from his truck which was then about three quarters of the distance across the bridge. Mr. Clarke also said, he immediately got up from his seat on the right side and went over to the left side of his truck because, to quote him, "When I found that the trailer truck was coming, I moved to my left as I felt that it would be ramming my truck". He added that the trailer was coming very fast with a continuous blowing of its horn, and so he held up his hands to stop two motor cars which were travelling behind his truck, a Chevrolet and a Volkswaggen, so they would not enter upon the bridge. The vehicles stopped. Mr. Clarke also said, that by the time he reached over to the left side of his truck, the trailer had hit the right side of his truck which was then completely off the bridge, going in the Runaway Bay direction; the trailer truck then proceeded to hit the St. Ann's Bay end of the bridge on its left side, mounted a bank, and finally overturned on the Volkswaggen motor car in which were the deceased men; both trucks could not pass on that bridge because it was too narrow.

The trailer had damage to its left and right sides. It had ended up on its side partially across the road with its front on the right side of the road facing St. Ann's Bay; some of the sugar it was conveying being thrown on to the road. The Volkswaggen motor car was on its left side of the road facing Runaway Bay, about 72 feet from the St. Ann's Bay end of the bridge. The Bedford truck had no damage to its left side nor was there any damage to the left side of the bridge facing Runaway Bay.

Simply put, the case for the prosecution was that Mr. Marsh who was driving the ice truck had completed crossing the bridge going in the Runaway Bay direction when the appellant driving a large trailer laden with sugar at a fast rate of speed, came around that curve blowing his horn and proceeded to enter upon the bridge, which could not accommodate both vehicles thereby causing the collision with Mr. Marsh's truck on the Runaway Bay side of the bridge, the trailer going on to strike the last left upright of the bridge, eventually overturning on the Volkswaggen motor car, and causing the deaths of two occupants of this car.

The appellant, in his defence, denied that he was speeding, he said that he was driving at about 25 m.p.h. as his trailer had on about 22 tons of sugar - that as he approached the bridge, he noticed a line of traffic about 4 to 5 chains from the bridge on the St. Ann's Bay side, that he blew his horn several times, reduced his speed and entered the bridge, that whilst the engine of his trailer was still about 3 yards from the St. Ann's Bay end of the bridge the Bedford truck "came on to the bridge" which was too narrow for both vehicles to pass and this was the cause of the accident. He claimed that it was the Bedford's right rear wheel that ran into the right rear wheel of his trailer causing it to get out of control and collide with the last column of the bridge on his left side looking towards St. Ann's Bay and as he was then unable to control his trailer, it hit the Chevrolet car, and overturned on the Volkswaggen motor car. He admitted that he was present when the driver of the Bedford truck pointed out a spot three to four feet from the Runaway Bay end of the bridge, saying, "This is where the accident occurred".

From this summary of the facts, one thing is clear and that is that these two vehicles could not pass on that bridge without there being a collision because of the narrowness of the bridge.

In a civil action, if the material facts as given by Messrs. Marsh and Clarke were believed, it would be clear, that the appellant was solely to blame for the accident. In a criminal matter of the nature of the instant case, a jury is not required to consider the question of apportioning blame as affecting the issues they have to determine. Contributory negligence would be no defence to the appellant if he was even only partially to blame so long as his dangerous driving

caused the deaths.

The main complaints made by counsel for the appellant related to the judge's directions on the law relating to the offence of causing death by dangerous driving and dangerous driving simpliciter; these complaints were expressed in the grounds of appeal as follows:-

(2) The learned trial judge incorrectly directed and/or failed to direct the jury properly on the law of causing death by dangerous driving.

(3) The learned trial judge incorrectly directed and/or failed to direct the jury properly on the distinction between causing death by dangerous driving and dangerous driving.

At the beginning of the summing-up, the learned judge referred to the addresses of Counsel and their submissions as to the verdict as they saw it and then went on to tell the jury

> "As judges of fact, you are quite supreme .... You will have to say, whether you find from the evidence that Harve Carle and Alain Grenier died as a result of the overturning of a sugar truck being driven by Eric Shaw .... you will have to decide
> (1) Where this collision took place;
> (2) What was the result of the collision;
> (3) What caused the collision;
> (4) Was it a serious criminal fault in the accused Shaw or was it, as Mr. Manning just submitted to you, misjudgment by Horatio Marsh as he drove along." ...

(The numberings above are my own).

It should be noted here that the learned judge was pointing out to the jury, inter alia, at the earliest moment that they must decide whether the death of the two men (who were on that road in the Volkswaggen) was as a result of the collision due to a serious criminal fault in the appellant. The summing-up went on to deal with the offence of manslaughter and the possible alternative verdicts on the indictment. In relation to the burden of proof the learned judge in effect said "you set the standard, put yourself on the spot" examine the evidence and determine (here I quote) "Was this driving so reckless on the 3rd February 1973, that if you were standing by and seeing him (the appellant) driving toward that bridge, you would have said that man was reckless and driving without due regard for other persons on the road"?

He goes on to deal with causing death by dangerous driving as follows: "May I just tell you what the law says about the alternative offences of causing death by dangerous driving and dangerous driving itself. First of all causing death by dangerous driving: A person who causes the death of another person by the driving of a motor vehicle on the road recklessly .... or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, if any person drives in that manner and you the jury say that he drove in that way, an offence is committed." .... Here it must have been clear to the jury as he read from the law itself, that he was telling them of the ingredients of the offence in terms of the provisions of section 25 A subsection 1 of the Road Traffic Law c.346. Continuing the summing-up the judge said:

> "Now let me tell you a little more about causing death by dangerous driving. You the jury will have to find - you will have to discover whether the Crown has proven that the accused was driving dangerously, looking at it objectively, looking at it and considering if you, from the evidence as you heard it, were standing by and watching this driving, would you have been able to say that he was driving dangerously? The Crown must prove that death resulted from the dangerous driving. If a man adopts a manner of driving which you the jury think was dangerous to other users of the road in all the circumstances, then on the issue of guilt, whether you are going to say he is guilty or not guilty, it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best, and there is nothing in the statute, the law, which I just read to you, which requires the manner of driving to be a substantial or major cause of the accident; it is sufficient if it is more than de minimis. Is it one of the causes?"

The earlier portion of this part of the judge's directions appears to have been taken from the case of Regina v. Evans (1963) 1 Q.B. 412. The Judge had already dealt with the standard of proof on a charge of manslaughter and here he was telling the jury what was the onus of proof from an objective point of view and later, he went on to the subjective approach "even doing his incompetent best"

i.e. fault in the driver (appellant), a falling below the required standard of skill resulting in a manner of driving which caused the accident (See R. v. Gosney (1971) C.L.R. p.534)). On the question of dangerous driving vis-a-vis causing death, the judge in the instant case, again reminded the jury:

> "You must bear in mind that the Crown must satisfy you that this man drove in a manner which you as reasonable and ordinary persons of commonsense can say was driving dangerously."

In my opinion, these directions do not erode any of the former directions nor detract from them in any way as was contended.

Objection was taken to a part of the directions as to the manner of driving above quoted following the words "incompetent best and", namely,

> "there is nothing in the statute, the law which I just read to you, which requires the manner of driving to be a substantial or major cause of the accident. It is sufficient if it is more than de minimis. Is it one of the causes?"

It was submitted that this direction was wrong, that the judge should have directed the jury, that the manner of driving must be a substantial cause of the accident; it must be proved that the dangerous driving on the part of the appellant was a "substantial" cause of death. In my opinion, that direction viewed in its proper context, is not wrong. The judge was there telling the jury in terms that the Crown had to prove that the death was caused by dangerous driving in keeping with the law, which he had read out to them, and that if they thought the manner of driving was dangerous in all the circumstances, it would be observed from what he read to the jury that there was nothing in the statute which required the manner of driving to be a substantial or major cause of the accident; it is sufficient if it is something more than minimal i.e. a material cause of the death and it need not be the sole cause of death, but must be one of the causes.

In Regina v. James Hennigan (1971) 55 Crim. App. R. p.262, where the appellant had been charged with a similar offence as in the instant case, the learned trial judge said this:

"It is admitted by the defence here very properly that the death of both Mr. Twis and Miss Twis was the result of the collision, so the only issue you have to try is whether it is established, first of all, that the manner of his driving his car was dangerous and secondly, if it was, that that dangerous driving on his part was a substantial cause of the collision which is admitted, resulted in the death of those two people."

A little later he said addressing the jury:

"You then say: If I think it was dangerous, was it a substantial cause - not necessarily the whole cause - of the collision which caused the death? ..... 'Substantial' means that it is not a remote cause of the death, but it is an appreciable cause of the death. It is rather like this: In a collision between two motor cars there may be both drivers each 50% to blame, and each would be a substantial cause of the collision. If on the other hand you get a situation, where you can say that one of the drivers was four-fifths to blame and the other was one-fifth, you can say: 'I don't regard one-fifth as being a substantial cause of the accident; if it is as low as that, then the fellow who really caused the accident was the one who is four-fifths to blame.' It is hard to define, but it means the real cause as opposed to being a minimal cause."

On appeal, Lord Parker, C.J. had this to say about those directions:

"What is said, as the Court understands it, is that that direction conveyed the impression to the jury that they could find the appellant guilty if he was only little more than one-fifth to blame. The Court would like to emphasise that there is nothing in the statute which requires the manner of the driving to be a substantial cause, or a major cause, or any other description of cause, of the accident. So long as the dangerous driving is a cause and something more than de minimis, the statute operates .... Though the word 'substantial' does not appear in the statute, it is clearly a convenient word to use to indicate to the jury that there must be something more than de minimis, and also to avoid possibly, having to go into details of legal causation, remoteness and the like. That appears from the further direction of the judge, who in terms said that it must not be remote and that it must be a real cause as opposed to being a minimal cause. It is perhaps unfortunate that he dealt with the matter in the illustration he gave on the basis of apportioning blame, but when one analyses it,

> it is quite clear that the direction, if anything, was much too favourable to the appellant. The Court is quite satisfied that even if the appellant was only one-fifth to blame, he was a cause of the death of these two people."

One of the conclusions which may be drawn from the above, is that in Lord Parker's opinion, the phrase "something more than de minimis" is a sufficient direction to give to the jury in cases of this nature and carries the same force or meaning as the word "substantial". The learned trial judge in the instant case must have had this judgment of Lord Parker fresh in mind when he directed the jury as he did. With this, I find no fault.

Further, as to dangerous driving vis-a-vis causation of death, the point was made that in most cases there was a direct collision between two vehicles resulting in the death. Each case must be decided on its own particular facts. In the instant case, the appellant was saying, the driver of the ice truck (Mr. Marsh) caused the accident on the St. Ann's Bay side of the bridge while the prosecution through the mouths of Mr. Marsh and his sideman said that the collision occurred after Marsh's truck had just crossed over the bridge on the Runaway Bay side of it and that it was the appellant's manner of driving that had caused the accident. The jury by their verdict accepted the Crown's version of how and where the collision between the trucks occurred and that the deaths were caused by the appellant's dangerous manner of driving. If a driver is speeding on a road, and dangerously so, and his motor vehicle thereby gets out of control, leaves the road, hits a pole and overturns on someone killing him, being brought to a stop when it is no longer on its wheels, then in the absence of positive evidence which could be said to break the chain of causation between the dangerous driving and the causing of the death of that person, I cannot see that such a manner of driving would not be the immediate and direct cause of the death. I can see no difference between such a case and the instant one, where one continuous series of events as given in evidence flowed from the dangerous driving of the appellant ending up with the overturning of the trailer killing the two men on the other side of the road.

Counsel for the appellant in the instant case indicated in the course of his submissions that he was not arguing that the appellant was

entitled to be acquitted; it appears he was therefore conceding that on the indictment, the appellant was at least guilty of dangerous driving; at the end of the day, when all the evidence was in, it was clear on the Crown's case that there was danger in the appellant's manner of driving and that there was nothing which could reasonably be said to have broken the chain of causation between that dangerous driving and its causing the deaths of the two deceased. It was clear that if the evidence for the prosecution was accepted, there was no "fault" in the manner of driving of Mr. Marsh and the sole cause of death would rest upon the dangerous driving of the appellant; on the other hand, if the defence was accepted, the appellant must be set free of all possible offences on the indictment, as the judge pointed out to the jury on many occasions, when dealing with the question of verdicts and the burden of proof; in this regard and in particular, he pointed out that they should similarly acquit the appellant of all charges, if they didn't accept the evidence of Messrs. Marsh and Clarke.

Counsel for the appellant also complained that the judge did not distinguish between the offences of causing death by dangerous driving and dangerous driving itself. He did define dangerous driving simpliciter and he did explain in effect that this was a possible verdict if they found he drove dangerously but that that dangerous driving was not the cause of the deaths. Having perused the summing-up with care, I see no merit in this complaint.

The summing-up shows that the judge dealt ad nauseum with the issues which arose on the Crown's case, the case for the defence, and the possible verdicts on the indictment. I am satisfied that the jury must have appreciated what the issues were and what they had to be sure about before they could bring home guilt to the appellant and that the summing-up was adequate and fair. I would dismiss this appeal against convictions.

EDUN, J.A.:

Appeal dismissed. Conviction affirmed. Leave to appeal against sentence granted. Appeal against the sentence of three years imprisonment at hard labour with period of disqualification to commence after the serving of such sentence allowed and the sentence set aside and instead a sentence of 12 months imprisonment at hard labour substituted therefor, and in addition the appellant is disqualified for a period of $2\frac{1}{2}$ years from holding or obtaining a motor vehicle driver's licence, such period of disqualification to commence from date of conviction.