

SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.1 of 1992

BETWEEN

O'BRIAN FEALING

Appellant

and

THE QUEEN

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice  
The Honourable Dr. Nicholas Liverpool - Justice of Appeal  
The Honourable Mr. Satrohan Singh - Justice of Appeal

Appearances: Mr. Michael Gordon for the Appellant  
Mr. Errol Walker, D.P.P. for the Respondent

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1993: January 25, 29.  
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JUDGMENT

SATROHAN SINGH, J.A.

On March 20, 1992, the appellant was convicted by a jury before Matthew J of the offence of Causing Death by Dangerous Driving, contrary to Section 51 of the Motor Vehicles and Road Traffic Act, No. 23 of 1988 of the Laws of St.Lucia. He was ordered to pay a fine of \$7,000.00 by April 30, 1992, or in default to serve a term of imprisonment for 3 years. He was also disqualified from holding a driver's licence for four years. His appeal is from this conviction and sentence.

The evidence on record was that on Sunday, June 30, 1991 at about 9.30 a.m., the appellant, driving car HA 6184 along the Gros Islet/Reduit Highroad, on a dry sunny day, on a road with no pot-holes, and with good visibility up to a distance of about 500

yards, in attempting to turn right into the Reduit Orchard, having signalled mechanically to do so, collided with an oncoming motor cyclist on the cyclist's correct side of the road causing the death of the cyclist. The case for the prosecution was that the appellant, despite seeing the approaching cyclist, turned across the path of the cyclist immediately upon activating his mechanical signal. The appellant's case was that having signalled his intention to cross the road, he saw the motor cyclist approaching, and, not realising the speed at which the cyclist was travelling, he thought he had enough time to execute the manoeuvre, so he proceeded and the cyclist collided with him. He says that at the time of the collision part of his car was already on Reduit Orchard. The appellant's car was hit between the left front door and the left front fender. An alleged eye-witness for the prosecution, Moses Ishmael, testified that he was driving his vehicle about 25 yards behind the appellant when the appellant signalled to turn and that when he first saw the motor cycle, it was about half a mile ahead coming towards them. His evidence was that the appellant, at the time he attempted the manoeuvre, was driving at about 20 to 25 miles per hour whilst the deceased was cruising at about 45 miles per hour. That was the only direct evidence of speed.

Inferentially there was also evidence of excessive speed on the part of the deceased from the evidence relating to measurements taken by the police officer, that the impact of the collision caused the appellant's car to be pushed sideways some 10 feet 4 inches and from the appellant that when he undertook his manoeuvre to turn in front of the oncoming cyclist, the cyclist was about one hundred yards away in front of him and yet the cyclist collided with him when the appellant was doing about 20-25 miles per hour.

The burden of this appeal as submitted by learned Counsel for the appellant was that at the trial, the defence raised the issue that the accident was not caused by any negligence on the part of

the appellant but rather by the fault of the deceased through the use of excessive speed on the highway and that this defence was not put or not put adequately to the jury by the trial Judge. Counsel contended that the defence of the appellant that the accident was caused by the deceased's speed was actually removed from the jury's consideration.

From the tenor of the defence, it is clear that the appellant raised the issue of excessive speed on the part of the cyclist, as the cause of the accident. Indeed, from the trial Judge's summing up it can be gleaned that Counsel for the appellant addressed this issue to the jury. Unfortunately, the learned trial judge did not appreciate this line taken by the defence. In his summing up he told the jury:

"Members of the Jury, I must tell you here one feature of this case is that speed was not the determining factor for the dangerous driving. Remember that even the Counsel for the Prosecution said he agree with the Accused on his speed. So nobody is saying it is because he was driving fast the accident occurred. You see the main witness is saying the Accused was not driving fast, he was driving about thirty-five to forty miles per hour. He says, the motorcycle was cruising down the road, he was not speeding. He tells you the motor cyclist was not speeding either."

In other parts of his summing up he told the jury:

".....so here again we see speed is not a relevant factor in determining the dangerous driving".

"Again I remind you, speed is not the issue in the driving here."

Finally he directed the jury thus:

"So you see Members of the Jury, the main plank of his defence is that he was going down the Gros Islet road, he turned across the traffic, saw the bike coming, the accident did not happen on the road proper. That is his defence. The accident did not occur on the right side of the road if you are going to Gros Islet. *'I was already in the Reduit Orchard gap when the accident occurred'*."

We consider this last quotation from the learned trial Judge's summing up to be a misdirection because that was not in fact the main plank of the appellant's defence. We also consider the other portions of the summing up mentioned above to be an effective withdrawal from the jury of what was really the main plank of the

defence of the appellant, that is, the accident was caused by the speed at which the deceased approached the appellant on his motor cycle. Accordingly, we find merit in this ground of appeal.

The learned trial Judge's summation to the jury also discloses an irregularity which we consider to be just as serious or even more serious than this misdirection on speed. The appellant was also charged on a second count in the indictment of the lesser or alternative offence of driving his vehicle in a manner dangerous to the public. In summing up the case to the jury, the trial Judge withdrew the consideration of that offence from the jury. This is how the learned trial Judge directed the jury:

"The essential difference between the first count under Section 51 and the offence under section 52 is that the former contains the ingredient of causing death. One is causing death by dangerous driving, the other one is dangerous driving. I have said on occasions before, and I will say it again, and I hope it's the last time. When therefore as in this case it cannot be contested that the Accused's driving caused the death, as the Director of Public Prosecutions said in his closing speech, a count for dangerous driving seems misguided. As presently advised, I cannot imagine the circumstance where an Accused can be found not guilty on the first count and guilty of the second count. One count says, causing death by dangerous driving. The other one says simply dangerous driving. If a death is caused you can only be charged under the first count. If a death is caused you cannot have a charge not guilty on the first count but guilty of the second count, because you would have to say the death did not occur. Members of the Jury you should ignore the second count. The Accused can either be guilty or not guilty of causing death by dangerous driving."

Because of its generality, this direction is clearly wrong. Each case would have to be looked at individually in order to determine whether or not the facts would allow for the consideration by the jury of the lesser offence of Dangerous Driving.

In *Regina v Fairbanks* (1986) 1 WLR 1202, Mustill L.J. in the Court of Appeal in England in dealing with a similar situation referred to *Fallon*, *Crown Court Practice: Trial*, (1978) p.703, *Rex v Vaughan* (1908) 1 Cr.App.R.25, *Rex v Naylor* (1910) 5 Cr.App.R.19

and *Rex v Parrott* (1913) 8 Cr.App.R.186 and then had this to say at p.1205:

"These cases bear out the conclusion, which we should in any event have reached, that the judge is obliged to leave the lesser alternative only if this is necessary in the interests of justice. Such interests will never be served in a situation where the lesser verdict simply does not arise on the way in which the case had been presented to the court: for example if the defence has never sought to deny that the full offence charged has been committed, but challenges that it was committed by the defendant. Again there may be instances where there was at one stage a question which would, if pursued, have left open the possibility of a lesser verdict, but which, in the light of the way the trial has developed, has simply ceased to be a live issue. In these and other situations it would only be harmful to confuse the jury by advising them of the possibility of a verdict which could make no sense.

We can also envisage cases where the principal offence is so grave and the alternative so trifling, that the judge thinks it best not to distract the jury by forcing them to consider something which is remote from the real point of the case: and this may be so particularly where there are already a series of realistic alternatives which call for careful handling by the judge and jury, and where the possibility of conviction for a trivial offence would be an unnecessary further complication.

On the other hand the interests of justice will sometimes demand that the lesser alternatives are left to the jury. It must be remembered that justice serves the interests of the public as well as those of the defendant, and if the evidence is such that he ought at least to be convicted of the lesser offence, it would be wrong for him to be acquitted although merely because the jury cannot be sure that he was guilty of the greater.

In the present instance we consider that the situation fell into the latter category. The subject matter of the trial was the criminality of the appellant's driving. Certainly the question whether recklessness could be inferred was the principal issue. But it was never the only issue. A verdict of careless driving would not have been fanciful. Nor would a direction that it was available have confused the jury: indeed it might well have served to illuminate the essential mental element of the greater offence. By taking it away from the jury the recorder created a risk that one or more jurors might feel an equal distaste for convicting the appellant of a serious crime on the basis of a single instance of bad driving, and for allowing him to escape without any penalty at all, and might thus be impelled to arrive at a verdict contrary to an objective assessment of the evidence. True there was a risk that a conviction for careless driving might be arrived at as a compromise, but it was also a verdict at which a conscientious jury could properly arrive on the evidence.

Accordingly we are of the opinion that by declining to leave the alternative verdict to the jury the recorder committed a material irregularity. There is no possibility of maintaining the verdict by reliance on the proviso, and the conviction must be quashed.

This Court does however have power to substitute a conviction for the lesser offence, and since the verdict

shows that the jury must have been satisfied that the appellant's driving involved a degree of criminal culpability, the power is one which can appropriately be exercised in the present case. We accordingly substitute a verdict of guilty of driving without due care and attention."

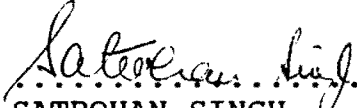
On the evidence in this matter, it was open to a jury, properly directed to say that both the deceased and the appellant drove in a manner dangerous to the public, and then to go on to decide whose dangerous driving it was that caused the accident. If they found that the appellant's dangerous driving caused or contributed to the accident, then they would convict him of the offence of Causing Death by Dangerous Driving. If however, they found that the deceased's driving was the sole cause of the accident, then they would return a verdict in favour of the appellant of not guilty of the offence of Causing Death by Dangerous Driving but guilty of the offence of Dangerous Driving. This was therefore a case where the interests of justice demanded that the lesser alternative of Dangerous Driving should have been left with the jury. The withdrawal of this lesser alternative from the jury was therefore a material irregularity in the course of the trial.

Had we felt sure that if the lesser offence had been left to the jury and if the defence had been adequately put to the jury, they would inevitably have returned the same verdict of guilty of Causing Death by Dangerous Driving, we would have applied the proviso to Section 35(1) of Act No. 17 of 1969 and would have dismissed the appeal on the ground that there was no substantial miscarriage of justice. But, we do not so feel. The verdict may have been the result of the jury's aversion to an outright acquittal. We must therefore allow the appeal and quash the conviction.

However, since a jury properly directed might have properly convicted the appellant of the greater or lesser offence, it is in the interests of justice that there should be a new trial to enable

a jury to bring in what they consider to be the appropriate verdict after a proper direction.

The appeal is accordingly allowed, the conviction is quashed, the sentence is set aside and a new trial is hereby ordered.

  
 .....  
 SATROHAN SINGH  
 Justice of Appeal



I concur.

.....  
 SIR VINCENT FLOISSAC  
 Chief Justice

  
 .....  
 NICHOLAS LIVERPOOL  
 Justice of Appeal

I concur.