

SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.2 of 1991

BETWEEN:

ANTHONY FLAVIUS	-	Appellant
and		
THE QUEEN	-	Respondent

Before: The Honourable Mr. Justice Floissac - Chief Justice
The Honourable Mr. Justice Byron
The Honourable Miss Justice Joseph (Acting)

Appearances: A. Richelieu for the Appellant
E. Walker for the Respondent

1991: Nov. 6th
1992: Jan. 27.

JUDGMENT

FLOISSAC, C.J.

On the 20th June 1991, the appellant was convicted of causing death by dangerous driving contrary to Section 51 of the Motor Vehicles and Road Traffic Act, No. 23 of 1988. He was fined \$3,000.00 and was disqualified from holding a driver's licence for a period of three (3) years.

Section 51 provides that:

"Any person who causes the death of another person by the driving of a motor vehicle on a road recklessly or at a speed or in a manner 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 that is actually on the road at the time or might reasonably be expected to be on the road at the time, is guilty of an offence and is liable on conviction on indictment to imprisonment for a term of ten years and shall be disqualified from holding a driving licence for a period of five years, such period to commence after the term of imprisonment.

The prosecution's case is that on the 12th July 1990, the appellant drove his motor omnibus dangerously on the Castries - Cul-de-Sac Road and thereby caused the death of Agnes Joseph (the deceased). At the trial, evidence was adduced to the effect that the appellant drove his vehicle at a dangerous speed through and near a junction of the road and at a time in the morning when, as might reasonably be expected, there was a fair amount of traffic on the road. The evidence was that in so doing, the appellant

collided with the deceased while she was standing stationary on her left and proper side of the road near the junction.

Evidence of some of the circumstances from which dangerous driving may be inferred was substantiated by the testimony of the appellant. Firstly, he admitted that: "It is a busy junction sometimes.....buses are always stopping at that junction. People are waiting at the 'shanti' (shed) to catch buses. I saw one bus parked by the side of the road putting down passengers..... passengers cross the road from a parked vehicle from which passengers are disembarking...." Secondly, he admitted that he was driving at 35 miles per hour or in excess of the speed limit of 30 miles per hour and testified that: "It never crossed my mind that I should proceed slowly through that junction." He further stated: "After the van knocked her, she leaped and flew into the gutter." Thirdly, he admitted: "I did not mash brakes that morning."

The appellant's defence was that by emerging from the back and blind side of a stationary van and by running across the road, the deceased bewildered the appellant with a dilemma or emergency to which the appellant reacted by swerving to his right and thereby knocking down the deceased who was then in the middle of the road.

It is against this background of admitted facts but contradictory versions as to the cause of the fatal accident that the appellant now appeals against his conviction. The grounds of appeal are to the effect that the learned Judge misdirected the jury on the law relating to dangerous driving and failed adequately to put the appellant's defence to the jury.

The alleged misdirection

Counsel for the appellant contended that there is no legal difference between the offences of causing death by reckless driving and causing death by dangerous driving and that the learned Judge should have given the jury the directions prescribed in R V LAWRENCE (1981) 1 A.E.R. 974. Those directions are contained in

Lord Diplock's speech where he said at page 982:

"In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things: first, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and, second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had none the less gone on to take it.

R. v LAWRENCE was a case of causing death by reckless driving contrary to Section 1 of the English Road Traffic Act 1972 as substituted by Section 50(1) of the English Criminal Law Act 1977 which provides that: "A person who causes the death of another person by driving a motor vehicle on a road recklessly shall be guilty of an offence."

R. V. LAWRENCE was not a case of causing death by dangerous driving as such. But in tracing the history of road traffic offences from 1903 (when there was no distinction between reckless, dangerous and careless driving) to 1930 (when the Road Traffic Act of that year drew a distinction between careless driving on the one hand and reckless or dangerous driving on the other hand), Lord Diplock said (obiter) at page 980:

"Although the adverb 'recklessly' as descriptive of a manner of driving has been there ever since the single offence was split up into two of which one was treated as much

graver than the other, the practice so far as living memory goes had been to charge defendants with driving 'at speed or in a manner which is dangerous to the public' and not with driving 'recklessly'. This is why the offence became popularly known as dangerous, not as reckless, driving; and juries, when the trial was on indictment, were instructed to consider whether in their judgment the defendant was driving in a manner that was dangerous to the public."

This dictum seems to suggest that reckless driving and dangerous driving are one and the same offence. But there are dicta to the contrary in the later decision of the House of Lords in *JENNINGS v UNITED STATES* (1982) 3 A.E.R. 104. Commenting on a passage in Lord Atkin's judgment in *ANDREWS v D.P.P.* (1937) A.C. 576, Lord Roskill (delivering the judgment of the House which included Lord Diplock himself) said at p. 114:

" My Lords, that decision of your Lordships' House left the law as it was at that date in no doubt. It was decided that conviction for what was then popularly called 'motor manslaughter' could only be justified if reckless driving were proved against the defendant; proof of dangerous driving was not enough. Thus a clear distinction came to be drawn between death caused by the dangerous driving of a motor vehicle on a road and death so caused by the reckless driving of a motor vehicle on a road."

Commenting on section 1(1) of the Motor Car Act 1903, Lord Roskill also said at p. 115:

"My Lords, your Lordships will observe the three states of fact which Parliament then

envisaged might arise in connection with the driving of motor vehicles on roads. The first was reckless driving. The second was negligent driving. The third was driving at a speed or in a manner which was dangerous to the public."

Therefore, although reckless driving and dangerous driving are similar and cognate offences attracting the same penalty, they are in fact different offences.

Where (as in the case of section 1 of the English Road Traffic Act 1972 or section 50(1) of the English Criminal Law Act 1977), the section refers only to reckless driving and "recklessness" is not defined or explained in the statute, the directions prescribed by Lord Diplock in *R v LAWRENCE* are appropriate. But where (as in the case of Section 11(1) of the English Road Traffic Act 1930 and Section 51 of the Saint Lucia Motor Vehicles and Road Traffic Act No. 23 of 1988) the prosecution may elect to prosecute for reckless driving (which is not defined or explained in the statute) or for dangerous driving (which is defined or explained by reference to circumstances from which dangerous driving may be inferred), the necessity for Lord Diplock's directions depends on the election. If the prosecution elects to charge the accused with reckless driving, Lord Diplock's dictum is appropriate. But if the prosecution elects to charge the accused with dangerous driving, the proper direction to the jury must be by reference to the circumstances from which the section prescribes that dangerous driving should be inferred.

In this case, having read to the jury the charge which repeated the circumstances prescribed by Section 51 of the Saint Lucia Act, no. 23 of 1988, the learned Judge elaborated on each of those prescribed circumstances. The learned Judge's directions to the jury cannot therefore be faulted on the ground that she did not adopt Lord Diplock's direction.

The alleged failure to put the defence

In their judgments, Appeal Justices Byron and Joseph have shown that the appellant's defence was adequately put to the jury. I concur with their conclusions and have nothing to add thereto.

I would therefore dismiss the appeal.

BYRON, J.A.

On 20th June 1991 the appellant was convicted of causing death by dangerous driving and fined \$3,000.00 and disqualified from driving for a period of three years. He appeals against his conviction.

The grounds of appeal were that the verdict was unsafe and could not be supported by the evidence, that the Judge's directions were inadequate, in accordance with the R v Lawrence guidelines, and that the Judge failed to put the defence to the jury that the appellant had been confronted with a sudden emergency.

The evidence in the trial was that on the 12th July, 1990 the deceased and her son left their home at Jackmel, Anse-la-Rayé and boarded a transit mini-bus HA4306 to go to work. They got off the mini-bus at the Cul-de-Sac junction about 6.30 a.m. The mini van parked on the left side of the road. They paid. other passengers got off the van as well.

According to her son Claudius Joseph, the deceased walked across the road. He remained where he was, and saw a vehicle "coming with a lot of speed". According to his evidence his mother had already crossed the road and was standing at the side of the road when the vehicle struck her and knocked her into the gutter at the side of the road. She died on the spot. The police came on the scene soon after.

Sgt. Ambroise took measurements from the point of impact pointed out by the appellant. According to his evidence the distance between the point of impact and the deceased in the gutter was 51 feet, and the distance between the point of impact and where the omnibus stopped 100 feet. Distance between the point of impact and the stationary van was 15 feet 6 inches.

The road was pitched with no pot holes and it was dry. There were no brake marks and the visibility was good. The Sgt. estimates 140 yds clear view from the point of impact towards Castries.

From the beginning the appellant contended that as he approached the stationary omnibus he saw a lady running across the road and he pulled to his right but could not stop his vehicle and hit her.

The main supporting witness for the prosecution was the driver of the mini van but he did not see the impact. He heard it according to him about a minute after the deceased had alighted from the van.

The appellant called one witness who said he saw the accident and that it occurred in the middle of the road while the deceased was walking across the road.

In his cross-examination the appellant made some telling admissions:

"After the van knocked her she leaped or flew into the gutter. I did not mash brakes that morning.....

I saw one bus parked by the side of the road putting passengers. It never crossed my mind that I should proceed slowly through that junction.

Correct, the road from a parked vehicle from which passengers are disembarking...."

In my judgment there was ample evidence to support the jury's finding that the manner of the appellant's driving was dangerous to the public and that the death of the deceased was caused by that dangerous driving.

Counsel submitted that the trial Judge made an error of law and her summing up was defective.

Counsel submitted that the summing up was defective because she failed to direct the jury on the mens rea required for this offence in accordance with the guidelines in R v LAWRENCE (1981) 1

A.E.R. 974. That case dealt with causing death by reckless driving. He argued that the legal requirements for dangerous driving and reckless driving are the same. However as a legal proposition that argument was quite wrong and unsupported by the authority on which it was alleged to have been based. The distinction between the two offences can be gleaned from the speech of Lord Diplock in the very case of R v Lawrence to which counsel referred.

In dealing with dangerous driving at page 980 he said:

"By its decision in R v Evans (1962) 3 A.E.R. 1086, however, the Court of Criminal Appeal for practical purposes abolished the difference between the standard of driving in careless driving and that involved in dangerous driving where danger to the public did in fact result. At the trial of Evans the judge had directed the jury:

".....in law it is now well settled that if the driving is in fact dangerous, and that dangerous driving is caused by some carelessness on the part of the accused, then however slight the carelessness, that is dangerous driving. This summing up was approved on appeal. The Court said:

'if a man adopts a manner of driving which the jury think was dangerous to the other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best'."

In dealing with reckless driving at page 982 Lord Diplock said

- letter J:

"In my view, an appropriate instruction to the

jury on what is meant by driving recklessly would be that they must be satisfied of two things: first, that the defendant was in fact driving the vehicle in such a manner as to create an obvious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and, second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had none the less gone on to take it."

The passages that I have extracted explain the principle that "reckless driving" is an offence which requires proof that the manner of driving created risk of harm to other persons using the road or damage to property along with proof that in so driving the defendant either gave no thought to risk involved or having recognised the risk decided to take it. Whereas in contrast "dangerous driving" requires proof only that the manner of driving was dangerous to the public for as long as the driver was conscious of what he was doing, it is unnecessary that he was conscious of the possible consequences of his driving. In my view it was completely incorrect to rely on *R v LAWRENCE* as supporting the proposition that the offence of causing death by dangerous driving requires proof of the *mens rea* required to establish the offence of causing death by reckless driving.

The other plank of the appeal was that the Judge did not put the defence of sudden emergency to the jury. But that was patently inaccurate. There were several instances in the summing up where that was put. At one point the Judge in dealing with the defence told the jury:

"As I reached towards the middle of the van

I just see someone run from behind the parked van and run in front of my van". Now this has been the story given by this accused and you must bear what he said in mind, that if this lady dashed across the road just in front of him and he pulled more to the right then he was not the one who was not reasonable on that day, it was the lady."

The issue for the jury in this case was fairly straight forward.

On the one hand if the account given by the prosecution witnesses was true in that the accused approached the junction too fast and drove on the side of the road where he struck the deceased where she was standing the verdict would clearly be justified.

On the other hand if the deceased created the hazard herself by running across the road in front of the appellant and gave him no chance to avoid colliding with her then the verdict would not have been justifiable. In my view the evidence, including the admissions on oath of the appellant, was sufficient to support the conclusion to which the jury came, and in the circumstances I think the appeal should be dismissed.

MONICA JOSEPH, J.A. (Acting)

The appellant appeals against his conviction on 20th June, 1991, of causing death by dangerous driving.

A ground of appeal is that the Learned Trial Judge failed to give the jury adequate, proper or sufficient directions in accordance with the Simpson v Peat and R v Lawrence guidelines.

Counsel for appellant submitted that the legal requirements for reckless driving are the same for dangerous driving and that

the mens rea required for both offences is identical.

Further, Counsel submitted, the appellant's explanation that the accident was caused by the sudden emergency with which he was faced - the running of the deceased across the road - was not put to the jury, and that, if it had been the verdict of the jury would have been different.

The counter argument of the Director of Public Prosecutions was that all the elements of the offence of dangerous driving have to be taken into account in determining whether the appellant was guilty of dangerous driving: the speed the appellant's vehicle was travelling, the nature of the road, the condition of the road, the use of the road and the amount of traffic that can reasonably be expected to be on it at the time the offence was committed.

It was the Director of Public Prosecution's contention that all these elements, in addition to the appellant's manner of driving after the accident would assist the jury in arriving at the dangerous quality of the driving of appellant, and that all these factors were left with the jury by the trial Judge.

The legal requirements for the offence of driving recklessly are not the same as those for the offence of driving dangerous to the public. In the former the direction to the jury as enunciated in *R v Lawrence* has been referred to in the judgments of the Learned Chief Justice and Byron J.A.

The instruction to be given to the jury in the offence of causing death by driving in a manner that is dangerous to the public, was approved in *R v Evans* (1962) 3 A.E.R. page 1086, at page 1087, letter "G" and is as follows:

"Members of the jury, there is no legal definition of driving to the danger of the public, and there cannot be any legal definition. It has sometimes been said that a very good test is for the jury to make up their minds on the evidence what actually

happened, and in their minds' eye to put themselves down at the scene of the accident, and to ask themselves this question, 'Had we seen this should we have said without any doubt was a dangerous piece of driving?' If the answer to the question is 'Yes', then the man is guilty, and if the answer to the question is, 'Oh no', or 'We cannot be sure about it', then he is not guilty.

You see, members of the jury, you are the public, and it is for you to set the standards. You no doubt all of you, use the roads and no doubt a good many of you drive motor cars and you have got to make up your minds here whether or not what (the appellant) did was dangerous to the public, that is dangerous to other road users. If it was, then even although the dangerous driving was caused by slight negligence, the slightest negligence on his part, he is guilty of the offence of driving to the danger of the public."

The trial Judge did not use the phrasing of *R v Evans*, but was the test asserted in that case to determine whether the appellant's driving was dangerous to the public applied? The answer is in the affirmative. The trial Judge put the versions of what happened that day given on behalf of the prosecution and of the defence to the jury and invited them to decide what they believed. This is what the learned Judge said:

"Now you heard what this son had to say. It has been said that he has an interest to serve because it is his mother who died. But this man tells you they came out, he was towards the back, his mother walked across and he said she was on the right side and he was on the left. So this man is saying that his mother was already on the right side and he was on the left side facing Castries. He didn't care to cross, but learned Counsel for the defence has told you that Claudius did not cross because he didn't think it was safe to cross at the time since there was a vehicle coming, whereas his mother ran across the road. The Crown is saying that this is not so. So you have these two diametrically opposed bits of evidence and you as judges of fact have to deduce the truth based on the evidence you heard here in this court room."

And again:

"The crown is saying he could not stop his vehicle because he had too much speed. And he didn't say why. He didn't tell the police why, he said he could not stop his vehicle. The police said he couldn't recall if he told him why, but he couldn't stop it, and has told you he couldn't stop. He's also told you later on he didn't brake. You as drivers

will apply your knowledge of proper driving to this case. That is why you are here today. Now when something like that happens, what is the first thing that one does. As a prudent, reasonable driver, he couldn't stop the vehicle."

The learned Judge was clearly inviting the jury to put themselves on the spot and to make up their minds as to what actually happened: that they are drivers and appreciate what proper driving is. "Proper" could only mean driving that was not dangerous to the public. The learned Judge told the jury that if they believed that the deceased ran across the road then the appellant was not "the one who was not reasonable on that day, it was the lady". Here the direction to the jury was that if the lady was the unreasonable one then the appellant was not guilty.

The jury could not have been in doubt as to the test to be applied as, towards the end of the summing up, the Judge again directed them that if the lady was careless then the appellant must be acquitted. She said:

"If you accept the evidence as given by this accused that it was the lady who was not prudent on that morning having no regard to the condition, the nature of the road and the traffic that was on the road or expected to be there on that morning of 12th July 1990 and if you believe his defence and you find that it was a proper defence you must free the man, acquit him. If you are in doubt as to his defence, what he told you, you are not too sure of what he said you must also free him, acquit him."

The trial Judge directed the jury - although not using the word emergency - to deal with the emergency situation with which the appellant said he was faced, in these words: (The appellant said):

"As I reached towards the middle of the van I just see someone run from behind the parked van and run in front of my van. Now this has been the story as given by this accused and you

must bear what he says in mind, that if this lady dashed across the road just in front of him and he pulled more to the right then he was not the one who was not reasonable on that day, it was the lady."

This ground of appeal accordingly fails.

Another ground of appeal is that the learned trial Judge misdirected the jury, when she told them that the act of the appellant after the accident constituted dangerous driving. I do not agree that the learned Judge so directed the jury. In the instances where the Judge mentioned what the appellant did after the accident she was putting the Crown's case to the jury. This ground also fails.

As regards the ground of appeal that the learned trial judge failed to adequately put the appellant's case to the jury, when she did not explain to them that the accused had said in evidence that he never saw the deceased 100 ft. away, but he saw the motor van 100 ft. away, the learned Judge told the jury that Ambroise said:

"....that the accused told him he first saw pedestrian was 100 ft. and he said he didn't just take what he said but that he had the accused to walk to the point where he first saw the lady and then he measured."

The evidence of the accused:

"I walked to a spot which I indicated to the Sergeant as the spot where I first recognised the parked van. At that point I had not seen the lady running across."

This bit of evidence was not specifically put to the jury by the Judge, but the jury heard all the evidence and it was purely a question of fact for them to find.

The trial Judge had made it abundantly clear to the jury that

it was for them to decide what facts they believe.

For the reasons given I agree that this appeal fails.

V.F.FLOISSAC
Chief Justice

C.M.D. BYRON
Justice of Appeal

M. JOSEPH
Justice of Appeal (Acting)