

IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO: ANUHCR2019/0081

BETWEEN:

THE QUEEN

v

CHARLES POWELL

Appearances:

Ms. Rashida Jonas and with her Mr. Cedric Dyer, Counsel for the Crown
Mr. Warren Cassell, Counsel for the Defendant

2021:	December 8 th , 13 th , 14 th , 15 th , 16 th ;
2022	January 10 th
2022:	January 12 th

RULING

- [1] **WILLIAMS J.:** The defendant, Mr. Charles Powell was the owner and operator of a garbage truck. The now deceased Mr. Estiben De La Cruz, aged 17-years-old, worked with Mr. Powell to load garbage into the truck.
- [2] While Mr. Powell was driving the truck on the 6th July, 2017 there was an incident at Scotts Hill, with the garbage truck over turning and Mr. De La Cruz who was on the back of the garbage truck was pinned under the truck from the area of his chest to his feet.
- [3] Mr. Powell was indicted by the Learned Director of Public Prosecutions on the 11th June, 2020 with Causing Death by Dangerous Driving, contrary to section 57 (1) of the **Vehicles and Road Traffic Act** Cap 460 of the Laws of Antigua and Barbuda, Revised Edition 1992.
- [4] The 'Particulars of Offence' as detailed in the indictment state:
- “Charles Powell on the 6th day of July 2017, at Scotts Hill, in the Parish of Saint John, in the State of Antigua and Barbuda, did cause the death of Estibien De La Cruz by driving a motor vehicle, to wit, a FAW Garbage Truck C10190 on a public road, to wit, Scotts Hill Main Road at a speed or in a manner which was 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 was actually at the time or which might reasonably be expected to be on such a road.”

- [5] The defendant, Mr. Charles Powell has pleaded 'not guilty' to the charge. The Defendant is saying that he is not responsible for causing the death of Mr De La Cruz.

Jurisdiction

- [6] The **Criminal Proceeding (Trial by Judge Alone) Act No. 8 of 2021** provides for cases to be tried by a Judge sitting alone without a jury. Pursuant to section 5 of the said **Act No: 8 of 2021**, the Defendant on the 27th October, 2021 filed a 'Certificate of Confirmation of Consent to be Tried by Judge Alone' at the High Court. (Offences contrary to the **Vehicles and Road Traffic Act** are not listed in the mandatory provisions of section 4 of Act No: 8 of 2021. A Defendant however upon receiving legal advice could consent to a Judge-alone trial).

Burden and Standard of Proof

- [7] In a Judge-alone trial, or a 'Bench Trial', a Judge sits without a jury. The Judge is both the Judge of the law and the forum of fact. The burden of proof and the standard of proof remain the same as they were and are in every other criminal case. It is the Crown that has the responsibility of satisfying the forum of fact that it was the Defendant who committed the offence as alleged; and the Crown can only do so by making the forum of fact feel certain of the Defendant's guilt.
- [8] The Defendant does not have to prove anything.

No Case Submission

- [9] At the close of the Crown's case, Counsel Mr. Warren Cassell on behalf of the Defendant submitted that the case ought to be stopped at this point since, in Counsel's view, the Defendant had no case to answer.
- [10] Mr. Cassell grounded his submissions on two points:
- 1) That the particulars of the charge were duplicitous; and
 - 2) The Crown did not provide any evidence that the manner of the Defendant's driving on the day in question was dangerous to the public having regard to all the circumstances of the case.
- [11] Counsel Mr. Cedrick Dyer who appeared for the Crown at the close of the Prosecution's case only, (the original counsel reportedly being on leave at the time), indicated that he was not in a position to fully respond to Mr. Cassell's submissions regarding duplicity. However, Mr. Dyer contended that there was evidence in the case that discloses the manner of the Defendant's driving upon which a forum of fact could act.

Duplicity

- [12] It is settled law, (both at the Common Law and by statute in some jurisdictions), that each count on an indictment must be for one offence only. If a count contains more than one offence, it is considered to be 'bad for duplicity' and is therefore defective.

- [13] The learned authors of **Commonwealth Caribbean Criminal Practice and Procedure Fifth Edition**, said this of duplicity at p. 73:

“The purpose of the rule against duplicity is to enable the defendant to know the case he has to answer so that he will not be prejudiced or embarrassed in the preparation of his defence. Such prejudice or embarrassment could result if the defendant is uncertain as to the specific offence for which he is charged... The principle is designed to ensure fairness: *Gee v General Medical Council* [1987] 1 WLR 564, p. 570 HL. The defendant must know which offence to defend and which not, so that his ability to plead should not be adversely affected. In other words, the defendant may wish to plead guilty to one of the offences contained in the duplicitous charge and not guilty to the other, but since only one plea is called for, he is prejudiced.”

- [14] Mr. Cassell referred to ***Bastin v Davies*** [1950] 2 KB 579. In that case, Lord Goddard, CJ, said, at p. 581:

“Duplicity consist in charging two or more separate offences in one information or count conjunctively: uncertainty arises when two or more offences are so charged in the alternative or disjunctively, for obviously such a procedure leaves it quite uncertain with which of those offences the defendant is charged, and the conviction, which must follow the information, would also leave it in doubt of which offence the defendant had been found guilty.”

- [15] The Defendant in ***Bastin v Davies*** sold beef sausages that were 32.6 percent deficient in meat. The headnote in that case states:

“Section 3, sub-s. 1 of the Food and Drugs Act, 1938 creates three distinct offences of selling to the prejudice of the purchaser food which is not of (a) the nature, (b) the substance, (c) the quality of the food demanded. Accordingly an information which charges the sale of an article of food which was not of the nature or not of the substance or not of the quality of the article demanded is bad for uncertainty.”

- [16] In ***Bastin v Davies*** the Prosecution submitted on Appeal that the offence was one of selling food to the prejudice of the purchaser and that the food may be bad in three different ways; that it mattered not whether the food demanded was deficient in its “nature”, its “quality” or its “substance” as those words were purely adjectival. The submission was rejected.

- [17] The original complaint in ***Bastin v Davies*** was dismissed by the justices “being of [the] opinion that it was bad for duplicity.” The Prosecution appealed the justices’ decision. The appeal was also dismissed. Lord Goddard CJ said, at p. 581-582:

“The point taken for the defendant to which the justices gave effect, was that this information was bad for duplicity, in that it disclosed three offences. The blemish, however, is not duplicity but uncertainty.... The question therefore is whether this information did in fact charge three offences in the alternative, or disjunctively, or whether it disclosed only one offence.

“I think that the defendant is entitled to be told by the prosecution whether they are saying that the article is not of the nature demanded or not of the quality demanded.

"I think the prosecution must decide what they are going to allege. If they are in doubt, they can issue more than one information against the defendant, charging him with selling to the prejudice of the purchaser in that in the one case the nature of the article was not as demanded and in the next it was not of the quality demanded.... I think that these are different offences in the sense that the constituent facts of the offence would be, or may be, different."

The Legislation

[18] Antigua and Barbuda's **Vehicles and Road Traffic Act** entered in to force on the 1st January, 1947. Section 57 (1) of the **Act** under which the Defendant is charged is worded in identical terms to section 1 (1) of the English **Road Traffic Acts** 1930-1962 (save and except the law in Antigua and Barbuda commences with the words "Any person" while the English legislation uses "A person").

[19] Section 57 (1) states:

"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 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, shall be liable on conviction on indictment to imprisonment for period not exceeding five years."

[20] Mr. Cassell's contention is that there are many ways of committing an offence under this subsection, whether it is by:

- 1) Driving a motor vehicle on a road recklessly; or
- 2) Driving a motor vehicle on a road at a speed which is dangerous to the public; or
- 3) Driving a motor vehicle on a road in a manner which is dangerous to the public.

[21] Mr. Cassell referred to **The Interpretation Act** Cap. 224 of the Laws of Antigua and Barbuda Revised Edition 1992. In the 'Miscellaneous definitions' found at section 58, it states that:

"In an enactment the expression - "or", "other" and "otherwise" are, unless a contrary intention appears, to be construed disjunctively and not as implying similarity, unless the word "similar" or some other word of like meaning is added."

Other Authorities

[22] The Defendant's Counsel also referred to the case of **The King v Wells and Another** (1904) 20 Times L. Rep. 1 (1903-1904) 548, to support his contention that the allegations of reckless driving, speed and manner of driving ought to be separated. In **Wells and Another**, section 1 (1) of the **Motor Car Act 1903** stated:

"If any person drives a car on a public highway recklessly or negligently, 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 highway and to the amount of traffic which actually is at the time or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act."

- [23] Lord Alverstone, CJ, in **Wells and Another** held that a conviction on a charge of driving at a speed or in a manner which is dangerous to the public, was bad for duplicity. Lord Alverstone found that it dealt with different offences – namely the driving at a speed dangerous to the public and driving in a manner dangerous to the public. The Chief Justice opined, at p. 549:
- “A person might be driving at a moderate speed and yet in a manner dangerous to the public.”
- He said that the fact finding forum
- “...had not to consider the two things together, but ought to consider whether the defendant was driving in a manner dangerous to the public apart from the question of speed. The conviction, therefore, could not stand.”
- [24] **Archbold Criminal Pleading Evidence & Practice**, Thirty-Sixth Edition, at paragraph 2818 states:
- “An indictment which charges the defendant with causing death of another person by driving a motor-vehicle at a speed and in a manner dangerous to the public, having regard to all the circumstances of the case is valid in law.”
- [25] The learned authors of **Archbold Thirty-Sixth Edition** cite **R v Clow** [1965] 1 QB 598; 47 Cr App R 136 as the authority for framing the charge “at a speed and in a manner dangerous to the public.” That wording however differs from the charge Mr. Powell is indicted for, which states “at a speed or in a manner” dangerous to the public.

Alternative Conviction

- [26] It should be noted that section 57 (2) of the **Vehicles and Road Traffic Act** provides for a person, (such as the defendant, Mr. Powell), who is charged with causing death by reckless or dangerous driving, to be convicted of the alternative offence of reckless or dangerous driving under section 55 (1) of the Act, if the forum of fact is not satisfied that the person’s driving was the cause of the death.
- [27] Section 55 (1) is identical to section 2 (1) of the old English **Road Traffic Act**. Sections 55 (1) and 57 (1) of the Antigua and Barbuda Legislation and the respective corresponding sections 2 (1) and 1 (1) of the former **English Act**, all use the identical wording: “recklessly, or at a speed or in a manner which is dangerous to the public.”
- [28] Archbold Thirty-Sixth Edition at paragraph 2845 in addressing offences for reckless and dangerous driving states that the subsection of “the Act contains three different offences which cannot be joined in the same count of an indictment.”

Application

- [29] The word “or” is a conjunction that connects two or more possibilities or alternatives.
- [30] The word “and” (like “or”) can be considered to be a conjunction as it is used to combine words, phrases or clauses. It can also serve as a joiner for sentences which are meant to be presented jointly and together.

- [31] A coordinating conjunction is a word which joins two clauses which are both equally important:
- “and” joins two similar ideas together;
 - “or” joins two alternative ideas;
 - “but” joins two contrasting ideas;
 - “so” demonstrates that the second idea is the result of the first.
- [32] It is apparent that the legislation creates different offences. A Defendant could be found to have caused the death of another person by driving (i) recklessly, or (ii) at a speed dangerous to the public, or (iii) in a manner dangerous to the public. It would be necessary for the fact-finding forum having found that the person drove recklessly, or at a dangerous speed, or in a dangerous manner, to then consider all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which was actually at the time, or might reasonably be expected to be, on the road.
- [33] Speeding could amount to dangerous driving. That fact no doubt is at the foundation of the decision in **R v Clow** where the offence was “at a speed and in a manner dangerous to the public.” A defendant’s driving can be dangerous in a number of circumstances, such as overtaking unsafely, being inattentive, ignoring traffic lights, driving while unfit to do so because of alcohol or drug use. Speed may or may not be a factor.
- [34] In this matter, Mr. Powell was charged with driving “at a speed or in a manner which was dangerous to the public.” Which mode of driving is the Prosecution alleging? Is it at a speed dangerous to the public or in a manner dangerous to the public? If the Prosecution was alleging both, then the indictment should have read “at a speed and in a manner which was dangerous to the public.” The present indictment is therefore duplicitous.

No Speed

- [35] Counsel, Mr. Dyer, conceded that the Crown did not adduce any evidence of speeding.
- [36] The witness, Mr. Daniel Castro, did say that: “Most of the time he [the Defendant] driving fast” and: “He go down the hill, the curve, he driving fast. We tell him slow down. He just move he head. He don’t talk to us. He continue driving fast and then the incident pass.” (sic).
- [37] The day of the incident (6th July, 2017) was the first time that Mr. Castro worked on the garbage truck. There is no evidence that Mr. Castro had a driver’s license, or was an experienced driver or had any notion of speed. Mr. Castro may well have been a teenager at the time of the incident judging from his appearance and his testimony that he and the deceased were friends for 10 years and grew up together. The deceased was 17 years old.
- [38] The Crown’s expert witness, the mechanic Mr Lancelot James, said that: “Carriage vehicles that carries (sic) a payload, the ratios for the low gears, that is 1st and 2nd gear, are higher than those of a normal passenger vehicle. As it was a garbage truck, carrying load, it requires the use of the 1st gear whether it is for ascent or descent especially on a hill. With load, it doesn’t allow the truck to go fast and because of the ratio, it gives the truck high torque to aid ascent and descent at a slow pace.”
- [39] The evidence adduced by the Crown was that as Mr. Powell descended Scotts Hill in a South to North direction, he lost the use of the breaks for the truck. Scotts Hill, according to the police

photographer who visited the scene, is about 900 feet long and it forms a 'T' junction with the Potters Main Road at the bottom of the hill. As one is descending Scotts Hill, it is not possible to see the East to West traffic on the Potters Main Road. The Crown's case was that Mr. Powell having lost the function of the brakes for the garbage truck, maneuvered the truck into an empty lot on the right hand side to the North of the Scotts Hill. The garbage overturned less than 100 feet before the Potters Main Road. Mr. Powell, who was in the cabin of the truck and Mr Castro who was at the back both jumped from the truck prior to it overturning. Mr. De La Cruz like Mr Castro was at the back of the vehicle; however Mr. De La Cruz ended up being trapped under the garbage truck.

Medical Evidence

- [40] At about 9:15 a.m. on the 6th July, 2017 Certified Emergency Technician Ms. Maria Fiedkow arrived at the scene of the incident at Scotts Hill. She saw a male person trapped under the garbage truck. A backhoe was used to enable the person to be removed. The male was then transported to the Emergency Room at the Sir Lester Bird Medical Centre, SLBMC. Dr. Alafen Stephens-Gordon worked at the Emergency Room at the SLBMC. At 10:05 a.m. on the 6th July, 2017 a patient identified as Estiben De La Cruz arrived at the Emergency Room. The patient was intubated and unresponsive. Dr. Stephens-Gordon observed multiple open wounds to Mr. De La Cruz's body and a deformity to his chest. Advanced cardiac life support was administered including four doses of epinephrine. He was also defibrillated with 200 joules on two occasions. The efforts to restore Mr. De La Cruz's pulse were unsuccessful. Mr. De La Cruz was then pronounced dead. On the 29th August, 2017 Dr. Lester Simon, a pathologist, did an autopsy on the body of Mr. De La Cruz. Dr. Simon concluded that the cause of death was a "fracture of the neck."

Brakes Failure

- [41] Corporal 416 Leon George, the investigating officer in the matter, said that he spoke with the Defendant at the scene of the incident sometime after 9:00 a.m. on the 6th July, 2017. Corporal George testified that the Defendant when asked for an explanation as to what happened said:
- "I was coming down the hill... I applied brakes and same failed. I then lost control of the truck and it collided with a tree and a house."
- [42] According to the Crown's expert, Mr. Lancelot James, the incident was caused by a failure of the braking system of the garbage truck. He expressed the view that contributing factors to the brake failure were poor servicing, poor maintenance and poor judgment.
- [43] The Crown's expert said that because of the extensive damage to the cabin of the garbage truck, it was inoperable. Mr. James said that he consulted the maker's manuals and examined a vehicle of similar model and year to assess how the FAW garbage trucks function. He noted that both the clutch and brakes function on an air pressure system; if there is no air pressure, there will be no brakes or clutch. The FAW vehicles however, were different from other heavy duty vehicles in that air pressure is needed to both activate and deactivate the brakes. He said that other vehicles had a safety feature where once there is no air pressure the vehicle would not move, but this feature was absent in the FAW vehicles.

“If the FAW was equipped like that, then the wheels would have locked up coming down the hill if you lose (air) pressure.”

- [44] Mr. James noted as well that the exhaust brake was disconnected. When he measured the thread wear of the truck tyres using his specialized tool, he found that only one of the truck’s six tyres was acceptable. Mr. James said that the special tool was required to be used to determine the tyres thread wear. He said:

“The driver can see whether easily or not if the tyre has thread. However no driver is able to tell you the measurement of the thread without the device to measure it accurately. But the driver can tell you smooth or not smooth.”

- [45] Mr. James in cross examination accepted that Mr. Powell said to him that the incident resulted from brake failure. Mr James agreed that the brake system fails at times. The expert agreed that one could have brakes one moment and none the next moment. Mr. James agreed that it is not impossible for even a properly maintained vehicle to suddenly loose its brakes.

- [46] Mr. James in re-examination said that in the absence of proper maintenance, the risk of brake failure was heightened. Mr. Cassell on behalf of the Defendant noted that the mechanic was present at the police station on the 12th July, 2017 when the Crown’s expert, Mr. James, conducted an examination of the vehicle. However the police did not solicit any statement from the mechanic of the truck’s service record.

- [47] Counsel Mr. Dyer noted that the witness Mr. James testified that the Defendant reported that:

“What he said was on his descent of the hill, he noticed that the brake pedal began to get hard. And he also tried to press the clutch pedal and that too was hard. He said at this time he glanced at the air pressure gauge and noticed there was no pressure. Then he said he put the truck in neutral... It was in gear and he could not disengage the gear normally because there was no clutch. His intent was to bank the truck on the side in the bushes. I also asked him about the emergency brakes which he said he also applied but it never engaged.”

- [48] Mr. Dyer said the Defendant’s act of forcing the vehicle out of gear and putting it in neutral as described to Mr. James, could amount to driving in a manner that was dangerous to the public.

- [49] The issue of the mechanical defect of the vehicle is generally an issue for the fact finding forum to consider. A Defendant cannot rely on mechanical defect where the defect was known to the driver or should have been discovered by him if he had exercised reasonable prudence; but it is to be considered when there has been a sudden total loss of control which could not be attributed to any fault on the part of the Defendant/driver.

- [50] **Blackstone’s Criminal Practice 2017** states at paragraph C1.7:

“Where a driver is deprived of control of a motor vehicle as a result of a mechanical defect of which he has no knowledge, real or constructive, then such defect is a defence to a charge of careless driving and a charge of contravening the regulations relating to pedestrian crossings and there seems little or no reason why its principles should not be of wider application.

“This defence of mechanical or latent defect stems from Kay v Buttersworth (1945) 61 TLR 452, Simpson v Peat [1952] 2 QB 24, Hill v Baxter [1954] 1 QB 227, and the general proposition that in cases not involving fault the law should seek to avoid the imposition of any criminal sanction.”

[51] In the present case, the Defendant was operating his garbage truck that morning from sometime after 6:00 a.m; the incident occurred after 9.00 a.m; Mr. Powell and his crew made several stops picking up garbage along the route before the incident which occurred at Scotts Hill. The Crown's expert said that brake failure can occur even in new vehicles. In this case, the issue of brake failure formed a part of the Crown's case.

[52] With regard to 'mechanical defect', **Wilkinson's Road Traffic Offences**, Fourteenth Edition, at 5.34-40, states in part:

“Where a lorry driver knew that a tyre was dangerously worn and drove, his conviction for causing death driving was upheld after the tyre burst, causing the lorry to swerve and kill the occupants of an oncoming car (**R v Robert Miller (Contractors) Ltd and Robert Miller** [1970] 1 All ER 577, following and approving the principle of **R v Spurge**). The principle of **R v Spurge** is that if the danger was created by a sudden loss of control in no way due to any fault on the part of the driver, the defendant should be acquitted. Once there is any evidence of mechanical defect which the driver neither knew of nor ought to have known of, 'the onus of disproving [it] undoubtedly rests on the prosecution' (per Salmon J, at page 692, expressly cited and approved by the Court of Appeal in **R v Gosney** [1971] 3 All ER 220). Once it has been found as a fact that the motorist knows or ought to have known of the mechanical defect, he cannot avail himself of the defence even if the car has subsequently been serviced by a garage **Haynes v Swain** [1975] RTR 40.”

[53] Could the sudden loss of the air pressure brakes – which the Crown said ultimately led to the Defendant losing control of the vehicle – be considered to be anything other than a mechanical defect or failure?

Quality of Driving

[54] There was no evidence from the Crown that there were other road users present on Scotts Hill or that it was heavily used at that time.

[55] The police witnesses called by the Crown as well as the expert witness, agreed under cross examination that the Defendant's election to bank the vehicle after losing the brakes function in the open area before reaching the T-junction with Potter's Main Road was a reasonable decision. Counsel for the defence highlighted the fact that Potter's Main Road was the end of Scotts Hill. Mr Cassell's intention was in keeping with the offence which said “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.” In Counsel's view the Defendant acted prudently.

[56] **Blackstone's** at C3.11 outlines the test for dangerous driving as it is contained in the **English Road Traffic Act 1988**:

“The standard of driving must fall ‘far below’ that expected of a ‘competent and careful’ driver and it must be obvious to a ‘competent and careful’ driver that the manner of driving is dangerous.”

Conclusion

- [57] Having noted the provisions of **The Interpretation Act** and having considered the wording of the indictment, which recites two different offences, it is determined that the indictment is bad for duplicity.
- [58] Given the absence of any evidence of speed and if the indictment recited only that Mr. Powell drove in a manner dangerous to the public, that is, if the indictment was not duplicitous, the ‘no case’ submission would have been sustained under the first limb of **R v Galbraith** [1981] 2 All ER 1060 in that there was no evidence that the offence alleged has been committed by the Defendant as the evidence did not disclose that the manner of Mr. Powell’s driving of the FAW garbage truck was dangerous to the public.
- [59] Mr. Charles Powell is accordingly discharged in relation to the offence of causing the death of Estiben De La Cruz on the 6th July, 2017.

Colin Williams
High Court Judge

By the Court

Registrar