BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 17 of 2007

BETWEEN:

RENNIS ALEXANDER JOHNSON ***Appellant***

AND

THE QUEEN ***Respondent***

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Sherman R. Moore and the Hon. Sandra P. Mason, Justices of Appeal

2009: 14 October

2010: 11 June

Mr. Andrew Pilgrim and Miss Nargis Hardyal for the appellant

Miss Manila Renée for the respondent

DECISION

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INTRODUCTION

MASON JA: On 18 July 2007 the appellant, Rennis Alexander Johnson, was tried before the High Court on two identical counts, namely:-

(a) that he on 1st day of July 2002 caused the death of Renaldo Gaskin by the driving of a motor vehicle on a road at a speed or in a manner dangerous to the public, having regard to all the circumstances of the case, and

(b) that he on the 29th day of June 2002 caused the death of Dale Blades by the driving of a motor vehicle on a road at a speed or in a manner dangerous to the public, having regard to the circumstances of the case;

both counts contrary to **section 81 (1) (b) (A)** of the **Road Traffic Act, Cap. 295.**

[2] On 30 July 2007 the jury by unanimous verdict convicted him of dangerous driving on the 1st count and of causing death by dangerous driving on the 2nd count. He was sentenced on 21 November 2007 to terms of imprisonment of 12 months and 5 years respectively; to run concurrently. The appellant's driver's licence was cancelled with immediate effect and he was disqualified from obtaining another driver's licence for a period of 2 years from the date on which the terms of imprisonment ended. His driver's licence was to be endorsed with the particulars of the conviction.

[3] On 29 June 2002 sometime after midnight, four friends, Dale Blades, Renaldo Gaskin, Kevin Jordan and Steven Sandiford, left the residence of Dale Blades to attend a karaoke session in St. Peter. They were travelling in two cars: Blades, Gaskin and Jordan in Gaskin's car, MU132, and Sandiford alone in his car, MN478. Sandiford drove ahead of Gaskin. Both cars were travelling in a northerly direction.

[4] Shortly before 1:00 a.m. as the friends travelled along Walmer Lodge Road, Lower Black Rock, St. Michael near to the Lazaretto, a car, MC782, driven by the appellant and going in the opposite direction drove past Sandiford's car and collided with Gaskin's car. Blades died on the spot. Gaskin was taken to the Queen Elizabeth Hospital where he later succumbed to his injuries on 1 July 2002. Jordan sustained serious injuries. The appellant and his passenger were also injured as a result of the collision.

THE PROSECUTION CASE

[5] In order to establish the appellant's culpability, the prosecution relied on the evidence of Jordan, Kerry Holligan, a passenger in the appellant's car and Sandiford. Jordan's evidence was to the effect that he sat in the rear seat of Gaskin's car and behind Blades who sat in the front passenger seat. Gaskin's car was following Sandiford's. As Gaskin's car approached the area of the Lazaretto, he heard a voice say, "Wait, wha going on hey?" When he looked to see what was going on, he saw bright headlights. That was the last thing he remembered. He woke up in the hospital where he was a patient for six weeks. Jordan did not see a collision. He was not cross-examined.

[6] Kerry Holligan, a lifetime friend of the appellant, told the court that on 28 June 2002 about 5:00 p.m. the appellant came to his home in his car and collected him. One Fidel was already seated in the car. They then went to Passage Road where they met Wayne White who accompanied them. On their way to Oistins they stopped by Weiser's. They remained at Oistins until around 11:00 p.m. While there, they bought fish and "were drinking beers". After leaving Oistins they took Wayne White back to Passage Road and Fidel to Fitts Village in St. James.

[7] On their way from Fitts Village and on reaching Batts Rock, he saw a car approaching them "on the same side of the road we were travelling on". The appellant then "manoeuvred" his car to the right hand side to avoid a collision and in so doing, collided with another car which was travelling on its proper side.

[8] Under cross-examination, he reiterated that the first car which passed the appellant's car before the accident, did so on the left side of their car. The effect of Holligan's evidence was that the appellant's car was travelling in a southerly direction towards Bridgetown on its left and proper side whereas Gaskin's car was travelling in the opposite direction on the right hand side of the road. The manoeuvre which Holligan said the appellant carried out would have meant that Gaskin's car attempted to pass the appellant's car on its left side.

[9] Steven Sandiford stated that when he and his friends left Dale Blades' house, he was driving alone in his car and he was driving ahead of Gaskin's car. While driving along by the Lazaretto, he was approximately one and a half to two car lengths in front, when he saw an oncoming car travelling at "uncontrollable" speed. This car made a swerve towards his side of the road. He pulled to the left and "carried on his path". When he looked in his

rearview mirror to see whether his friends had also escaped he did not see any lights coming behind him. He "cleared" the corner and then turned around and went back. When he did so, he saw the car that had passed him "colliding" with his friend's car "head-on".

[10] Under cross-examination he stated that the appellant's car made a "swerving sliding" motion towards his car. He denied that his and Gaskin's cars were drag racing. He also denied that his car passed the appellant's car on the appellant's left side. He stated that he saw the appellant's car for "a couple of seconds" and it was about 10 feet from him. He admitted that he did not hear the collision.

[11] In re-examination he gave as his reason for not hearing the collision that he was not "studying that they would have collided". It was "far from his mind."

[12] Station Sergeant Lewis' testimony was that on 1 July 2002 as a result of a report of an accident he went on duty to Walmer Lodge Road, St. Michael where he saw two cars facing in opposite directions. He conducted certain investigations and he also gave instructions to the police photographer who later arrived on the scene.

[13] On 2 July he went to the Queen Elizabeth Hospital where he informed the appellant that he was conducting investigations into the accident where Dale Blades had died on the spot. He also told him that Renaldo Gaskin had died as a result of injuries sustained in the accident. He then served the appellant with notices of intended prosecution.

[14] Station Sergeant Lewis arrested and charged the appellant on 2 October 2002 after his discharge from the hospital. The appellant was taken to the police station, informed that he was going to be interviewed about the matter and informed of his rights. He requested a telephone call to his lawyer and after this was granted he refused to give a written statement.

THE APPELLANT'S CASE

[15] The appellant gave an unsworn statement from the dock in which he stated that on the day in question he collected his three friends in his car and went to Oistins where he had some grilled fish and "a beer to go with that". They left Oistins around 11:00 p.m. and he took two of the friends to their homes.

[16] On his way going towards Black Rock, he passed Batts Rock junction and entered between the "cut rocks". He was driving at about 50 to 60 kilometres per hour. He drove through the right hand corner and up the incline. As he cleared the corner he saw a pair of bright headlights coming towards him. He was unable to gauge the speed of the oncoming vehicle but, as it got closer, he realized that it was coming straight at him. He "pulled" to the right and the vehicle passed him on the left. There was a collision but he did not see the vehicle with which he had collided. He sustained a broken ankle and thigh and suffered an injury to his left eye. He was taken to the Queen Elizabeth Hospital where he remained for 5 weeks.

[17] This statement, he maintained, was the statement which he had given to his lawyer and which he had suggested that Station Sergeant Lewis collect from the lawyer.

GROUNDS OF APPEAL

[18] The appellant advanced eight grounds of appeal.

Ground 1

[19] On this ground the appellant complained that the trial judge erred in law when she failed to warn the jury in accordance with **section 137** of the **Evidence Act, Cap. 121** that Steven Sandiford, to the extent that he had an interest to serve, was an unreliable witness.

[20] Counsel submitted that this failure to warn the jury and to categorise Steven Sandiford as an unreliable witness was fatal to the conviction. He argued that against the background of the testimony given by Sandiford, he was either the cause of the accident or a witness to it. Counsel said that the evidence suggested that Sandiford was drag racing and overtaking a vehicle on the wrong side of the road. As a consequence Sandiford may have given false and implausible evidence in an attempt to protect himself from blame. Counsel's criticism therefore is

that the judge should have given a specific warning to the jury.

[21] Counsel referred to the two following instances in Sandiford's testimony which he considered to be in direct conflict with each other and therefore to be self-serving.

In evidence-in-chief Sandiford said:

> "Looking into my rearview mirror to see if my friends had escaped also I saw no lights behind. I cleared the corner, turned around and went back to see the said car that passed me colliding with my friend's car, head-on."

In cross-examination he admitted that he did not hear the collision.

[22] In re-examination when asked the reason why he did not hear the collision, he stated:

> "I wasn't studying that they would have collided. It was far from my mind."

[23] Counsel suggested that since both statements are statements of fact, they could not both stand. He argued that while the judge acknowledged that Sandiford's testimony was crucial to the matter, she did not direct the jury how to treat that evidence nor to warn the jury about its unreliability and the danger of convicting the appellant on that evidence.

[24] Counsel for the respondent submitted that there was no reason for the **section 137** warning. She submitted that the evidence disclosed a two car collision between the appellant and the deceased and there was no evidence which could properly describe Sandiford as a participant in the collision. The mere fact that a suggestion had been put to him that he had been drag-racing - which was denied – was not sufficient to label him as a person with an interest to serve or as unreliable. There had to be some substantial material from which that conclusion could be drawn. A s**ection 137** warning is not mandatory. To support this contention counsel referred to the case of ***Robert Walker v. R. Criminal Appeal No. 12 of 2004, unreported decision of 18 March 2008.***

[25] **Section 137** of the **Evidence Act** deals with warnings in relation to unreliable evidence. It provides as follows:

(1) This section applies in relation to the following kinds of evidence:

(a) ….

(b) ….

(c) ….

(d) in criminal proceedings

(i) evidence given by a witness called by the prosecution, being a person who might reasonably be supposed to have been concerned in the events giving rise to the proceeding; or

(ii) …

(e) …

(2) Where there is a jury the Judge shall, unless there are good reasons for not doing so,

(a) warn the jury that the evidence may be unreliable;

(b) inform the jury of matters that may cause it to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) It is not necessary that a particular form of words be used in giving the warning or information.

(4) This section does not affect any other power of the Judge to give a warning to, or to inform the jury.

[26] It is generally accepted that it would be unreasonable to expect a judge to direct a jury on all aspects of unreliability. In fact the judge in her general directions informed the jury that while she had to advise them of the law, it was their function to sift out the facts and situate the emphases for themselves while bringing to bear their "experience of the world" and their common sense.

[27] It is however the responsibility of the judge to give an appropriate warning in circumstances where there are potential dangers in the jury acting upon evidence which may not be appreciated by the jury if the warning is not given.

[28] It was stated by *Howie J* in the Australian case of ***R. v. Stewart [2001] NSWCCA 260***:

> "where a matter which might adversely affect the reliability of evidence in the trial would be readily understood and appreciated by the jury because it falls within their general experience and understanding and where the court has no special knowledge about the matter or no reason to doubt that the jury would appropriately assess its weight, then this evidence is not "of a kind that may be unreliable" and the section does not apply".

[29] Matters which *Howie J* thought would not generally attract a warning but are at risk of making the summation defective especially in the case of a crucial Crown witness and ought to be commented upon by the judge include prior inconsistent statements made by a witness; inconsistencies within the evidence of a witness, inconsistencies between the evidence of a witness and other evidence in a trial, an allegation of bias made against a witness or the fact that it has been suggested that the witness had a motive to lie.

[30] In the instant case the judge pointed out to the jury that there was a conflict of evidence and directed them that it was a matter for them whether or what part of the evidence they would accept. While she did not expressly warn them in terms of **section 137**, it cannot be said that she failed to give proper consideration to the possibility of Sandiford's evidence being unreliable and that it should therefore be approached with caution. The judge highlighted the two sets of statements complained of by counsel for the appellant and left it to the jury to determine their effect. **Section 137 (3)** of the **Evidence Act** provides that it is not necessary that a particular form of words be used when giving the warning.

[31] The judge dealt extensively with Sandiford's evidence (See pages 242 to 247 of the Trial Record) and reminded the jury at page 247 lines 9 to 26:

> "So it is for you to decide whether or not you can accept the testimony of Sandiford as to how those two cars ended up in an (sic) head-on collision or whether you accept the testimony of the accused and Holligan as to how those two cars met in that head-on collision. As I said to you, Mr. Foreman and members, there are two versions of how this accident occurred, before you. It is a matter entirely for you which version you find to be true. However, I must tell you that if you find that the version given by the accused is just as likely as that given by Sandiford, then you must accept the version that is in favour of the accused. So long as you find that the version given by him, the accused, is just as likely as the version given by Sandiford, then you must find for the innocence of the accused. In other words, if you find that the version, given by the accused, is consistent with innocence as well as with guilt, that is, the versions are equivocal, then you must find for the innocence of the accused.

[32] It is our opinion that while the judge did not specifically state to the jury that they ought to treat Sandiford's evidence with scepticism because it was possible that he could have been the real cause of the accident, it is clear from the summation that she alerted them to the need to carefully assess Sandiford's evidence while leaving up to them the decision of how it was to be weighed and assessed. It is to be noted that defence counsel did not cross-examine Sandiford as to the veracity of the first of these statements, the second having been elicited in re-examination, nor was he particularly forceful about it except to observe for the benefit of the jury that Sandiford could not have seen the cars "colliding". He stated that it was a question of credibility for the jury.

[33] The Court in ***R. v. Fowler [2003] NSWCCA 321*** at para. 188 made the following observation:

> "Where the issue raised concerns the honesty of the witness' evidence, a warning will not normally be required. As a general rule, the court has no particular advantage over a lay jury in determining whether a witness is telling the truth. General matters used by a tribunal of fact to assess a witness' credibility such as demeanour, consistency, recent invention and the presence of a motive to lie are readily appreciated by members of a jury as part of their normal life experiences. In such a case, if anything needs to be said by the trial judge about the evidence, it would normally be sufficient for the judge to comment on the evidence by reminding the jury of criticisms of it made by counsel during address."

[34] In our view there was nothing in this case which had the potential to mislead the jury or to deflect them from properly evaluating the evidence. We also believe that the issues would have been readily accepted and understood by the jury because they "fell within their general experiences and understanding". We have no doubt that they were able to adequately and appropriately assess the evidence even to the point of appreciating that a witness may fabricate evidence or attempt to divert attention from himself in order to extricate himself from a given situation.

[35] Counsel for the appellant, cited ***R. v. Beck [1982] 1 All ER 807.*** This was a case involving accomplices and the danger in acting on the uncorroborated evidence of an accomplice. Under English law, a specific warning may have to be given to the jury in the case of an accomplice or a person with an interest to serve, properly so called: ***Davies v. DPP [1912] 1 All ER 507 AND R. v. Prater [1960] 1 All 298.*** The words of *Edmund Davies J* in **Prater** at p.300 are particularly pertinent to counsel's submission in the context of this case. He said:

> "This court has looked in vain at the transcript of the summing up, and has listened in vain, with respect to counsel for the appellant, for any satisfactory indication that there was material on which the learned Common Sergeant would have been justified in presenting Mr. Truman to the jury as being an accomplice. As *Hilbert J* said, it is easy to make suggestions to a witness. That is one thing. More than that is required to clothe a witness for the Crown or any other witness with the garment of an accomplice. This court is unable, on the material before it, to hold that it is shown that any warning was in prudence called for, for it is by no means satisfied that there was any material on which Mr. Truman could properly be described as an accomplice."

[36] We are of the opinion that there was no miscarriage of justice by reason of the omission of specific words of warning to the jury. This ground accordingly fails.

Ground 2

[37] The appellant submitted on this ground that the trial judge "erred in law when she failed to point out the fundamental inconsistencies in the evidence of the witness Steven Sandiford".

[38] This ground is closely associated with the first ground in that it relates to the two statements of the witness Sandiford which Counsel for the appellant complained of (paras. 21 and 22).

[39] Counsel contended that the judge ought to have pointed out the inconsistency between these two statements. He stated that although defence counsel did not emphasize the inconsistency, this did not derogate from its importance. He argued that in accordance with the learning in ***Fuller v. The State [1995] 52 WIR 424*** the judge ought to have analysed this critical bit of evidence for the benefit of the jury. Thus the absence of a proper direction to the jury on the question of the inconsistencies prejudiced the fairness of the trial.

[40] In response, Counsel for the respondent denied that there was a fundamental inconsistency in the statements complained of. She contended that the judge gave a general direction in relation to inconsistencies but there was no duty on the judge to point out every inconsistency which arose in a case. In any event, defence counsel by his cross-examination and in his address to the jury accepted that Sandiford could not have seen the collision.

[41] It has to be noted that the inconsistency was in effect raised for the first time as a ground of appeal. There was no cross-examination on the statement and no attempt by defence counsel to clarify the use of the term "colliding". Defence counsel limited his cross-examination on that issue to finding out whether Sandiford had heard the collision - the reason why he did not, being clarified in re-examination. In his closing address defence counsel posited reasons why Sandiford could not have seen the collision, and suggested that the word "colliding" was incorrectly used by Sandiford.

[42] While it is accepted that it is the function of a trial judge to identify, apply and assess the evidence in relation to each direction of law, we are unable to accept counsel's contentions in the circumstances of this case. The trial judge gave a general direction on discrepancies and inconsistencies and when dealing with the testimony of Sandiford she recalled to the jury's mind this direction and reminded them that they had to bear the direction in mind when assessing his testimony. See page 242 lines 10 to 17 where the judge said:

> "So there are material discrepancies between the testimony of Sandiford on the one hand and Holligan and the accused on the other. And in this regard, you will recall the direction I gave to you on discrepancies and that direction is particularly important in the context of this case. So I must ask you to bear it in mind when you come to assess and weigh the testimony of Sandiford, Holligan and the accused."

[43] The judge continually reminded the jury of their function as sole arbiters of the facts, but in assessing the differences in the evidence, they had to determine which version represented the truth. She alerted them to the shortcomings in Sandiford's evidence and dealt with it at length. She also adverted to defence counsel's arguments on the matter.

[44] At page 244 lines 16 to 19 the judge had this to say:

> "Now, Mr. Foreman and your members, it is for you to determine whether on Sandiford's version of events he could have cleared the corner, turned around, gone back in time to see the head-on collision between MU132 and MC782."

[45] Also at page 245 lines 29 to 32 at page 246 lines 1 to 4; the judge directed the jury as follows:

> "So it is open to you, Mr. Foreman and members, to conclude on the evidence that the impact or collision occurred directly after Sandiford's car passed MC782. And if you come to that conclusion, then you should have no difficulty in determining whether Sandiford could indeed have cleared the corner, turned around and driven back to witness the actual collision."

[46] The judge also reminded the jury at page 246 lines 9 to 22 that:

> "… prosecuting counsel is saying to you that if you look at all of Sandiford's evidence in its totality, it is quite clear that Sandiford never saw that crash and by the time he returned to the scene the crash had already taken place. So, at the very least on this aspect of the matter, defence counsel and prosecuting counsel are in agreement, but it is for you, Mr. Foreman and your members, to determine what you make of Sandiford's testimony in relation to the use of the word "colliding". Is he deliberately lying to you, or is he mistaken, or is it that he simply used the word "colliding" in the present tense instead of the word "collided" in the past tense. These are matters entirely for your determination, Mr. Foreman and your members."

[47] This case clearly concerned the question of credibility, that is, which of the witnesses the jury were prepared to believe, and the ability of the jury to assess the evidence using their "normal life experiences".

[48] It is evident that they accepted that Sandiford could not have seen the collision despite his use of the word 'colliding" - a question left for their determination by the judge.

[49] It is uncertain how much more could realistically have been expected of the judge. It was ultimately and properly left to the jury's determination how this inconsistency was to be handled.

There is no merit in this ground.

Ground 3

[50] The appellant complained that "the Learned Trial Judge erred in law when she allowed the Prosecution to encourage the jury to draw the following inferences …"

[51] There were originally eight instances of inferences listed by the appellant. Counsel for the appellant conceded that he needed only to argue three of them.

(i) *an inference that the witness Kerry Holligan and the appellant did not cooperate with the police.*

[52] Counsel complained of the following portion of the summation at page 257 lines 18 to 27:

> "And prosecuting counsel is saying that in this case, the police have carried out their investigations and their duties properly. They asked the accused if he wished to gave (sic) a statement, and he said that he did not. He responded, "I have no statement to give you. I already give my lawyer Randall Worrell my statement, so you get it from him." And it took the police months to get a statement from Holligan. So, the prosecution is saying neither the accused nor Holligan was cooperative with the police in their investigations."

[53] Counsel argued that the judge's statement that the prosecution's assertion that it led evidence "of a quality, nature and kind etc" was irrelevant and not probative of what happened in the accident. He stated that the judge did not give any direction on how to deal with prosecuting counsel's suggestion that Holligan and the appellant were uncooperative in giving statements to the police.

[54] Counsel for the respondent contended that the statements were not prejudicial and that the judge properly permitted the submissions to be placed before the jury for their consideration when weighing the evidence.

[55] She stated that the prosecution's address to the jury in relation to this first inference was a response triggered by both the closing address and the cross-examination by defence counsel of the police in which he sought to portray the officers as incompetent and delinquent in conducting their investigations and more especially in seeking to obtain a statement from the appellant. The prosecution had a duty to rebut even while admitting that the appellant had a right to silence and therefore not to give a statement. Counsel referred to the case of ***R. v. Nation [1954] SASR 180*** in which it was determined that the judge's summation must be regarded in the light of the conduct of the trial and the questions which had been raised by defence counsel.

(ii) *inferences as to speed on the part of the appellant.*

[56] For this counsel for the appellant referred the court to page 257 lines 13 to 17 of the record which reads:

> "Prosecuting counsel is saying that when you look at the photographs, 4,5,6,7 and 8, you cannot accept that that extensive damage you see there, and as described to you by the vehicle examiner, could have been caused by the accused driving at a speed of about 50 to 60 kilometres per hour."

[57] Counsel submitted that the inferences were equivocal because the evidence as to how the accident took place was sparse and no witness supporting the Crown's case saw how the accident happened. In other words it could have been Sandiford who was speeding.

[58] Counsel for the respondent countered that no direction was required by the judge because there was nothing prejudicial about the prosecution asking the jury to accept the evidence of Sandiford as to how the accident occurred and to accept the evidence as provided by the photographs.

(iii) *an inference that the appellant was drinking "as opposed to what was stated in the evidence.*

Page 257 lines 1 to 4 of the record states:

> "So the prosecution is saying that when you put together all those things, together with the evidence that they were drinking beers at Oistins from after 5 o'clock to 11:00 p.m., that that is what accounts for the accident."

[59] Counsel's complaint is that the judge permitted prosecuting counsel to refer without interruption to the appellant and Holligan being at Oistins and "drinking beers". Counsel also objected to the judge in her summation referring to the prosecution's position that this accounted for the accident, in effect allowing the prosecution to say things which were not in evidence. Counsel suggested that it was not enough for the judge to attempt to correct the inferences by merely stating that the appellant stated that he "had a beer to go with that".

[60] He referred to the case of ***Allie Mohammed v. The State [1998] 53 WIR 444*** in which the Court of Appeal of Trinidad and Tobago was critical of prosecuting counsel's behaviour in the manner of his address to the jury.

[61] In ***Allie Mohammed (supra),*** *Lord Steyn* in delivering the judgment of the court observed that prosecuting counsel's speech contained many inflammatory passages and he repeatedly urged the jury to convict. He also made emotional appeals for sympathy for the deceased and his family. The Board disagreed with the Court of Appeal of Trinidad and Tobago that the speech made no difference to the inevitable outcome because in their

Lordships' opinion, a conviction was not a foregone conclusion and that was why prosecuting counsel had taken elaborate pains to attempt to generate prejudice against the appellant in the minds of the jury.

[62] In ***Randall v. R. [2002] 60 WIR 103*** the Privy Council accepted that not every departure from good practice renders a trial unfair. It is only when that departure is so gross or so persistent or so prejudicial or so irremediable that an appellate court would have no choice but to consider the trial as unfair.

[63] *Lord Bingham* in that case observed that the jury's attention must not be distracted from its central task of deciding whether, on all the evidence adduced before it and on all the submissions made, and on the judge's legal directions and summing up of the evidence, the guilt of the defendant is or is not established to the required standard. He spoke to the important rules which derive from this imperative. *Lord Bingham* also commented at page 105:

> "While the duty of counsel may require a strong and direct challenge to the evidence of a witness, and strong criticism may properly be made of a witness or a defendant so long as that criticism is based on evidence or the absence of evidence before the Court, there can never be any justification for bullying, intimidation, personal vilification or insult or for the exchange of insults between counsel. Any disparaging comment on a witness or a defendant should be reserved for a closing speech."

[64] In ***Benedetto v. R. [2003] 62 WIR 63*** the Privy Council held that the principles which determine the proper role of the prosecution have to be applied in the context of his own environment. Although juries needed to be spoken to in a language and style they would understand and although there could be no objection to a robust speech by the prosecution, that speech had to be respectful and ought not to be xenophobic or inflammatory or ought not to make use of inadmissible and irrelevant material.

[65] Against that background we turn to the basis of the appellant's complaint. Counsel submitted that the issues raised were equivocal, that prosecuting counsel inferred that these issues went to proof of the appellant's guilt and that the judge in her summation reiterated these inferences resulting in prejudice to the appellant.

[66] It must be noted that prosecuting counsel's closing address was made before that of the defence, that defence counsel did not object, during prosecuting counsel's address, to any of these inferences now complained of nor did he require retraction of any statements made by prosecuting counsel.

[67] The appellant's specific complaints must be considered within their context. The judge was properly recalling for the jury's benefit, the submissions and comments of prosecuting counsel on aspects of the evidence. She was repeating the arguments and directing the jury how to find for one side or the other. In our view, the judge was being even-handed.

[68] We do not believe that the issues complained of would have engendered such prejudice in the minds of the jury as to make the trial unfair. We cannot assume that "emotion (whether induced by the eloquence of counsel or otherwise) might have supplanted the collective common sense and careful reasoning that jurors bring to bear upon a difficult task" per *Hayne J* dissenting in **Gilbert v. R. [2000] CLR 414.** We are of the view that prosecuting counsel's address was in keeping with the proper function in our adversarial system for counsel to make out as effectively as possible the prosecution's case against the accused that he was guilty as charged. We are satisfied that prosecuting counsel did not overstep the boundaries of propriety, did not make an inflammatory speech, did not seek to evoke sympathy for the deceased, nor depart from good practice so as to prejudice the appellant's case. Her address was consistent with the "cut and thrust" of ordinary courtroom tactics.

[69] We do not consider that there were any misstatements by prosecuting counsel. She sought to explain to the jury why it was difficult for the police to obtain a statement from the witness Holligan and emphasized that it was not due to the dereliction of duty on the part of the police. She sought to encourage the jury to accept Sandiford's testimony that the appellant was travelling at over 100 kilometres per hour and on the wrong side of the road. She tried to convince the jury to consider the evidence which Holligan gave about going with the appellant and friends to Oistins where they drank beers. It was for defence counsel to persuade the jury otherwise.

[70] In her summing up which was accurate and comprehensive, the judge told the jury in clear terms that they were the sole judges of fact, that they were not bound to accept any view that she or counsel might have expressed and that no one could usurp their function as final judges of fact.

[71] The key issue in the case was one of credibility which had to be determined by the jury. The trial judge in putting both sides to the jury and alerting them to the inconsistencies was correct not to venture into the province of what

was properly the jury's domain. In our view there was no need for a specific caveat with respect to prosecuting counsel's speech.

[72] In ***Franco v. R. [2001] UKPC 38*** the Privy Council stated:

> "The starting point must always be that in a trial on indictment the jury is the body to which the all-important decision in the guilt of the accused are entrusted. This does not mean that every deviation from procedural regularity and legal correctness vitiates a jury's verdict of guilty. That could impose an unattainable standard of perfection and frustrate to an unacceptable extent the effective administration of criminal justice. But it does mean that an appellate court, which is not the trial tribunal, should be very cautious in drawing inferences or making findings about how the jury would have resolved issues."

[73] Having considered the summation in its entirety, we are not satisfied that the judge improperly influenced the jury in their task of drawing such inferences as were warranted on the evidence. Equally, we are not satisfied that prosecuting counsel conducted herself improperly or displayed conduct worthy of censure. Accordingly this ground fails.

Ground 4

[74] We are of the view that this ground is unsustainable. It asserts that the trial judge erred in law when she failed to point out what evidence there was in the case on which the jury could convict.

[75] Counsel contended that in accordance with the decisions in ***Fuller (supra)*** and ***Dwight Ovid Alleyne v. R., Criminal Appeal No. 17 of 2003 unreported decision of 5 March 2004,*** the judge ought to have evaluated and analysed the evidence for the benefit of the jury.

[76] It cannot be said that the judge failed to give proper consideration to the evidence upon which the case rested so that it resulted in unfair prejudice to the appellant. The judge's execution of the summation cannot be faulted. She provided general guidance to the jury as to the way in which they should assess the evidence given by the witnesses. Recognising that the evidence of Sandiford was pivotal to the outcome, the judge dealt with his evidence at length, highlighting the discrepancies and the conflict with that of Kerry Holligan.

[77] At page 241 of the record, the judge related Sandiford's evidence, then she noted for the benefit of the jury that it contradicted that of Holligan "in every material particular", then she reminded the jury of her directions on discrepancies and its importance in the context of the case, then she asked them to "bear it in mind when you come to assess and weigh the testimony of Sandiford, Holligan and the accused."

[78] Accepting that there could be confusion about the collision and whether Sandiford could have cleared the corner, turned around and driven back to witness the collision as he indicated, the judge clarified the issue and then left it for the jury's determination. The relevant comments and direction by the judge are at page 246, lines 5 to 22 of the trial record (already noted at para. 46).

[79] The judge dealt extensively with the photographs of the scene which were produced in evidence. She advised the jury to use the photographs to the extent that they could assist them in their deliberations but to do so dispassionately and without bias or sympathy.

[80] It is inconceivable how differently the judge could have treated the evidence in this case. She reminded the jury that it was ultimately their decision as to a finding of guilt or innocence and she put the issue of credibility fairly at page 247 lines 17 to 26 (already noted at para. 31.)

[81] We have found no errors in the course of the trial or any grave irregularities such as would undermine the safety of the convictions. It cannot be said that the appellant was denied a fair trial. This ground of appeal also fails.

Grounds 5 & 6

[82] These grounds were argued together. They were drafted as follows:

> 5. The Learned Trial Judge misdirected the jury when she told them that the Rules of Evidence did not allow the Prosecution to suggest to the witness Kerry Holligan that he was not telling the truth; and
>
> 6. The Learned Trial Judge misdirected the jury that the Prosecution had to call Kerry Holligan as a witness.

[83] Counsel for the appellant complained of the following passage in the summation at page 241 lines 5 to 19:

> "Now in her address to you, counsel for the prosecution told you, quite correctly, that the rules of evidence did not allow her to cross-examine Kerry Holligan and suggest to him that he was not telling the truth because he was a childhood friend of the accused. So what the prosecution is saying to you is that the conflict in its case stems primarily from the fact that insofar as Kerry Holligan was a witness to the accident, the prosecution had to call Kerry Holligan as a witness, but at the same time the prosecution was calling a person who was not a disinterested person because of the life-long friendship Kerry Holligan shared with the accused. So the prosecution is asking you to treat the testimony of Kerry Holligan with caution. In fact, later on in her address she asked you to reject it."

[84] Counsel submitted that to the extent that the judge by using the words "quite correctly" adopted the incorrect statement of law relied on by the prosecution, it was a misdirection in law. He contended that there was no obligation on the Crown to call a witness who in their estimation did not "come up to proof." He argued that if the witness no longer appeared to be a credible witness worthy of belief, then that witness ought to have been tendered for cross-examination by defence counsel. The Crown ought not to appear to be cross-examining its own witness or appear to be "at war" with its witness. In the alternative, the Crown could have made application under **section 35** of the **Evidence Act** to treat the witness as a hostile witness.

[85] In any event, argued counsel, the jury had a right to be apprised of the law in respect of a witness who gives contrary evidence.

[86] Conversely, counsel for the respondent submitted that the mere fact that the testimony of a witness was not supportive of the case for the prosecution did not constitute a sufficient basis for impeaching that witness' credibility. In other words, the evidence of Holligan was not of the nature and quality for an application to be made under **section 35** of the **Evidence Act** for him to be deemed a hostile witness. There was no evidence of animus on his part.

[87] Counsel for the respondent continued that while the prosecution had a discretion whether or not to call witnesses listed on the back of the indictment, that discretion is not absolute. She submitted that given the circumstances of this case – the witness was himself involved in the accident and was a close friend of the appellant – as well as the need for fairness of the trial, this would not be an appropriate instance for the exercise of the discretion. Counsel cited the case of ***R. v. Oliva [1965] 3 All E. R. 116*** in support of these submissions.

[88] The question for this Court is whether the fact that the judge gave credence to the statement of prosecuting counsel (see para. 80 above) amounted to such material irregularity as to unhinge the case for the prosecution. Or would a jury properly directed have inevitably reached the same verdict, for if in spite of the error, the jury would still have convicted, then there could not be said to have been prejudice to the appellant.

[89] It is not every failure to observe the appropriate rules of evidence and procedure which renders a conviction unsafe or make a trial unfair. Even where a mistake was not corrected during the trial, the trial would still have been fair if in all essential respects, it was the kind of trial which the law expected that an accused should have: *Lord Rodger* in ***Howse v. R. [2006] 2 LRC 339.***

[90] The instant case was based on the credibility of the witness. Although the jury had sat through the trial, the judge recited for them the differing versions of the events as given by the appellant, by Holligan and by Sandiford and reminded them that it was for them as sole judges of facts to determine which of these versions in their opinion represented the truth of what had taken place. The appellant's criticism centered around the judge's failure to apprise the jury of the law relating to hostile witnesses and the Crown's discretion in calling witnesses who give unfavourable testimony.

[91] **Section 35** of the **Evidence Act** reads:

> "(1) Where a witness gives evidence that is unfavourable to the party who called the witness, that party may, with the leave of the court, question the witness about the evidence as though the party were cross-examining the witness.

(2) Where, in examination-in-chief, a witness appears to the court not to be making a genuine attempt to give evidence about a matter of which the witness may reasonably be supposed to have knowledge, the party who called the witness may, with the leave of the court, question the witness about that matter as though the party were cross-examining the witness.

(3) A party who is questioning a witness referred to in subsection (1) or (2) may also, with the leave of the court, question the witness about matters relevant only to the credibility of the witness, and such questioning shall be taken to be cross- examination for the purposes of this Act.

(4) Unless the court otherwise directs, questioning as mentioned in this section shall take place before the other parties cross-examine the witness.

(5) The court may direct the order in which the parties may question the witness.

(6) The matters that the court shall take into account in determining whether to give leave, or give a direction, under this section include:

(a) whether the party gave notice at the earliest opportunity of his intention to seek leave; and

(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by some other party.

[92] In our opinion, prosecuting counsel in her wisdom and recognising that her duty was not to obtain a conviction at all costs but to act as a minister of justice **(***Lord Bingham* i n ***Randall v. R. (supra))***, properly exercised her discretion in calling Holligan as a witness despite the fact that his testimony was not fully supportive of the Crown's case.

[93] In the same vein, recognizing that his evidence was not of the nature and quality that she should seek leave to treat him as hostile, she opted not to seek leave under **section 35** of the **Evidence Act.** Instead she sought to elicit from him evidence to support her case and in her closing address laid before the jury what they would obviously have been aware of – Holligan was the appellant's friend and on the night of the accident he was accompanying him in his car. She left it up to the jury to draw their own conclusions.

[94] This role of the prosecutor's was very clearly described by *Rand J* in the Supreme Court of Canada in ***Boucher v. R. [1954] 110 Can CC 263*** at 270 which was cited with approval by *Lord Binghan* in ***Randall v. R. (supra) at page 104:***

"It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecution excludes any notion of winning or losing…"

[95] It however must be noted that the judgment to be made whether or not to call a witness for the prosecution is primarily that of the prosecution and it is a discretion which she may chose to exercise.

[96] The case of ***R. v. Oliva*** (supra) cited by counsel for the respondent dealt with the question of whether prosecuting

counsel had a discretion not to call a witness whose name was on the back of the indictment if the witness no longer appeared to be a credible witness worthy of belief. In setting out the principles relating to the calling of prosecution witnesses likely to give contradictory testimony, the English Court of Appeal said:

> "The prosecution must of course have in court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them, either calling and examining them, or calling and tendering them for cross-examination. The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief then it is their duty, well recognized, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interest of justice, and at the same time be fair to the defence. If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and if they refuse there is the ultimate sanction in the judge himself calling that witness."

[97] The Privy Council in ***Adel Muhammed El Dabbah v. Attorney General for Palestine [1944] AC 156*** recognising this discretion stated that the court would not interfere with the discretion "unless it can be shown that the prosecution has been influenced by some "oblique motive."

[98] The question therefore is whether there was a risk that the jury would use the evidence inappropriately as a result of an improper judicial direction or judicial misstatement. In our view, this case turning specifically on the question of the credibility of the witnesses, it is doubtful that the jury would have been swayed by the fact that the judge reiterated prosecuting counsel's statement (see para. 80 above) with respect to the calling of Holligan as a witness.

[99] There was no application before the Court to treat Holligan as hostile, nor was his examination conducted improperly. In such circumstances we do not consider that there was any duty cast upon the judge to give the jury directions in relation to the treatment of hostile witnesses. These grounds accordingly fail.

Ground 7

[100] The essential thrust of this ground was the inconsistency of the two verdicts. Counsel for the appellant submitted that since the two charges were identical, related to the same car in the same accident in which the two men died, it meant that only the lesser verdict could stand.

[101] The judge's directions to the jury were very clear. Between 265 and 268 she briefed them fully on the charges and indicated what were the issues to be considered in relation to the changes. She told them at page 268 lines 15 to 25:

> "Mr. Foreman and your members, it is therefore open to you to find the accused guilty of causing death by dangerous driving, or guilty of dangerous driving. So you can find him guilty of causing death by dangerous driving, or if you find that it was not his driving that caused the deaths of either Renaldo Gaskin or Dale Blades, but that he was in fact driving dangerously, you can return a verdict of dangerous driving. And if you are in doubt as to whether he did in fact drive dangerously, if you are not satisfied with the evidence led by the Crown, you will return a verdict of not guilty."

[102] The legal authorities indicate that the fact that verdicts are shown to be inconsistent will not lead to the verdicts of guilty being set aside as being unsafe unless the only explanation for the inconsistency must or might be that the jury was confused or adopted the wrong approach. Thus, there are instances when, notwithstanding the inconsistency, the conviction or convictions will stand. It all depends on the facts of the case.

[103] In ***R. v. Durante [1972] 56 Cr. App. R. 708*** *Edmund Davies LJ* cited with approval the oft quoted test formulated by *Devlin J* in the unreported case of ***Stone (13 December 1954):***

> "When an appellant seeks to persuade this court as his ground of appeal that the jury has returned a repugnant or inconsistent verdict, the burden is plainly upon him. He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion and once one assumes that they are an unreasonable jury or they could not have reasonably come to the conclusion, then the conviction cannot stand. But the burden is upon the defence to establish that."

[104] However, as previously determined by the case of ***R. v. Hunt [1968] 2 QB 433,*** if the verdicts reflect a view of the facts and evidence which the jury could reasonably have taken, the appeal will be dismissed even if the majority of juries faced with the same evidence might have been expected to acquit, or as the case might be, convict on each count rather than return a split verdict.

[105] There is no suggestion in this case that the trial judge erred or misdirected the jury in her summation in relation to the charges which were put to the jury. The charges were identical and the facts were identical except for the time of death of the two deceased. It was therefore for the jury to consider these identical charges and facts in light of the directions given them by the judge.

[106] On the return of the verdicts there was no complaint or dissatisfaction expressed by either prosecuting or defence counsel.

[107] Could the jury have been confused or have adopted the wrong approach? The judge told them at page 265 line 30 to page 266 line 30:

> "Mr. Foreman and members of the jury, the law provides that even though the indictment only charges the accused with the offence of causing death by dangerous driving, if you come to the conclusion that the accused did drive at a speed or in a manner which was dangerous to the public, but that the death of Renaldo Gaskin and Dale Blades did not result from that driving, you will find the accused not guilty of causing death by dangerous driving, but if you find that he drove at a speed, or in a manner that was dangerous to the public, then you may find him guilty of dangerous driving. So it is open to you, if you find, that he drove at a speed or in the manner dangerous to the public, and that his driving was the substantial cause of the death of Renaldo Gaskin or Blades, or both of them, to find him guilty of causing death by dangerous driving. If you do not so find, if you are in doubt about it, then you must find him not guilty. If, however, you find that he did in fact drive dangerously, but that his driving was not the cause of the death of Renaldo Gaskin or Dale Blades, you may return a verdict of dangerous driving. Guilty of dangerous driving even though no such charge appears on the indictment. Now, the law does not provide a definition of dangerous driving. Dangerous driving is just that, dangerous driving. As long as there is some fault on the part of the person who is alleged to have been driving dangerously. So it is for you, Mr. Foreman and members of the jury, to examine the evidence to see what in fact, the accused did. This is what you have to do. You are the judges of the facts, you set the standards. Are you satisfied that he drove in a manner dangerous to the public? You have to determine how in fact he drove on the day, on the night, or the morning in question. Was it in a manner dangerous to the public?

[108] The jury seized with this direction and being cognizant of the fact that Blades died on the spot and that Gaskin was extricated from the vehicle, taken to the hospital, underwent surgery and died two days later, evidently concluded that these two deaths were to be viewed differently. Defence counsel's address would have given the jury pause. The trial judge reminded the jury about this: (page 253 lines 18 to 32 and page 254 lines 1to 5):

> "Now you will recall that no doctor came and testified before you that he or she pronounced Renaldo Gaskin dead, and you will also recall the evidence is that Renaldo Gaskin was cut from MU132 by the firemen, using the "jaws of life" and transported to the Queen Elizabeth Hospital, and later, Dr. Jones testified that he performed an autopsy on the body of Renaldo Gaskin, and of the injuries he found on examination, and of his opinion that death was as a result of traumatic chest, abdominal and lower limb injuries with haemorrhage and shock, and the injuries were consistent with injuries sustained in a vehicular collision.
>
> Now you will recall that defence counsel pointed out to you in his address, that no one came before you to say that he, that's no doctor, to say that he or she pronounced Gaskin dead, or what injuries he had, or what treatment he received at the Queen Elizabeth Hospital before he died. So, defence counsel tells you there is a lacuna, and that means there is a gap in the evidence, and this relates to what transpired to Renaldo Gaskin at the Queen Elizabeth Hospital."

[109] Thus, where one verdict is readily explicable from the way in which the prosecution or the defence have put the

case, from the evidence and from a proper direction from the judge on the law and facts, and where the second may well be attributable to the jury's attempt to do justice on the facts regardless of the constraints of the charges or to a failure by the judge to give adequate directions as to the consequences from the second verdict of a possible conclusion or the first, the court could properly form the view that only the second verdict should be quashed: per *Auld J* in ***R. v. McKechnie and Others [1992] 94 Cr. App. R. 51.***

[110] We consider apposite the words of *Lord Bingham CJ* in the unreported case of ***R. v. W (M) (30 March 1999)*** which were cited with approval by *Thomas LJ* in ***R. v. B & Q plc [2005] EWCA Crim 2297*****:**

> "It seems to us important to begin our consideration of this matter by reminding ourselves of the role of the jury in a criminal case. The jury is one of the oldest and most highly valued of our legal institutions, esteemed by the public and almost all of the legal profession, for the fairness, open-mindedness, common sense, practical judgment and breadth of experience which jurors bring to their important task. But the jury is not a precision instrument. It delivers its decision ordinarily in one or two words; it gives no reasons; it provides no explanation. While jurors ordinarily listen with obvious attentiveness to judicial directions, no one can be sure what they make of those directions in the course of their deliberations. It may be that if their thought processes were subjected to logical analysis, flaws would be found. If, however, a flawless process of reasoning were required, a jury would be a strange body from which to require it. As *Evans LJ* pointed out in ***R. v. Van Der Molen [1997] Crim LR 604, 605*****,** the court must be very careful not to usurp the role of the jury."

[111] We are of the view that the appellant having received a fair trial, the inconsistency of the verdicts did not prejudice the appellant in any

way and therefore should not result in the quashing of both verdicts. It would however be just to set aside the verdict on the second count and let remain the verdict on the first count.

[112] The Constitution provides that in addition to the guarantee of a fair trial, an accused person is entitled to a hearing within a reasonable time. The chronology of this case reveals that the incident occurred on 29 June 2002. Some five years later on 30 July 2007 the appellant was convicted and the appeal came on for hearing on 14 October 2009.

[113] The appellant was granted bail pending appeal and taking into account the period which has elapsed since the incident and the final adjudication of the case, we do not consider it appropriate to reinstate the period of imprisonment. We are therefore of the view that the ends of justice would be better served by varying the sentence.

Disposal

[114] We therefore dismiss the appeal and vary the sentence by substituting therefor a fine of $8000.00 to be paid in 3 months or 12 months imprisonment.

The appellant is also disqualified from holding a driver's licence for a period of 2 years effective from today and his driver's licence must be endorsed with the particulars of this order.

Chief Justice

Justice of Appeal Justice of Appeal