JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 119/04

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

LLOYD BROWN v R

Mrs. J. Samuels-Brown, Miss Keisha McDonald and Mr. Patrick Peterkin for the appellant

Miss Paula Llewellyn, Snr. Dep. Director of Public Prosecutions, Mr. John Tyme and Tracy-Ann Johnson, Crown Counsel (Ag.) for the Crown

2nd, 3rd, 10th, March 2006; 15th, 16th, March 2007 and June 12, 2008

HARRISON, P.

This is an appeal from convictions by a judge and jury on four counts of an indictment for the offences of manslaughter at the Manchester Circuit Court on 4th June 2004. The appellant was sentenced to serve a term of six years imprisonment at hard labour on each count. The sentences are to run concurrently.

The relevant facts are that on the 24th of June 1998 at about 9:40 p.m. prosecution witness Errol Lemonious was driving a left hand drive Ford Ranger pickup, blue in colour, along the main road – Winston Jones highway in the parish of Manchester. He was driving on his left hand side of the road going

towards Kingston at about 50 kilometers per hour. The road surface was asphalted and dry. A tractor trailer was travelling behind him. The witness Lemonious saw the lights of a motor vehicle coming from the opposite direction. At a distance of 12 feet from his Ford Ranger Pickup the oncoming motor vehicle "... drifted to the left side of the road where he (Lemonious) was." Lemonious swerved to his left, further to the embankment, as far as he could. The motor truck continuing, came towards him and struck his vehicle on its right side, causing his pickup to roll over, ending up with its wheels on the road surface. Lemonious came out of his pickup, and saw the tractor that had been travelling behind him "pinned" to the left embankment by the truck – a Mack truck, that had struck him. He saw in the tractor trailer, a female "pinned" motionless and the driver bleeding. Lemonious denied that he had, in overtaking the tractor trailer, gone across the road and collided with the Mack truck.

Delroy Spencer, the driver of the tractor trailer, an 18-wheeler, was travelling downhill on his left at a speed of 30 mph with passengers, on the Winston Jones Highway in the parish of Manchester going towards Kingston. He saw a line of traffic coming from the opposite direction. He then saw the Mack truck "leaving its line and coming towards me over to my side", when it was 2 to 3 chains from the tractor trailer. Spencer applied the brakes of the tractor trailer and moved further left up to the embankment. The Mack truck hit into the right side of the tractor trailer. There was "a big explosion." The body of the trailer was up in the air, with the Mack truck underneath "pinning" the trailer.

Prosecution witness Sergeant of Police Lancelot Lambert went to the scene at 10:00 p.m. along the Winston Jones highway. He saw the red Mack truck on its right side of the road, underneath a tractor trailer. The front of each vehicle was resting on the left bank facing Kingston. He saw the Ford Ranger pickup, about four yards down from where the trucks were. He had the Mack truck removed from the body of the tractor trailer which was resting on the truck. He took measurements. He said that the point of impact, where he saw debris, blue duco and broken glass, was 13 feet from the left embankment on the left as one goes to Kingston. That is, he said, 6 inches from the white centre line within the left side of the road as one goes to Kingston, where the pick up was. The width of the road at the point of impact was 21 feet, with a soft shoulder 3 feet wide on the side going to Kingston. There were no drag marks. He saw in the tractor trailer 2 males and 2 females all, lifeless. He sent them off to the hospital.

The appellant, in his defence, said that, he was driving a Mack truck loaded with wet river sand on the left, downhill, going towards Mandeville. He saw a sudden flash in front of him from the opposite direction and heard an explosion. His truck dipped "swagged" and started drifting to the opposite side of the road. He had seen lights coming up from the opposite direction and a set burst up from behind a truck going in the Kingston direction. He denied that he swerved to his right and collided with another motor vehicle. He admitted, in cross-examination that in his statement to the police he made no mention of a

van nor of a tyre that burst. The defence witness Anthony Dawkins stated on oath that he was a passenger in a pickup travelling behind the Mack truck and he saw the Ranger come across the road and hit the front wheel of the Mack truck, then go across the road in front of the trailer and hit the trailer. He said that the front wheel of the Mack truck blew out.

The jury accepted the prosecution's case and convicted the appellant on each count of the indictment.

Leave to appeal was granted on 16th March 2005.

The appellant filed eighteen original and five supplemental grounds of appeal. He was granted leave to argue the supplemental grounds.

The original grounds of appeal read:

> "(1) The Learned Trial Judge erred in law in rejecting the submission for the Appellant that the prosecution had failed to establish a prima facie case against him.
>
> (2) The verdict of the jury was unreasonable and cannot be supported having regard to the evidence.
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> (3) The Learned Trial Judge erred in law in that she failed to direct the jury on, and/or failed to assist the jury adequately or at all to resolve, the discrepancies and inconsistencies within and between the evidence of Errol Lemonious and Sergeant Lancelot Lambert.
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> (4) The Learned Trial Judge erred in law in that she failed to direct the jury on, and/or failed to assist the jury adequately or at all to resolve, the discrepancies and inconsistencies within

and between the evidence of Errol Lemonious and Delroy Spence.

(5) The Learned Trial Judge erred in law in that she failed to identify to the jury, and/or failed to assist the jury adequately or at all to resolve, the discrepancies and inconsistencies within and throughout the evidence of Errol Lemonious, Delroy Spence and Sergeant Lancelot Lambert.

(6) The Learned Trial Judge erred in law in that she failed generally to direct the jury on the drawing of inferences, and in particular she failed to direct them that they should only draw inferences that are inescapable.

(7) The Learned Trial Judge erred in law in inviting the jury, to make a distinction between a 'drifting' as against a 'swerving' of the truck driven by the Appellant, and to make the distinction in such a way as to draw an inference that the Appellant was tired or worse fell asleep thereby occasioning the former manoeuvre as against the latter, when in fact no evidence was led to describe the manoeuvre that was called a 'drifting' and to distinguish it from a 'swerving.'

(8) The Learned Trial Judge erred in law by misstating the evidence when she told the jury that the Appellant was saying that the lights he saw coming the opposite direction caused him to swerve, when in fact what the Appellant said in evidence was that after he saw the lights he heard an explosion. The Appellant was prejudiced by this misstatement when the Learned Trial Judge went further and invited the jury to consider why the Appellant did not swerve to the left instead of to the right.

(9) The Learned Trial Judge in her summing up commented that the credibility and truthfulness of the Appellant was at the very heart of the

matter, and juxtaposed that comment with a reminder to the jury that the Appellant gave to the police in his statement one version of the time he left May Pen for Saint Elizabeth, and gave another version in his evidence, and she thereby invited the jury to say that the Appellant was not credible and was untruthful on the point, which invitation was unwarranted, as it did not take into account that the difference could have arisen from genuine mistake and was also unbalanced, as there was no similar comment regarding differences in versions given by prosecution witnesses on other points.

(10) The learned Trial Judge erred in law when she commended to them the view of counsel for the crown that the Appellant must have accelerated uphill to the point of impact because he was travelling in 2nd gear and 2nd gear is usually used to accelerate without commending to them also the evidence of the Appellant that he was, before arriving at the impact, travelling downhill, loaded with sand weighing about 24 tons, and was so travelling in the 2nd of 7 gears, which is a low gear.

(11) The Learned Trial Judge erred in law in that she failed adequately to direct the jury on the degree of negligence that was required to establish the offence of manslaughter, and on the differences in the degrees of negligence required for the offence of Manslaughter vis a vis the offence of Causing Death by Dangerous Driving.

(12) The Learned Trial Judge failed to analyze adequately for the benefit of the jury, the legal ingredients of the alternate offences especially of the lesser offence, and analyzed same so succinctly and ineffectively that the jury could not reasonably have been assisted thereby.

(13) The Learned Trial Judge failed to analyze the alternate offence of Manslaughter and Causing Death by Dangerous Driving against the evidence led, and did not adequately assist the jury to identify the particulars of and the issues arising from the evidence, that were relevant to arriving at a verdict as to the lesser offence as against or instead of the other, and the summing up was therefore not conditioned by the nature of the case and the issues raised therein.

(14) The Learned Trial Judge erred in law when she unnecessarily adjourned the trial of the Appellant on several occasions to facilitate another trial and/or other trials, thereby resulting in the Appellant's trial being unnecessarily discontinuous and extended.

(15) The Learned Trial Judge erred in law, and/or caused a miscarriage of justice, when she ruled that she had no power, and refused , after the jury had left the box but had not dispersed as they all came back into court, to investigate the allegation made to the court by a woman police corporal, that a member of the jury had complained to her that the foreman had announced the wrong verdict, and that the verdict agreed by the jurors was in fact "not guilty" to the charge of manslaughter.

(16) The sentence imposed on the Appellant was manifestly excessive and did not give adequate weight to the good character of the Appellant nor to the highest level of culpability that the evidence was capable of showing.

(17) The Learned Trial Judge erred in law in that the severity of the sentence imposed by her on the Appellant resulted from immaterial considerations being taken into account by her. In particular, the Learned Trial Judge criticized the Appellant for denying under cross-examination that he was tired, and she stated

that if he had told the jury that he fell asleep he probably would not be where he was (before her for sentencing)."

The supplemental grounds read:

"1. The summing up was unbalanced and/or unfair whereby the Appellant's chances of acquittal were impaired and there has been a miscarriage of justice.

2. The physical evidence of the damage to the Ford Ranger pick-up and point of impact between it and the Mack truck did not support Mr. Spence's account of the impact being to the extreme left and then his car 'rolling and rolling' to the middle of the road. The Learned Trial Judge failed to point this out to the jury which non-direction amounted to a misdirection.

3. The Learned Trial Judge erred in law in that she failed to direct the jury that the witness Errol Lemonious was objectively a witness with a purpose of his own to serve and accordingly his evidence ought to be approached with caution.

4. The Learned Trial Judge erroneously left to the jury matter for their consideration which were not the subject of evidence, to wit:

   (a) 'So this now is when you hear about the car in that line up. He said they overtook him just as he came from under the overhead bridge, that is ten chains from where the collision occurred.'. p. 360 lines 12-16
   (b) 'As I said earlier to decide you are to use your knowledge about blown out truck, if you have any'. P. 380 line 11-13

5. The Learned Trial Judge's directions on the burden and standard of proof, in the context of

> the Appellant giving evidence were inadequate and/or confusing."

Ground 2 and supplemental **ground 1** may be considered together.

Counsel for the appellant argued in support of this ground that aspects of the physical evidence contradicted the evidence of the police officer as to the point of impact, the learned trial judge's treatment of differences in the evidence of the various witnesses was erroneous and blameworthy of the appellant, and the failure to point out certain specific discrepancies between the evidence of the prosecution witnesses, per se, and that of the defence witness Spence and the prosecution witnesses, caused the jury to return an unreasonable verdict unsupported by the evidence. Miss Llewellyn for the prosecution argued that the directions of the learned trial judge cannot be regarded as unbalanced or prejudicial, nor was she obliged to conduct a minute examination, as counsel for the appellant did. Counsel for the prosecution correctly directed the Court to ***R v Joseph Lao*** (1973) 12 JLR 1238. The headnote reads:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which tell for and against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable."

In my view one cannot say that "the verdict was so against the weight of the evidence as to be unreasonable and insupportable."

The physical evidence, the real evidence in the case, was properly highlighted by the learned trial judge and which, on an examination by the jury, along with the oral testimony of the witnesses, would have been most helpful and conclusive to the jury in arriving at the verdict.

The observations made and measurements taken by Sgt. Lancelot Lambert at the scene of the accident reveal that the width of the road at the point of impact was 21 feet. The white centre line would accordingly be 10 feet 6 inches inches from the edge of the road. The point of impact between the Mack truck and the Ford Ranger was 13 feet "from the left bank facing Williamsfield (Kingston)." At pages 85-86 of the transcript, he said:

> "A ... point of impact, truck and van, Mack truck and Ford Ranger van, 13 feet from the left bank facing Williamsfield. Width of road at point of impact, Mack truck and trailer, 21 feet. Three feet soft shoulder left facing Williamsfield."

That measurement of "13 feet from the left bank ..." inclusive of "three feet soft shoulder" placed the point of impact at a point 6 inches from the white centre line on the left hand side of the road facing Williamsfield, as one goes to Kingston, that is on the tractor trailer's and the Ford Ranger's side of the road. At page 90, the evidence in-chief-reads:

"Q. With the point of impact on which side of the road, let's say you were going towards Williamsfield, which part of the road would be the point of impact between the Mack truck and the trailer?

A. On the left hand side."

...

Q. Now in respect of the point of impact between the Mack truck and the ranger van – okay, could you tell us what you observed why you say the point of impact was where you saw it?

A. At that point I saw broken glass, head lamp glass.

Q. You are dropping your voice.

A. I saw broken glass, blue strips of duco and dirt.

Q. Any other vehicles were blue?

HER LADYSHIP: Any of the?

MR. MAHONEY: Vehicles.

Witness: The ranger van."

and at page 91 –

"Q. And similarly, when you said point of impact was 13 feet from left bank facing Williamsfield, that would mean it is 3 feet of soft shoulder and 10 feet of road surface?

A. Yes, sir.

Q. Which would put it on which section of the road as you face Williamsfield?

A. Not exactly, slightly on the left, not exactly in the middle."

From that evidence, which was unchallenged, the jury could not have been but convinced that the collision between the appellant's Mack truck and the Ford Ranger van driven by Lemonious occurred on the left side of the road facing Kingston, the tractor trailer's side of the road, which was the appellant's incorrect side of the road. The police officer saw the Ford Ranger van "four yards further down towards Williamsfield" from the Mack truck.

Additionally, Sgt. Lambert testified that at the scene he saw the red Mack truck with its front resting on the left road bank as one faces Williamsfield (Kingston)," and resting on top of the bonnet of the Mack truck was a tractor trailer. He said:

> "Point of impact, truck and trailer, eight feet from left bank." ... "Width of road at point of impact, Mack truck and trailer 21 feet. Three feet soft shoulder left facing Williamsfield."

He determined this point of impact on seeing on the road surface, eight feet from the left bank, white strips of duco, broken headlamp glass, dirt and strips of metal. The trailer head of the tractor trailer was white.

This real evidence of the points of impact indicated by

> (a) broken glass, blue strips of duco and dirt, 13 feet from the left bank facing Kingston and 6 ins from the white centre line facing Kingston, on the Ford Ranger's correct side of the road, and
>
> (b) broken glass, blue strips of duco and dirt 8 feet from the left bank facing Kingston, on the tractor trailer's correct side of the road,

is clear evidence from which the jury would have found that the collisions occurred on the appellant's incorrect side of the road. The jury quite correctly accepted that that real evidence did not support the evidence of the appellant and concluded that it was he who drove onto his incorrect side of the road and not that he was initially struck by the Ford Ranger to cause him to go onto his right side of the road, as he claimed. The learned trial Judge was correct to tell the jury in respect of the appellant's contention, at page 395 of the transcript –

> "The physical evidence does not support that, it is a matter for you what you believe."

Complaint was also made by counsel for the appellant that the learned trial judge misunderstood that there was a difference in the evidence by the use of the words by the witness Lemonious "it swerved" and by the witness Spence "...all of a sudden I saw the truck leave his line," in describing the movement of the appellant's Mack truck, and erroneously invited the jury to find that the appellant was at fault. We do not agree with counsel for the appellant.

The learned trial judge gave a proper direction when she said at page 377:

> "At this point you might wish to remember the evidence of Mr. Lemonious and Mr. Spence and indeed the word that the accused man used, although he gave a different reason. So this is not a person who is said to have drove (sic) out suddenly. Mr. Lemonious said a drifting over, Mr. Spence said he left the line of traffic and came over to his side. So, it is for you to put all of that together, even though the

> accused man is saying he was not tired, and see what you make of that."

The learned judge recognized and stated repeatedly that the facts are the exclusive province of the jury, even in circumstances where comments or views are expressed by the trial judge. The learned trial judge said, at page 310 –

> "Now, your area of responsibility is the facts of this case. You are the supreme judges of the facts. It is your duty and yours alone to decide on the facts you accept as proved in this trial ..."

and at page 314 –

> "Now, in the same way, in the course of this summing-up, if I express any views on the facts or emphasize any particular aspect of the evidence, do not adopt those views unless you agree with them. Now, please note that I am here talking about views that I may express on the facts, that is what I am saying, that you must not accept them, unless you agree with them. I am not talking about my directions in law, you have no choice there. My directions in law, must be accepted by you and followed by you, however, as far as the facts are concerned, that is your area of responsibility.
>
> If I express any views on the facts, you must not adopt those views unless you agree with them."

and also at page 315 –

> "So it may be that I mention something which I think is important, you must remember that your verdict must be based on the evidence. If that happens, I mention something that you think is important, you must consider it and give it such weight as you think it deserves.
>
> It is for you to decide on the facts of the case and then you put them together with the directions in law, in other words, to arrive at your verdict."

Each witness was describing what he the witness perceived to be the movement of the truck. The use of the phrase "all of a sudden" by the witness Spence does not mean "suddenly" as, misconstrued by counsel for the appellant.

I agree with learned counsel for the prosecution that the learned trial judge was correct in expressly directing the jury that the facts are for their consideration. Counsel referred to the case of ***Uriah Brown v The Queen*** [2005] UKPC 18. In that case the summing up of the trial judge was criticized as "unbalanced and unfair", in that "...the judge had placed excessive weight on the evidence of the prosecution witnesses or unduly criticized evidence given by or on behalf of the appellant." Their Lordships, observed, in paragraph 33:

> "... it is the effect of the totality of a judge's directions which is important. They also bear in mind that a judge is entitled to give reasonable expression to his own views, so long as he makes it clear (as the judge did) that decisions on matters of fact are for the jury alone and does not so direct them as effectively to take the decision out of their hands."

A further complaint is made in this ground that the learned trial judge erroneously failed to point out certain discrepancies arising in the evidence of the various witnesses.

There is no duty on a trial judge to point out to the jury each and every discrepancy which arises in a case. It is sufficient that the learned trial judge points out some of the major discrepancies, as illustrations of such discrepancies,

give proper directions of the manner of identifying such discrepancies and further advising the jury to decide whether they are material or immaterial and the way in which they should be treated.

In such circumstances, it is the credit of the witness which is in issue. The creditworthiness of a witness is a matter of fact for the jury. In the case of ***R v Baker et al*** [1992] 12 JLR 902 at 912 in considering the duty of the trial judge in dealing with discrepancies, Smith, J.A. (as he then was) said:

> "... in a proper case, ... the judge is under a duty to assist the jury in assessing the credit-worthiness of the evidence given by a witness whose credibility has been so attacked. This duty is usually sufficiently discharged in our opinion, if he explains to the jury the effect which a proved or admitted previous inconsistent statement should have on the sworn evidence of a witness at the trial and reminds them, with such comments as are considered necessary, of the major inconsistencies in the witness' evidence. It is then a matter for the jury to decide whether or not the witness has been so discredited that no reliance at all can be placed on his evidence. There is, of course, the inherent power of a judge to withdraw a case from the jury if, in his view, the only witnesses in proof of a charge have been so discredited that no reasonable jury could safely rely on their evidence. If, however, there is evidence in the case in support of the charge, apart from the discredited evidence, on which it is open to a jury to convict, the judge, in our opinion, has no power and, thus, no legal duty to withdraw the discredited evidence from the jury leaving the other evidence only for their consideration. All the evidence must, *ex hypothesi*, be left to the jury as judges of fact with a strong comment by the judge against the acceptance of the evidence which he considers to be so discredited."

Despite the discrepancies, the resolution of which was for the jury, we are of the view that the strength of the physical evidence and the corresponding oral testimony were properly accepted by the jury. We find no merit in this ground.

Ground 1

Counsel for the appellant argued that the learned trial judge was wrong to have rejected the submission of no case to answer.

Where the strength or weakness of the prosecution's case relies on the view to be taken of the witness' reliability, and where on one possible view of the facts there is evidence upon which a jury could properly find the accused guilty, the case ought to be left to the jury – ***R v Galbraith*** [1981] 2 All ER 1060. This test was satisfied at the close of the case for the prosecution. The credibility, of the witnesses was a fact for the jury. The witnesses' testimony and the physical evidence were, in our view, sufficient evidence on which a jury properly directed could find the appellant guilty. The learned trial judge was correct to find that a prima facie case had been made out. There is no merit in this ground.

Grounds 3, 4 and 5

These grounds may be considered together. In these grounds counsel for the appellant complains that the learned trial judge failed to direct the jury adequately in respect of the discrepancies and inconsistencies that arose in respect of the witnesses Lemonious, Sgt. Lambert and Spence, comparing each with the other.

No such duty is placed on a trial judge. This minute comparative examination of facts was expressly regarded as not required by Henriques, P in ***R v Joseph Lao*** (supra), moreso when their credibility is being considered. The learned trial judge correctly, left the finding of facts to the jury and the resolutions of discrepancies also for their consideration. In respect of the manner in which the jury should deal with discrepancies, the learned trial judge said at page 317 of the transcript –

> "Now, when the witness is shown to have said something different, you must remember the evidence is what the witness has told you here. Any admission about something said elsewhere is an admission, just that, unless the witness accepts that was the truth, before you in this trial. So, what was said outside, whether in a statement or before another court is not evidence, unless the witness tells you here, that is so. Then it forms part of the evidence here and if this is put, something different from what the witness has told you, put before you it's just to show you that the person had said something different outside of this trial. I invited you to consider it not as evidence in the case, but to say that at another time the witness had said something different from what the witness is telling you and that should assist you in trying to decide whether what the witness is telling you at this trial is true or not."

and at page 321 she said:

> "Now, Mr. Foreman and members of the jury, in your lives (sic) experiences you will no doubt come to realize that people from different walks of life operate at different levels of intelligence and it is for you to assess the witnesses' level of intelligence as you look at and listen to the witnesses. For instance, some people are able to recall details of an incident like it was just happening while others are unable to recall. Some people can express themselves well when

telling about something happening and some people cannot express themselves well at all. They just don't know how to put it in words to make themselves clearly understood. Because people are so different, it very often happen (sic) in these trials that when witnesses come to give evidence differences are seen in the evidence. So that one witness may say something about a particular matter at one point in the evidence and then that same witness might go on to say something different about the same matter at another point in the witness's evidence. It may be that one witness may say something and another witness say something different about the point. Now, these are the differences which are referred to as discrepancies and inconsistencies. It is for you to say whether there are any such differences in the evidence you have heard in this trial.

Now, if you find that these differences exist, then you must go on to assess them. That is, you must go on to say whether they are slight or serious. Now, if you decide that the discrepancy or inconsistency is slight, you would be well within your right to say that it does not really affect the credibility of the witness concerned and you can still rely on the evidence of the particular witness.

On the other hand, if you decide that it is serious, you may feel it will not be safe to rely on the evidence of that witness on that particular point where you find the difference, or it may be that it is so serious you do not feel that you can safely rely on the evidence of that witness at all. It is for you to say whether any difference you find is slight or serious and then you go on to deal with them as I have directed you.

You must bear in mind that a difference in a witness's evidence does not necessarily mean that a witness is lying, although it could mean just that. You have to consider the evidence carefully. When assessing the discrepancy or inconsistency you should take into consideration the witness' level of intelligence as you assess it. The witness' ability to recall, powers of observation, as you recall, as you assess it rather

> than to whether you feel that the witness is able to vividly recall the incident, and also consider the lapse of time between the date when the incident occurred and the date the witness is giving evidence. In this case you have heard about an incident that took place on the 24th of June 1998 and the witnesses are here now being called upon to give evidence about it in the year 2004."

The above are comprehensive directions to the jury of the mode of treatment of discrepancies. The learned trial judge thereby properly discharged her functions to the jury. To do otherwise, the learned trial judge may well have been criticized as usurping the functions of the jury. For these reasons and for those previously expressed by us, in relation to ground 2 with reference to ***R v Barker, et al*** (supra) we find no merit in these grounds.

Ground 6

No arguments were advanced in support of this ground. We therefore treated it as abandoned.

Ground 7

The complaint by counsel for the appellant was that the learned trial judge was in error to invite the jury to consider the manoeuvre of the appellant's truck prior to the collisions, in view of the witnesses' Lemonious' use of the word "drift" and the witness Spence's description of a "swerve".

The learned trial judge, in her directions to the jury, said, at page 334:

> "Now, you (sic) wish to take note, Mr. Foreman and members of the jury, of the movement, or how he

> described the movement of the truck that was coming from the left side. He is not saying it swerved, he is saying it drifted and you might find significance in that later on when assessing the evidence, in that it drifted over to his side."

and at page 342:

> "Now, Mr. Spence tells you that as he was travelling going down and reached down at that section as he puts it, he saw a line of traffic coming from the opposite direction. Now, this line of traffic, at this time when he was talking to prosecuting attorney, he said consisted of three cars in front of the truck that was coming on. And then he says, 'All of a sudden, I saw the truck leave his line and coming towards me.' It leaves from the line of traffic he was travelling in and coming over to my side. So, again you wish to look at this, how he says it happened and Lemonious says it as well. He said he applied his brakes and tried to move further left, but could not go no further because he was already up to the embankment."

and further at page 376:

> "Now, prosecuting attorney asked him if he was tired and he said no. Mr. Foreman and members of the jury, you will recall what prosecuting attorney had to say to you about that. You may well wish to recall the evidence on the work schedule, getting up at 4:00 to 4:30, driving for 5 to 5 ½ hours with a loaded truck drawing 26 tons of silica sand. I don't know what you assess his age to be, you saw him. Then after that, according to his evidence, you know he goes to pick up another load which weights approximately 24 tons. All of this in one day. Hauling that load on the way back to St. Elizabeth, the time was a quarter to ten.
>
> His day would have started from 3:30 to 4:30, five to five and a half hours of driving, pulling this heavy weight, picking up more sand, pulling another heavy weight. He didn't say any anything about a rest period, all you hear about is the time it took for

> loading, it is a matter for you. Not because the accused man has told you that he was not tired, but you have to use your commonsense, you have to use your experience of life, your wisdom, you put all of that together and look at the evidence and examine it for yourself and see what conclusions you come to on the basis of the evidence you have heard. These are surely matters for your consideration."

As we pointed out, in our consideration of ground 2, the learned trial judge left the finding of facts exclusively for the jury, highlighting the discrepancies, and leaving them for the jury's consideration. As observed, the physical evidence revealed that there were no collisions on the appellant's left side of the road, but on the contrary, on his incorrect side. A deliberate act of driving by the appellant onto his incorrect side of the road, while he was in his words "fully alert" and in full control of his motor vehicle, at a time when other motor vehicles were approaching him from the opposite direction, can only be seen as a dangerous manoeuvre. The learned trial judge was more than generous to the appellant, in pointing out this area of the evidence for the jury's consideration. There is no virtue in this ground.

Ground 8

Counsel complained that the learned trial judge misdirected the jury by saying that the appellant said that the oncoming lights caused him to swerve instead of telling the jury that he said that he saw the lights and heard an explosion.

The evidence from the cross-examination of the appellant by counsel for the Crown, at page 198 of the transcript, reads:

> "Q. You said that, in answer to counsel, that there is no truth to the statement that whilst you were travelling along the highway you swerve to your right. In your statement to the police ...
>
> HER LADYSHIP: Just a minute. You said that you agree that you said that, sir?
>
> WITNESS: Yes, I did swerve to my right.
>
> HER LADYSHIP: You are saying there is no truth to that. Your question now?
>
> Q. In your statement, let me deal with the full statement. Did you tell the police the truck then wabbled and dip? Let me start before that. 'I then heard an explosion from the right side of the truck.' You told the police that?
>
> A. Yes, sir."

and at page 200:

> "Q. But you agree with me that while you were in the hospital you told the police, when he asked you what happened, that a van hit you in the right back wheel of your truck and cause you to go across the right of the road?
>
> A. Yes, I did say that."

The direction of the learned trial judge to the jury, relevant to the complaint, is recited at pages 363-366 of the transcript. With reference to the evidence of the appellant, the learned trial judge said:

> "So he talks about a vehicle from the Williamsfield direction going to Kingston direction, that would be

> the vehicles that were approaching him and so he recognized the truck lights by the clearance light, he suddenly saw this burst of light coming from behind the truck and coming up. He says he could take no evasive action.
>
> Now, what Mr. Brown, you might well think that he is saying, he was being overtaken by this van – I'm sorry, the van is overtaking the trailer. All his lights were on so it would be easy to see him and he said it was not true to say he was travelling along and swerve to his right and collided with another vehicle.
>
> However, the next question that was asked of him, according to my note, was, 'At the time the light came upon you and you swerve to the right were there other vehicles in front of you?' And he said, 'Yes, trailer head, the pick-up and the car.'
>
> So, is Mr. Brown saying to you that he wasn't just travelling along and swerved but the light caused him to swerve and why he swerved to the right, according to the unchallenged evidence of Sergeant Lambert, there were two feet of soft shoulder available to him. So, you might well be asking yourselves why he swerved to the right in the path of the oncoming traffic, one of which was a truck which he recognized to be a truck because of the clearance light, but that is his evidence. He has told the police the pick up collided with him and caused him to go on to the right and then there was the impact with the trailer."

In our view, the complaint of counsel for the appellant is taken out of context and is misconceived. The learned trial judge quite fairly put to the jury both the case for the prosecution and the case for the defence, for their consideration. The evidence was that there was a soft shoulder of two feet to the appellant's left. The learned trial judge was quite correct to ask the jury to

consider that if there was a conscious swerving by the appellant "At the time the light came up (him), why he had not swerved to his left".

This was not a misdirection. Nor was any prejudice caused to the appellant. There is no merit in this ground.

Ground 9

Counsel for the appellant complained that the learned trial judge, in inviting the jury to conclude that the evidence of the appellant in giving differing times in his statement to the police, as opposed to his evidence in court, in respect of the time he left May Pen going to St. Elizabeth was not credible and was untruthful, and unwarranted. In addition, the learned trial judge did not advise the jury that that difference could have arisen from a genuine mistake, and also, failed to make a similar comment in regard to discrepancies in respect of the prosecution witnesses.

The learned trial judge in her directions, at page 367 said:

> "Now, you will no doubt come to realize that the credibility or truthfulness of the witness is, however, of great importance, that certainly may be your thinking of this case up to this time. So you will have to look very carefully at all the evidence and seek the truth in it. You have heard different accounts and so it will be your job to determine what really happened."

and at page 369:

> "He said he did not take the sand from West Indies Glass but from May Pen. You probably remember

> defence attorney's address on that. Is for you to determine whether what is the importance of what he says because you will remember my directions on discrepancies and follow them."

The learned trial judge was, as she properly could, pointing out to the jury a discrepancy in the evidence of the appellant, but left it to the jury to resolve it. Her general directions to the jury on the recognition of a material or immaterial discrepancy, both in the case for the prosecution and the case for the defence, and how to resolve them, were correct, adequate and comprehensive.

Trial judges are not required to follow any particular fixed formula in directions to a jury. Nor could the jury have failed to consider that in common experience differences in testimony may arise from mistakes made by a witness. The learned trial judge did point out differences that arose on the prosecution's case. For these reasons and our views expressed, in respect of grounds 2, 3, 4 and 5 concerning the learned trial judge's directions on discrepancies, we can find no basis to fault the learned trial judge on this ground. This ground also fails.

Ground 10

Counsel complained that the learned trial judge misquoted the evidence in stating that the appellant's truck was going up hill and in the context of the cross-examination of the appellant, that by not using his brakes he allowed his motor vehicle to go too fast, implying that he was negligent.

The cross-examination of the appellant by counsel for the prosecution, at page 191-193 of the transcript reads:

"Q. In fact, you (sic) travelling down hill at the time?

A. When it happened, sir?

Q. Just before the incident happened?

A. Yes, sir, I was coming down the hill?

Q. And would you agree with me that with load, even with load, if you don't put your foot on the gas the vehicle pick up momentum rolling down hill. Agree with me on that?

A. If what?

Q. Even if your foot not on the gas, just the load alone, wouldn't it give the vehicle momentum driving down hill?

A. The load would normally push the vehicle.

Q. Which the vehicle would pick up momentum beyond 15, 20 miles per hour?

A. Normally.

Q. Isn't that so?

MR. PHIPPS: May he be allowed to answer?

A. Normally, driving a loaded truck the truck you asking about, sir, coming down the hill if you just leave it alone like that it would go up by itself?

Q. So?

A. That's the question you asking if you leave it alone?

Q. It would go beyond 15 to 20 miles per hour?

A. Yes, it would go beyond that.

Q. Now, did you tell the police that you were coming down hill?

A. Yes, sir."

In re-examination of the appellant, at page 212 it reads:

"Mr. Brown, is there anyway to control the speed without applying brake?

A. Yes, sir, you can control the speed without applying brakes?

Q. Let me ask you, what gear were you travelling in at the time of the accident?

A. Second gear, sir.

Q. And what effect would that have on your speed?

A. It helps to hold back the truck, that the truck don't develop speed downhill."

The learned trial judge in her directions to the jury, at page 371 said:

"He agrees that he was travelling downhill when the incident occurred, also agrees that he was travelling with foot on the gas, driving a loaded truck downhill and just the load alone would make the truck pick up momentum, in other words, it push along down the hill, in his words, the load would normally push the vehicle. He agrees that normally coming down, leaving it alone it could go beyond 15 to 20 miles an hour and that he told the police that he was going downhill and saw the

> vehicle coming towards him off the hill from the Mandeville direction. No vehicles were before him at the immediate time. He said then around that time three vehicles overtook his vehicle going down the hill towards Mandeville."

The learned trial judge did say at page 379:

> "Now, prosecuting attorney asked him, you know, if he was saying that a heavily laden vehicle, going uphill at 15 to 20 miles per hour, dipped and swagged, went across and pinned the truck to the embankment. Because, remember now this trailer truck; and you heard it is an 18 wheeler and heard them describe it in length, various lengths, he is going at 15 to 20 miles an hour, going uphill and goes across to the side and pins the truck to the left embankment. He said that the truck was heavily laden, the wheel blow out, it would be difficult to control the truck with the load, when the wheel blew out. He was asked when he discovered that the tyre blow out, and he said, 'I discovered that when I heard the explosion and the truck dipped and rocked to the other side, I didn't come to 'interview' the truck.'
>
> So the question was repeated to him and then he said after he came out of the hospital that was when he discovered that the tyre blew out."

The learned trial judge did recite that it was said that the appellant's truck was travelling uphill. That was a misquotation of that aspect of the evidence. The jury having heard the evidence and the further directions of the learned trial judge must have recognized this misquotation for what it was, a mere lapse by the learned trial judge. It was inaccurate for counsel for the appellant to submit that "under cross-examination of the appellant at pages 191 to 193 it had been

suggested that by not using his brakes he was allowing his vehicle to go at too fast a rate." No such suggestion was there made.

The learned trial judge, alluding to the views of counsel, erroneously again referring to "uphill", at page 381 said:

> "You heard in closing about putting the vehicle in gear going up the hill, I don't know if any of you are experienced with driving. If it might make sense to you or not. They expressed their views and it is for you to decide what makes sense to you, you adopt what makes sense and reject anything that does not make sense to you."

The learned trial judge here, was correctly directing the jury how to deal with views and opinions expressed by counsel and that the facts are for them to decide. In the context of the directions above, the jury could not have been misled, despite the misquotation by the learned trial judge. We see no merit in this ground.

Grounds 11, 12 and 13 may be considered together.

Counsel for the respondent conceded that on the basis of the recent decision of the Privy Council case in ***Uriah Brown v The Queen*** (supra) the conviction for manslaughter cannot be supported. Their Lordships set out the test to be applied, to satisfy the proof of motor manslaughter. At paragraph 30, they said:

> "A trial judge in Jamaica should give a jury a direction in a motor manslaughter case along the following

lines, which should be tailored or adapted to meet the requirements of the particular case:

(a) Manslaughter in this context requires, first, proof of recklessness in the driving of a motor vehicle, plus an extra element of turpitude. That extra element is that the risk of death being caused by the manner of the defendant's driving must in fact be very high.

(b) The jury should be told specifically that it is open to them to convict the defendant of causing death by reckless driving if they are not satisfied that the risk of death being caused was sufficiently high.

(c) Proof of reckless driving requires the jury to be satisfied

(i) 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;

(ii) that in driving in that manner the defendant had recognized that there was some risk of causing such injury or damage and had nevertheless gone on to take the risk.

(d) It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard which from their experience and observation would be observed by the ordinary and prudent motorist.

(e) If satisfied that an obvious risk was created by the manner of the defendant's driving, the jury must, in order to reach a finding of recklessness, find that he appreciated the

> existence of the risk; but they are entitled to infer that he was in that state of mind, though regard must be given to any explanation he gives as to his state of mind which displaces the inference."

Their Lordships observed that the trial judge in that case, failed to "refer to the appellant's mental state or attempt to give the jury any definition of recklessness." Their Lordships' Board quashed the conviction for manslaughter, and said of the offence of causing death by dangerous driving, at paragraph 39:

> "It is inherent in the jury's verdict that they must have been satisfied that the prosecution case was right and that the appellant had overtaken other traffic and was on his wrong side immediately before the collision. Their Lordships consider that that action of the appellant was clearly a serious misjudgment on his part and that it was notably dangerous to the public. On the jury's findings the appellant must be found guilty of causing death by dangerous driving."

Counsel for the appellant, in these grounds, complains that the learned trial judge failed to analyse the alternate offence of causing death by dangerous driving or did analyse it so inadequately or ineffectively in relation to the evidence that no assistance was afforded to the jury. We do not agree.

Section 30 of the Road Traffic Act (Jamaica) permits a jury before whom a person is charged with manslaughter, to convict instead, for the lesser offence of causing death by reckless driving or by dangerous driving. Consequently, if the learned trial judge left the alternative offence of causing death by dangerous driving, as was done, in the instant case, and the jury find that the manner of driving of the appellant was dangerous to the other users of the road, causing

death, they are entitled to return that alternative verdict. The learned trial judge, in directing the jury on the alternative offence of causing death by dangerous driving, at page 397 - 399 of the transcript, said:

> "Now, after you consider all of the evidence it may well be that you find he is at fault for this accident, but, you do not find that the degree of negligence was of such a high standard or such a high extent, that amounts to manslaughter. In that event you are entitled to consider another offence, which is the offence of Causing Death by Dangerous Driving. A person who causes the death of another person by driving a motor vehicle on the road at the speed in a manner dangerous to the public, having regard to all the circumstances of the case, including the nature the condition, the use of the road and the amount of traffic which was always (sic) on the road at the time or which may be reasonably have been expected to be on the road, that person is guilty of the offence of Causing Death by Dangerous Driving.
>
> Now, for the offence to be proved it is the manner of driving that is important, not common sense, bear that in mind. Now, you must be satisfied that the manner of driving was one of substantial cause of each death and you would have, as well, for this offence there is really no legal definition of driving which is dangerous to the public. The law places this on you, the jury, the duty to determine in any given circumstance the driving is or is not dangerous to the public. The law really depends on you, Mr. Foreman and members of the jury, to set the standard. You must make up your minds here, as to whether or not, what you find the accused man to have done on this night, during this incident, was dangerous to other users of the road.
>
> Now, anyone who uses the road, this is why the law puts this on you, to determine what is dangerous to the public, make up your minds. In doing so, you put yourself out there, in your mind try to visualize it in your minds, as though you were standing on the side

> of the road and put together the incident if you accept that it did happen. Ask yourselves whether if you were out there looking at the driving you would have said without any doubt, that driving was dangerous to other users of the road. If your answer to that question is yes, then he would be guilty. If your answer is no or that you cannot be sure then your verdict will be not guilty.
>
> Now, I have to tell you here, you see, that for this offence even if you think that negligence here was very slight on his part, even if you think it was due to just lapse of concentration for a moment, even if you think just because he failed to be watchful for a moment and that he was doing his best, however, important that would be, but that he was driving in the way that he did, you find that it was dangerous to the public, then he would be guilty of the offence of Causing Death by Dangerous Driving."

In our view, these directions of the learned trial judge were adequate, comprehensive and helpful to the jury. In ***R v Evans*** [1963] 1 Q.B. 412; 47 Cr. App. R 62 in a trial for the offence of causing death by dangerous driving, Solomon, J., the trial judge during the course of the trial said:

> "I shall feel it my duty to direct the jury that 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."

and, in his summing up to the jury, said:

> "... 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, that 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."

On appeal, the Court of Criminal Appeal approved of the directions of Solomon, J., re-affirmed the fact that there is an absolute prohibition in respect of dangerous driving, and said (per Atkinson, J.,):

> "If a driver in fact adopts a manner of driving which the jury think was dangerous to 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 ***Uriah Brown v The Queen*** (supra), their Lordships, commented on the manner of the driving of the appellant. In that case the jury was satisfied that immediately before the collision the appellant was on his wrong side of the road, an action that was a serious misjudgment and dangerous to the public and therefore the appellant must be found guilty of causing death by dangerous driving.

The learned trial judge cannot be faulted in her directions to the jury for the offence of causing death by dangerous driving. There is no merit in these grounds.

Ground 14 was not pursued.

Ground 15, is a complaint that the learned trial judge erred in refusing to investigate a report to the court by a woman corporal of police, that a member of the jury complained that the foreman had announced the wrong verdict, in that the correct verdict agreed was "not guilty" of manslaughter. This report to the court, it was being alleged, was made to the court "after the jury had left the box but had not dispersed as they all came back into court." (Emphasis added)

Counsel for the appellant argued that the learned trial judge should have exercised her discretion and allowed the jury to alter its verdict, even though they had been discharged. Counsel relied on ***R v Andrews*** [1986] Crim. L.R. 124. Counsel for the prosecution submitted that the learned trial judge was correct to refuse to allow the jury to amend their verdict for the reason that the jury had been discharged and were therefore functus officio. We are in agreement with counsel for the prosecution.

The sequence of events which gave rise to this ground commenced when the learned trial judge was being asked to consider the bail of the appellant. The transcript, at page 406 reads:

> "HER LADYSHIP: Mr. Gittens, the situation is this, that the court's hands are not tied. Should Mr. Brown not turn up on Friday, I can still do what I have to do. So, therefore it would be unwise to say the very least
> ...
> MR. MAHONEY: M'Lady, sorry, I have just been informed that apparently the wrong verdict was

given, should have been in respect of the lesser count.

HER LADYSHIP: I don't know about this procedure.

MR. MAHONEY: I don't know, I am just passing on information.

HER LADYSHIP" The jury, they were asked about the offence of manslaughter, I gave them clear directions on how to treat the matter and they answered in relation to the count of manslaughter so I don't - I can't do anything about that now. What exactly was there that was not understood?

MR. MAHONEY: The officer just informed me.

HER LADYSHIP: Where the officer got that information?

OFFICER W: I was standing there when one of the juror call me outside.

HER LADYSHIP: Mr. Gittens, as I was saying to you the point, I trust you understand what I was saying. In other words, I really don't have a problem in extending his bail because his appearance or not on the 4th, really would not prevent the sentencing procedure from taking please. So, I will extend his bail.

MR. GITTENS: Oblige. M'Lady, I just want to make one brief comment on what just transpired. By way of a question, whether it is not – if there would be no point to investigate what was said by way of interviewing.

HER LADYSHIP: And then do what about it after that?

MR. GITTENS: I don't know, m'lady.

HER LADYSHIP: If you can bring me some authority to say what action I can take in a situation where the verdict of the jury has been taken and accepted and at no stage, even when the registrar said if that is your verdict and so say all of you, at no stage did anybody say anything. If they had even given an indication I would have stopped and make (sic) enquiries.

MR. GITTENS: I haven't had a reason to look at the law obviously but I do recall in most of the situation what is seen as the appropriate handling of the matter would be at least interview the foreman. We know what happens in the jury room is sacrosanct.

HER LADYSHIP: The point is, it is given and you cannot go behind it.

MR. GITTENS: If we could interview, if he genuinely made a mistake then I think that would throw a different light on the situation.

HER LADYSHIP: Mr. Gittens, you can bring authority on that. I don't question the verdict of the jury, it is given. In the same way if it was the other way around and they went outside, said that was not it, I couldn't do anything about that either. Certainly, when it comes to question of sentencing you might wish to address me on that but the fact is it is not that they are saying that the verdict was not guilty and that the foreman said guilty.

MR. GITTENS: Certainly, based on what we heard, it would certainly be that way in respect of the greater offence. It would certainly be that what Your Ladyship had said would not be the case, would certainly be the case in respect of manslaughter, it would certainly be the case that they announced a verdict of guilty.

HER LADYSHIP: I meant if they had said not guilty when they meant guilty, I couldn't do anything about that. The fact is, they have returned their

> verdict. I am putting the matter down for sentencing on the 4th of June. The record reflects what the officer has brought to the attention of the court. I will also note it in my note book.
>
> MR. MAHONEY: M'Lady, I just looked through the Archbold from paragraph 447, 1997 Archbold, m'lady.
>
> Once a jury has formally returned a verdict which is not ambiguous and which is open to them on the indictment, the judge has no discretion to refuse to accept it. The jury may, before the verdict is recorded (or even promptly after the verdict is recorded) rectify their verdict and it will stand as amended. This may be done even after the defendant has been discharged out of the dock, if it is done before the jury have left the box.
>
> HER LADYSHIP: As I said, I know that I could ask them questions in the jury box I could find out in there exactly what the position is if I found anything that indicated that something was different. I don't know of any authority that says I can call back the foreman in here. Even if before they step down, when I was there talking to them, they had the opportunity up there to put up their hand or something and said (sic) there was a mistake, even after the verdict, I would have enquired from them. Thank you Mr. Mahoney. So, Mr. Brown, your bail is extended, sir, to come back here on the 4th of June for sentence. Of course, Mr. Gittens, you may still address..."

The learned trial judge had discharged the jury previously and the jurors had left the courtroom. The transcript, at page 404 reads:

> "HER LADYSHIP: Mr. Foreman and members of the jury, having given your verdict, there is really no further part for you in these proceedings, so I can excuse you at this time.

> We are almost towards the end of the circuit but we still have a little more work to do so you will have to return tomorrow in the event we might need your service. By then we should have a pretty clear picture of how much further we are going to be able to go. But thank you very much for your deliberations, you seem to have taken time to consider the matter carefully and you have the appreciation of all concern (sic). So you can leave now and return tomorrow morning at 10:00 a.m. ...
>
> HER LADYSHIP: Mr. Gittens, do you have any request at this point?"

If a verdict is pronounced by the foreman, within the sight and hearing of all the jurors and there is no dissent from any of them, the presumption is that they have all assented to the pronouncement. In ***Lalchan Nanan v The State*** [1986] 35 WIR 358 at page 366, their Lordships of the Judicial Committee of the Privy Council dismissed the appeal, in circumstances where the foreman in the presence of the jury returned a "unanimous verdict" of guilty of murder and was sentenced to death. The following day the foreman and one of the jurors returned to the clerk and stated that the verdict was not unanimous. Their Lordships in dismissing the appeal said at page 366 (per Lord Goff of Chieveley)

> "If a juryman disagrees with the verdict pronounced by the foreman of the jury on his behalf, he should express his dissent forthwith; if he does not do so, there is a presumption that he assented to it. It follows that, where a verdict has been given in the sight and hearing of an entire jury without any expression of dissent by any member of the jury, the court will not thereafter receive evidence from a member of the jury that he did not in fact agree with the verdict, or that his apparent agreement with the verdict resulted from a misapprehension on his part."

See also ***Sanker and Pitts v R*** [1982] 33 WIR 64 in which the Court of Appeal of Belize came to a similar conclusion. Both decisions relied on the case of ***Ellis v Deheer*** [1922] 2 KB 121, in which an application for a new trial was granted in circumstances where three of the jurors, stated in affidavits that the verdict given by the foreman was not the verdict of the whole jury, because they did not hear the verdict delivered nor did they assent to it. The jury had returned to the courtroom after their deliberations but only the foreman and three jurors could enter the courtroom. The remaining jurors had to stand in a passageway outside the courtroom because another jury was then occupying the jury box. Atkin, L.J., at page 120 said:.

> "In accordance with the ordinary practice the verdict is, or ought to be, delivered in open Court by the foreman in the presence of the other jurymen, and if it is so delivered in their presence, and none of them protest, there is a prima facie presumption that they all assented to it. But that presumption may be rebutted. Circumstances may arise in connection with the delivery of the verdict showing that they did not all assent."

In ***Ellis v Deheer,*** therefore, the presumption was rebutted and although the jury had been discharged the appeal was allowed and a new trial was ordered.

In ***R v Andrews*** [1986] Crim. L. R. 124, the Court of Appeal dismissed an appeal from a conviction, where a trial judge took an amended verdict of guilty from a jury after having previously entered a verdict of not guilty. The headnote reads:

> "... where the jury seeks to alter a verdict pronounced by the foreman, the judge has a discretion whether to allow the alteration. In exercising that discretion he takes into account all the circumstances of the case; in particular, important considerations will be the length of time from the original verdict; the probable reason for the initial mistake, the necessity for justice to be done not only to the defendant but also to the prosecution. The fact that the defendant has been discharged is one factor but not necessarily fatal to the discretion to alter a verdict to guilty. If the jury have been discharged it might be impossible to allow the verdict to be changed. In the present case the judge was clearly entitled, and right, to allow rectification."

In ***R v Andrews*** (supra), the jury had indicated by note to the judge the change of verdict ten minutes after the first delivery and had presumably, not yet been discharged.

If after verdict the jury is discharged, it seems unlikely, although it may be permissible, depending on the circumstances of the case, that the jury may be permitted to amend its verdict. If the jury is discharged, having pronounced its verdict within the sight and hearing of each other, without any dissent, and furthermore, has dispersed, a change of verdict may not be accepted.

In the instant case, the verdict was delivered by the foreman in open court, in the sight and hearing of all the jurors, without dissent. They are deemed to have accepted the verdict as correct. Furthermore, having been discharged the record indicated, at page 404:

> "Jury leaves at 4:17 p.m."

Having been discharged the jury was functus officio. Having left the courtroom, the jury would have dispersed, no longer subject to the close scrutiny of the court officials and police, as they were previously, having retired. Therefore, having dispersed, they were then subject to outside control and influences. By analogy, in ***R v Neal*** [1949] 2 K.B. 590, an appeal was allowed and a conviction of larceny was quashed where a jury, having been delivered to the bailiff to consider their verdict, were permitted by the learned trial judge to leave the courtroom and go into the town nearby for lunch prior to considering their verdict. This was regarded as a material irregularity.

In the instant case, the jury, having dispersed and being "at large", could not be permitted, in all the circumstances to be heard further in respect of any change of views and verdict by the jury. There is no merit in this ground.

Grounds 16 and 17 may also be considered together.

It was argued that the sentence was manifestly excessive (that is, six years imprisonment at hard labour on each count) in that the learned trial judge did not consider adequately the evidence of his good character. In addition the learned trial judge took into account immaterial considerations, namely, the fact that, if the appellant had admitted that he was tired and fell asleep, the jury may have viewed his defence more favourably.

The appellant called three witnesses who gave evidence of his good character and the learned trial judge expressly gave recognition thereto. The learned trial judge, at page 431 said:

> "Mr. Brown, I have no doubt at all that you are a very good person. All persons of substance and persons who certainly cannot be said to be anything less than pillars of the society, have spoken well about you. So, therefore, it isn't a question about that, ..."

It is erroneous and certainly a misconception to say that the learned trial judge in respect of the appellant's good character, "put it aside." The use of the phrase "so therefore it isn't a question about that,..." is the learned trial judge's specific appreciation, in the context in which it was used, that there is no doubt in respect of the good character of the appellant.

Furthermore, the learned trial judge did direct the jury to consider "... if you find that the accused man was tired ...", and continued with reference to his duty "to pull off the road and rest." However, this factor was referred to in the context that the appellant had breached his duty of care, in the learned trial judge's direction on manslaughter as charged in the four counts of the indictment.

In addition, in sentencing the appellant, the jury having brought in the verdict of manslaughter, the learned trial judge, inter alia said:

> "... if indeed you were tired, you ... could have said that was the position ... after all this long hour of work although your employers ... spoke ... wonderful things of you ... they subject you to this kind of work,

> where you spend so much time out on the road, and still coming in the night drawing heavy load of sand. If you had said that you fell asleep I don't think you would be standing there now." (Emphasis added)

The learned trial judge, bearing in mind that she was addressing the appellant in the context of the manslaughter verdict, was alluding to the appellant being sleepy and in an automatous state or unconscious of his actions, negativing any mens rea. The learned trial judge was in fact being overly generous and very solicitous and helpful to the case of the appellant, contrary to the complaint of counsel. Of course, in her directions to the jury, in regard to "being sleepy", the learned trial judge no doubt had in mind the case of ***Hill v Baxter*** [1858] 1 Q.B. 227; 42 Cr. App. R 51, where on charge of dangerous driving, Lord Goddard, C.J. said:

> "If a driver finds that he is getting sleepy he must stop."

There is the no virtue in the complaint contained in these grounds. Of course, the point is a moot one, in view of the fact that the manslaughter verdicts are now subject to the decision in ***Uriah Brown v R*** (supra), and will not stand.

Supplemental ground 2

This complaint was that the learned trial judge failed to point out that the physical damage to the Ford Ranger pick up and the collision did not support "Mr. Spence's account" of the impact being to the extreme left and then his "car 'rolling and rolling'."

It should be noted that it was the witness Lemonious who was the driver of the Ford Ranger. The witness Sgt. Lambert stated that he saw the Ford Ranger "overturned" in the middle of the road with damage to its "right front right side." I fail to see why there should be any complaint that that damage is inconsistent with Lemonious' evidence that the Ford Ranger "start rolling and rolling". If any inconsistency arose, that was essentially a matter of fact for the jury and the learned trial judge gave to the jury full and adequate directions on the manner in which discrepancies should be considered. There is no merit in this ground.

Supplemental ground 3

The complaint was that the learned trial judge failed to direct the jury that they were to approach the evidence of the witness Lemonious with caution as he was a witness with an interest to serve.

If there is material in a witness' evidence to suggest that he has an improper motive or an interest to serve, the learned trial judge has an obligation to advise the jury to approach the evidence of the witness with caution – see ***R v Beck*** [1982] 74 Cr. App. R 221. In the instant case the prosecution witness Lemonious said in examination in chief, that it was the appellant's truck which came across the road to his, the witness' correct side and hit his Ford Ranger van. He denied, in cross-examination that it was his Lemonious' vehicle which went onto its incorrect side of the road and hit the appellant's truck. There was

therefore no evidence on the prosecution's case to support the view that Lemonious had an interest to serve. The evidence of the investigating officer Sgt. Lambert did not indicate any material to point to any blameworthiness on Lemonious' part. On the contrary, the real evidence in the case, as observed by Sgt. Lambert, revealed, based on the point of impact shown by blue duco, glass and dirt on the road surface on the left side of the road going towards Williamsfield, that it was the appellant's Mack truck which came across the road onto the witness Lemonious' correct side and hit Lemonious' Ford Ranger van.

The learned trial judge gave careful directions to the jury, to look at all the evidence and repeatedly told the jury to consider the evidence of the prosecution witnesses as to their credibility in seeking to find the truth. No further directions were required. The witness Lemonious, on the evidence before the jury, was not shown to have had an interest to serve.

There is no merit in this ground.

Supplemental ground 4

Counsel for the appellant complained that the learned trial judge left for the consideration of the jury matters which were not the subject of evidence namely:

> (1) "... he said they overtook him ... ten chains from where the collision occurred, probably you are familiar with the road and know that area."

And

(2) "... you are to use your knowledge of blown out truck, if you have any."

The jury is required to consider the evidence led in court to the exclusion of any knowledge peculiar to them concerning the case. In so far as the learned trial judge encouraged them to do otherwise, she was in error. However, in the circumstances of the case, the jury being "familiar with the road" in an area "ten chains from ... the collision..." could in no way affect their consideration of the truth of the actual collision. In addition, the reference to "the tyre blew out," was followed by the words of the learned trial judge:

> Now, here I wish to recall, Sergeant Lambert spoke of the punctured side."

The learned trial judge was obviously alluding to that discrepancy. This should not have been resolved however by their personal knowledge. Despite this, the evidence led by the prosecution, in particular the real evidence of the points of impact, was clear. The collision, as the jury accepted occurred on the appellant's incorrect side of the road, in his act of dangerous driving. The contact with appellant's right rear wheel would have occurred on the appellant's incorrect side. No prejudice could have been caused to the appellant. This ground also fails.

Supplemental ground 5

Counsel complained that the learned trial judge in her directions, may have given the impression that the appellant, in seeking to establish his innocence, by sworn evidence, was required to do so by the same standard of proof as the prosecution. We do not agree.

The learned trial judge, on each occasion that reference was made to the burden and standard of proof, emphasized that it was on the prosecution, and to the extent that the jury felt sure. The learned trial judge repeatedly directed the jury that "The accused is not required to prove that he is innocent" and "...the accused man has nothing to prove." She quite properly told the jury, the manner in which they were to assess the sworn evidence of the accused and his witnesses –

> "... by the same fair standard as you use to test the evidence of the prosecution's witnesses and you don't disregard it simply because he is the accused."

This direction was unconcerned with the burden of proof, but was entirely in relation to the assessment of credibility and truth. A jury must be taken as having some intelligence. They could not have thought otherwise, as counsel suggests. This ground also fails.

On the prosecution's case, which was accepted by the jury, the appellant drove his loaded truck from his correct left hand side of the main road onto his

incorrect side and into the path of oncoming motor vehicles causing collisions and the consequent four deaths. The first collision being to the right rear wheel of the appellant's Mack truck, with the Ford Ranger van, the deposit of blue duco, glass and dirt, depicting the point of impact, was six (6) inches over the midline on the appellant's incorrect side of the road. Consequently, the front of the appellant's truck would then already have been over onto its incorrect side of the road. The other motor vehicles were on their correct side of the road. That was an act of dangerous driving on the part of the appellant, on a main road, with oncoming motor vehicles from the opposite direction. In ***Uriah Brown v R*** (supra), in describing a similar act of driving on the incorrect side of the road, Lord Carswell at page 39, inter alia, said:

> " ... that that action of the appellant was clearly a serious misjudgment on his part and that it was notably dangerous to the public. On the jury's findings the appellant must be found guilty of causing death by dangerous driving."

Dangerous driving is an offence of absolute prohibition.

In all the circumstances of this case, the appeal against convictions for manslaughter is allowed, the convictions quashed and the sentences are set aside. Substituted instead, are convictions for the offences of causing death by dangerous driving in accordance with section 30(2) of the Road Traffic Act, on each count.

The sentence is that the appellant shall pay a fine of $200,000.00 on each of the four counts and in default of payment it shall be six months imprisonment. In addition, the appellant is disqualified from holding or obtaining a driver's licence for a period of eighteen (18) months.