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Privy Council Appeal No. 62 of 2003

Uriah Brown *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 13th April 2005

Present at the hearing:-

Lord Steyn
Lord Slynn of Hadley
Lord Hutton
Lord Rodger of Earlsferry
Lord Carswell

*[Delivered by **Lord Carswell**]*

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1. On 4 March 2000 a serious traffic accident involving several vehicles occurred on the road between Montego Bay and St Ann's Bay, Jamaica. A police car being driven in the direction of St Ann's Bay by the appellant, a serving police officer, with another officer Sergeant Christie as passenger, came into collision with a Nissan car travelling in the opposite direction. The collision also involved a Ford Ranger pick-up truck driven by Michael McKennon, which was travelling in the same direction as the appellant's car. Both the Nissan and the police car, which was in close contact with it after the collision, went on fire. The two occupants of the Nissan, Mark Williams and Gregory Vassell, were killed, the appellant was seriously injured and his passenger Sergeant Christie also sustained injuries.

2. The appellant was indicted on two counts of manslaughter. His trial took place before Harrison J and a jury in the Circuit Court for the

parish of St Ann. On 7 June 2002 he was found guilty on both counts and on 13 June 2002 he was sentenced to two years' imprisonment with hard labour on each count, the sentences to run concurrently. He applied for leave to appeal to the Court of Appeal against conviction and sentence, but on 7 March 2003 the court (Downer, Walker and Smith JJA) dismissed the application. The Court of Appeal granted leave to appeal to the Privy Council, certifying that the matter involved a point of law of exceptional public importance, which it framed as follows:

> "Whether in cases of Manslaughter by criminal negligence, involving motor vehicle driving, it is a sufficient direction to the Jury to adopt the test of the ordinary principles of negligence set out by the House of Lords in *R vs Adomako* [1995] 1 AC 171 (which was not a case involving motor vehicle driving) or that stated by the Judicial Committee of the Privy Council in *Kong Cheuk Kwan* (1986) 82 Cr. App. R. 18 for gross negligence and adopted in *R v Charlie Williamson* (1993) 30 JLR 457, by the Court of Appeal."

The appellant has been on bail for virtually all of the period since his arrest.

3. The account of the facts which follows has been put together from the directions of the trial judge to the jury, since regrettably their Lordships were not furnished with a transcript of the evidence. Nor does it appear possible, in the absence of any photographic or mapping evidence, to arrive at anything but an approximation of sight lines, the location of skid marks or the position of vehicles after the accident, which might have assisted in obtaining an understanding of the course of events immediately before the occurrence of the collision.

4. The trial court received two diametrically opposed versions of the events, one from Michael McKennon, the eye witness called to give evidence on behalf of the prosecution, and the other from the appellant and his passenger. These versions were recounted in some detail by the judge when he was directing the jury. There was little room for a conclusion that one account or the other may have been a genuine error, and the factual issue accordingly was one of credibility, that is to say, which account the jury accepted as correct.

5. Mr McKennon stated that he was driving on a straight section of the road in question at about 12.15 pm on a bright and sunny day with good visibility. The road was approximately 26 feet wide at that point,

asphalted and dry. His truck was the lead vehicle in a line, with some five cars behind him. He was travelling at a speed which he estimated at about 76 kilometres per hour, just below the speed limit on that part of the road of 80 kph. There were no road markings to indicate any restrictions on passing, such as an unbroken central white line.

6. Mr McKennon said that he saw a vehicle coming from behind him, overtaking the line of cars. This was the police car driven by the appellant, and he estimated its speed as 120 kph. As it drew alongside him there appeared approaching from the opposite direction two cars, a Toyota Starlet and behind it a Nissan, both travelling on the proper side of the road. When faced with the appellant's car on its wrong side of the road, the driver of the Starlet swerved to his left on to the soft shoulder and escaped a collision. The driver of the Nissan braked hard and may have attempted to swerve on to the soft shoulder, but skidded and turned sideways, so that it was "at a bit of an angle" when the appellant's car crashed into it. The impact drove the appellant's car into McKennon's truck, and when the Nissan and the police car came to a stop McKennon ran into the police car.

7. The account of the accident given by the appellant in his evidence at trial, as retailed by the judge in his directions to the jury (pages 50-51 of the record), was as follows:

> "I was travelling on the Llandovery Main Road, at about 55 to 60 kilometers. I was at the front of the line of traffic. As I approached the middle of the hill, there was a line of traffic, a white Starlet car approached over the brow of the hill. After overtaking a line of traffic, the Starlet cut suddenly in front of the car that was at the front of that line of traffic. He continued on the road surface.
>
> A grey Nissan motorcar, which was following close behind the Starlet also came over the hill, overtook the line of traffic and cut suddenly in front of the last car it overtook. I saw when the Nissan went to the extreme left, skidded and cut across the road right in front of my car. When I saw the Nissan heading across the road, I held the steering wheel firmly, held on my brakes, there was nothing else I could do. The car slammed in the left side of the Nissan motorcar. Immediately after that impact, I heard and felt a bang in the rear of my motorcar."

8. The judge set out in his directions to the jury some information about the damage to the several vehicles and the skid mark or marks found on the road. It is somewhat difficult to follow this information or

the time, or which might reasonably be expected to be, on the road, shall be liable on conviction on indictment to imprisonment with or without hard labour for a term not exceeding five years.

(2) Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under subsection (1) to find him guilty of that offence, and upon the trial of a person for an offence under subsection (1) it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under section 27, to find him guilty of that offence, whether or not the requirements of section 38 have been satisfied as respects that offence."

11. The judge directed the jury on the meaning of manslaughter in the following terms (pages 15-16 of the record):

"Manslaughter is an unlawful and dangerous act committed against the person of another, without the intention to kill or to cause serious bodily injury and which results in death.
When you are driving a motor vehicle for it to be Manslaughter there must be a very high degree of negligence on the part of the driver of the motor vehicle involved. You the Jury will have to find that at the material time the driving of the accused man showed a reckless, wanton and total disregard for the life and safety of other persons on the road.

To amount to motor manslaughter the prosecution must prove these five ingredients. One, that the accused man was the driver of the motor vehicle. Two, that the accused man owed a duty of care to the deceased persons who were in the other vehicle. Three, that the accused man failed to take care resulting in the death of these two persons. Four, that death was a direct and immediate result of the accused man's failure to take care, and fifthly, that the failure to take care was of a very high degree amounting to recklessness."

A little later (page 18) he told the jury that manslaughter is "gross recklessness". At the end of his charge he again summarised the elements of manslaughter in the following terms (pages 69-71):

"If you, the Jury, are satisfied that the negligence that the prosecution has adduced in this case is of a high degree and of such a character that any reasonable driver endowed with ordinary road sense and in full possession of his faculties would

realise, if he thought at all, that by driving in the manner which caused the fatal accident he was without lawful excuse, incurring a high degree of recklessness, causing substantial personal injury to others, then on the evidence of the prosecution, the prosecution is saying the crime of Manslaughter would be established, this high degree of recklessness on the part of the accused man. If you find that he drove in such a manner as I have said before, let me remind you of the legal meaning there in law.

If he drove with a very high degree of negligence; if he drove and showed a reckless, wanton and total disregard for life and safety for someone on the road, the prosecution is saying they would have satisfied you to the extent that you feel sure that this accused man is guilty of manslaughter."

12. In accordance with section 30 of the Road Traffic Act the judge left the lesser offence of dangerous driving causing death to the jury as a possible verdict if they did not find manslaughter proved. He defined that offence to them, and no complaint was made on behalf of the appellant about the terms of his definition. He did not, however, leave the offence of reckless driving causing death or mention it at any time. The Board was informed by Mr Pantry QC, the Director of Public Prosecutions, who appeared on behalf of the Crown, that it is not the practice in Jamaica to charge defendants with reckless driving or reckless driving causing death or for judges to leave that offence to juries. It is customary only to charge manslaughter, dangerous driving causing death or dangerous driving simpliciter, depending on the facts, and the course taken by the judge reflected that practice. Their Lordships recognise that simplifying the task of judges and juries is commendable and are aware that the same practice of charging defendants only with causing death by dangerous driving was adopted in England following the enactment of the Road Traffic Act 1956: see *R v Seymour* [1983] 2 AC 493 at 502, per Lord Roskill and cf *R v Lawrence* [1982] AC 510 at 523, per Lord Diplock. They must observe, however, that it may in some cases lead to the omission of an important charge which has been provided for by the Jamaican legislation. There may be cases in which a defendant caused a death by driving in a manner which was reckless, but fell short of the stringent requirements for proof of manslaughter. In such a case a charge of causing death by reckless driving may be the most appropriate one to bring. Moreover, the jury in the present case, if given the option of convicting of causing death by reckless driving –

which is generally regarded as a more serious offence than causing death by dangerous driving, though the maximum penalties are the same for each – might have felt that it was the appropriate finding rather than manslaughter. Their Lordships are of opinion accordingly that prosecuting authorities should give consideration to bringing charges of causing death by reckless driving in cases where the facts warrant that course and that judges should likewise leave that offence to the jury in suitable cases.

13. The major complaint about the judge's directions made by counsel for the appellant was that they contained no guidance on what constitutes recklessness and that they focused on the quality of the appellant's acts rather than on his state of mind. Moreover, he submitted, they did not inform the jury of the particular ingredients of manslaughter which distinguish it from causing death by reckless driving and which require to be proved before a defendant is convicted of motor manslaughter. Crown counsel argued, on the other hand, that the judge's references to the necessity of proof of a high degree of negligence, to gross recklessness and to a "reckless, wanton and total disregard for the life and safety of other persons on the road" were a sufficient explanation of the elements of the crime of manslaughter.

14. That crime has received a good deal of judicial attention in recent years, but it would be difficult to maintain that it has been left in a state which is easy for judges to explain or juries to comprehend. In order to understand the apparent shifts in the definition of the offence it is necessary to appreciate the changes which have occurred from time to time in the legislation in England and Wales governing road traffic offences. The history of those changes up to 1977 is set out in the speech of Lord Diplock in *R v Lawrence* [1982] AC 510 at 522-5 and that of Lord Roskill in *R v Government of Holloway Prison, Ex p Jennings* [1983] 1 AC 624 at 640-3. For present purposes it is sufficient to summarise the development as follows:

(a) From 1930 to 1956 a person who caused the death of another in a road traffic accident could be charged with manslaughter, reckless driving or dangerous driving.

(b) A new statutory offence was introduced by section 8 of the Road Traffic Act 1956, on account of the well-known reluctance of juries to convict of motor manslaughter. That offence was defined as causing the death of another person by "the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public".

(c) In 1977, for the reasons summarised by Lord Diplock in *R v Lawrence* at 524-5, the offence of dangerous driving was abolished and the offence under section 8 of the 1956 Act was amended by eliminating dangerous driving from its definition.

(d) Following the report of the Road Traffic Law Review (the North Report) in 1988, dangerous driving and causing death by dangerous driving were restored by the Road Traffic Act 1991 and reckless driving and causing death by reckless driving were omitted from the criminal calendar.

It is necessary to bear these statutory changes in mind when considering the sequence of cases in which the elements of manslaughter and the directions to be given to juries have been set out.

15. That sequence can conveniently commence with the decision of the Court of Criminal Appeal in *R v Bateman* (1925) 19 Cr App R 8, in which a doctor was convicted of manslaughter arising out of his treatment of a woman in childbirth. In giving the judgment of the court Lord Hewart CJ discussed the law governing manslaughter by negligence, which for many years had required, as the element distinguishing criminal from civil liability, proof of "gross negligence". Lord Hewart defined that elusive concept at pages 11-12 in the following terms (although in *Andrews v Director of Pubic Prosecutions* [1937] AC 576 at 583 Lord Atkin thought that the expressions used by Lord Hewart were not, and probably were not intended to be, a precise definition of the crime):

> "In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as "culpable", "criminal", "gross", "wicked", "clear", "complete". But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

It may be seen that this definition was directed, as was the judge's charge in the present case, to the quality of the act and not the state of

mind of the defendant, a focus to which the law has returned in the most recent authorities. For reasons which will appear from consideration of cases decided in the intervening period, however, directions so based will not suffice where the issues before the court include allegations of recklessness against the defendant.

16. In *Andrews v Director of Public Prosecutions* [1937] AC 576, a case of motor manslaughter, the House of Lords sought to express a simple concept of manslaughter which would prove serviceable in road traffic death cases. Lord Atkin, with whose speech the other members agreed, commenced by outlining the problem at page 581.

> "My Lords, of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions. From the early days when any homicide involved penalty the law has gradually evolved 'through successive differentiations and integrations' until it recognises murder on the one hand, based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intention to kill but with the presence of an element of 'unlawfulness' which is the elusive factor."

After considering earlier decisions Lord Atkin referred with approval to *R v Bateman* and expressed his conclusions at page 583:

> "The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'reckless' most nearly covers the case. It is difficult to visualise a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter: but it is probably not all-embracing, for 'reckless' suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction. If the principle of *Bateman's* case is observed it will appear that the law of manslaughter has not changed by the introduction of motor vehicles on the road. Death caused by their negligent

> driving, though unhappily much more frequent, is to be treated in law as death caused by any other form of negligence: and juries should be directed accordingly."

He ended his speech by indicating the manner in which a judge should direct a jury in a case of motor manslaughter.

17. Before the decision of the House of Lords in *R v Lawrence* [1982] AC 510 the courts had begun to run into difficulties in defining recklessness, as evinced by such cases as *R v Murphy* [1980] QB 434, a decision of the Court of Appeal on causing death by reckless driving, and *R v Caldwell* [1982] AC 341, a decision of the House of Lords on recklessness in the context of the Criminal Damage Act 1971. In *R v Lawrence,* an appeal against a conviction for reckless driving causing death, the House of Lords unanimously accepted the view of the majority in *R v Caldwell* [1982] AC 341 concerning the meaning of "reckless" and "recklessness" in the statutory context of the Criminal Damage Act 1971 and applied that ruling to the offence of causing death by reckless driving. Lord Diplock pointed to the difference in context between criminal damage and motoring offences, in that the latter, unlike the former, arose out of activities such as driving a car which formed part of the ordinary routine of life. He said at pages 525-6:

> "In ordinary usage 'recklessly' as descriptive of a physical act such as driving a motor vehicle which can be performed in a variety of different ways, some of them entailing danger and some of them not, refers not only to the state of mind of the doer of the act when he decides to do it but also qualifies the manner in which the act itself is performed. One does not speak of a person acting 'recklessly', even though he has given no thought at all to the consequences of his act, unless the act is one that presents a real risk of harmful consequences which anyone acting with reasonable prudence would recognise and give heed to. So the actus reus of the offence under sections 1 and 2 is not simply driving a motor vehicle on a road, but driving it in a manner which in fact creates a real risk of harmful consequences resulting from it."

Lord Diplock went on at pp 526-527 to formulate a standard direction to a jury:

"In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things:

First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and

Second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it.

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 of the ordinary prudent motorist as represented by themselves.

If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives as to his state of mind which may displace the inference."

18. The House of Lords had occasion to consider motor manslaughter again in *R v Governor of Holloway Prison, Ex p Jennings* [1983] 1 AC 624. In that case an applicant for habeas corpus sought to avoid extradition to California on a charge of manslaughter arising from a motor accident. Her counsel argued in support of the application that the unlawful killing of another by the reckless driving of a motor vehicle on a road was no longer manslaughter by the law of England, since the enactment of the 1956 and 1977 legislation. He submitted that reckless driving and motor manslaughter were synonymous, and since reckless driving was not an offence for which a person could be extradited under the treaty with the USA, the applicant could not be extradited on the charge of manslaughter. The House of Lords rejected this argument. Lord Roskill, with whose speech the other members agreed, reviewed the legislative history of road traffic offences and held that the common law offence of manslaughter remained as fully intact after 1956 and 1977 as it had before the successive statutory offences had ever been created. He expressed the view at page 644

that the ingredients of the statutory offence of reckless driving causing death were co-extensive with the ingredients of the common law offence of manslaughter. A few sentences earlier, however, he made the observation which Mr Knox emphasised:

> "No doubt the prosecuting authorities today would only prosecute for manslaughter in the case of death caused by the reckless driving of a motor vehicle on a road in a very grave case."

19. The House of Lords took the opportunity to make it clear in *R v Seymour* [1983] 2 AC 493 that manslaughter was a more grave offence than causing death by reckless driving. It was argued on behalf of the appellant that recklessness in a manslaughter case bore a different meaning from that which applied in respect of the statutory offence. The House was not prepared to accept that proposition. It did, however, hold that the degree of recklessness required for conviction of the statutory offence was less than that required for conviction of the common law crime of manslaughter. Lord Fraser of Tullybelton said at page 500 that the jury was to perform the duty of assessing the degree of wickedness exhibited by the accused in order to decide which offence (if any) he has committed. He added at page 501:

> "If any modification of the '*Lawrence* direction' is appropriate in a case where manslaughter alone is charged, it would be to add a warning to the jury that before convicting of manslaughter they must be satisfied that the risk of death being caused by the manner of the accused's driving was very high. Such a direction will, of course, always be necessary where the common law crime and the statutory offence are charged alternatively, but where, as in this case, the common law crime is charged alone, it may be unnecessary and inappropriate."

20. Lord Roskill in *R v Seymour* referred to the Scottish practice, approved by Lord Fraser of Tullybelton, of charging both culpable homicide (identical in its ingredients to manslaughter) and causing death by reckless driving in cases which appeared to the prosecutor to be serious enough to merit the former charge. He did not consider that this practice should be followed in England and said that the prosecution should be required to elect upon which charge they wish to proceed. His view of the proper practice did not, however, affect his opinion, expressed clearly throughout his speech, that the meaning of recklessness was the same in both offences. He stated at page 506:

> "My Lords, I would accept the submission of Mr Hamilton for the Crown that once it is shown that the two offences co-exist it would be quite wrong to give the adjective 'reckless' or the adverb 'recklessly' a different meaning according to whether the statutory or the common law offence is charged. 'Reckless' should today be given the same meaning in relation to all offences which involve 'recklessness' as one of the elements unless Parliament has otherwise ordained."

He went on in another passage at pages 506-7 to differentiate between the offences in terms of comparative turpitude:

> "Parliament must however be taken to have intended that 'motor manslaughter' should be a more grave offence than the statutory offence. While the former still carries a maximum penalty of imprisonment for life, Parliament has thought fit to limit the maximum penalty for the statutory offence to five years' imprisonment, the sentence in fact passed by the learned trial judge upon the appellant upon his conviction for manslaughter. This difference recognises that there are degrees of turpitude which will vary according to the gravity of the risk created by the manner of a defendant's driving. In these circumstances your Lordships may think that in future it will only be very rarely that it will be appropriate to charge 'motor manslaughter': that is where, as in the instant case, the risk of death from a defendant's driving was very high."

He accordingly answered the certified question by stating that –

> "Where manslaughter is charged and the circumstances are that the victim was killed as a result of the reckless driving of the defendant on a public highway, the trial judge should give the jury the direction suggested in *Reg. v Lawrence* but it is appropriate also to point out that in order to constitute the offence of manslaughter the risk of death being caused by the manner of the defendant's driving must be very high."

21. The same approach to the ingredients of manslaughter was taken by the Privy Council in *Kong Cheuk Kwan v The Queen* (1985) 82 Cr App R 18. This unusual, not to say unique, appeal concerned charges of manslaughter against officers of two hydrofoils, arising out of a collision between the vessels, but the Board held that in principle a direction regarding their navigation could be given which was comparable with that given in motor manslaughter cases. They

accepted the correctness of the decisions of the House of Lords in *R v Lawrence* and *R v Seymour* and applied them to the appeal before them.

22. Such was the state of the law when the House of Lords returned to the topic of involuntary manslaughter in *R v Adomako* [1995] 1 AC 171, in which a charge of manslaughter was based on an allegation of gross negligence on the part of an anaesthetist. Their Lordships accepted the correctness of the submission of the appellant's counsel that "the law in this area should have the characteristics of clarity, certainty, intellectual coherence and general applicability and acceptability". The Court of Appeal had adopted the gross negligence test, without reference to that of recklessness, as sufficient for all cases of involuntary manslaughter, except those of motor manslaughter. The House of Lords set out, however, to frame a definition which would serve as a universal test for directing juries in all cases of this type, including those concerned with motor manslaughter.

23. Lord Mackay of Clashfern LC, with whose opinion the other members agreed, reasserted the authority of *R v Bateman* (1925) 19 Cr App R 8 and *Andrews v DPP* [1937] AC 576, describing the latter decision as the most authoritative statement of the present law. He went on to state at page 187:

> "On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.
>
> It is true that to a certain extent this involves an element of circularity, but in this branch of the law I do not believe that is fatal to its being correct as a test of how far conduct must depart from accepted standards to be characterised as criminal. This is necessarily a question of degree and an attempt to specify that

> degree more closely is I think likely to achieve only a spurious precision. The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.
>
> My Lords, the view which I have stated of the correct basis in law for the crime of involuntary manslaughter accords I consider with the criteria stated by counsel although I have not reached the degree of precision in definition which he required, but in my opinion it has been reached so far as practicable and with a result which leaves the matter properly stated for a jury's determination.
>
> My Lords, in my view the law as stated in *Reg. v Seymour* [1983] 2 AC 493 should no longer apply since the underlying statutory provisions on which it rested have now been repealed by the Road Traffic Act 1991. It may be that cases of involuntary motor manslaughter will as a result become rare but I consider it unsatisfactory that there should be any exception to the generality of the statement which I have made, since such exception, in my view, gives rise to unnecessary complexity."

He considered it perfectly appropriate that the word "reckless" should be used in cases of involuntary manslaughter, but in "the ordinary connotation of the word". He said further at page 188 of the test of recklessness laid down in *R v Lawrence* [1982] AC 510:

> "In my opinion it is quite unnecessary in the context of gross negligence to give the detailed directions with regard to the meaning of the word 'reckless' associated with *Reg. v Lawrence* [1982] AC 510. The decision of the Court of Appeal (Criminal Division) in the other cases with which they were concerned at the same time as they heard the appeal in this case indicates that the circumstances in which involuntary manslaughter has to be considered may make the somewhat elaborate and rather rigid directions inappropriate. I entirely agree with the view that the circumstances to which a charge of involuntary manslaughter may apply are so various that it is unwise to attempt to categorise or detail specimen directions. For my part I would not wish to go beyond the description of the basis in law which I have already given."

The House accordingly answered the certified question as follows:

> "In cases of manslaughter by criminal negligence involving a breach of duty, it is a sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case following *Rex v Bateman*, 19 Cr.App.R. 8 and *Andrews v Director of Public Prosecutions* [1937] AC 576 and that it is not necessary to refer to the definition of recklessness in *Reg. v Lawrence* [1982] AC 510, although it is perfectly open to the trial judge to use the word 'reckless' in its ordinary meaning as part of his exposition of the law if he deems it appropriate in the circumstances of the particular case."

24. Their Lordships do not wish to throw any doubt on the correctness of the propositions in *R v Adomako* in its relation to motor manslaughter in England and Wales. They observe that there is a degree of synthesis between the *Adomako* test and the *Seymour* test, in that under each the defendant's conduct has to be such that it creates a very high degree of risk before it is to be classed as manslaughter.

25. Notwithstanding the importance of achieving clarity, simplicity and consistency in manslaughter directions, the decision in *R v Adomako* cannot be applied as a test in jurisdictions where causing death by reckless driving is a possible alternative offence. In those jurisdictions their Lordships do not consider it possible to apply only the test prescribed in *R v Adomako*, for its application to motor manslaughter was predicated upon the disappearance of the statutory offences of reckless driving and causing death by reckless driving. Where those statutory offences can be charged, as in Jamaica, the content of motor manslaughter must frequently bear some relation to them, in which event a definition has necessarily to be framed with reference to recklessness. There must be proof of an extra ingredient, over and above the elements proof of which will ground a charge of causing death by reckless driving, but in their Lordships' opinion juries have to be directed on the meaning of recklessness if they are to give proper consideration to a charge of motor manslaughter. It follows that the authority of *R v Seymour* and *R v Lawrence* must still hold good in those jurisdictions, subject to the modification made by the recent decision of the House of Lords in *R v G* [2004] 1 AC 1034, to which their Lordships now turn.

26. *R v G* concerned a charge of criminal damage, contrary to section 1 of the Criminal Damage Act 1971, the defendants "being reckless as to whether any property would be damaged or destroyed". The defendants were two boys, aged 11 and 12 respectively, who set fire

some newspapers and threw one burning piece of paper under a large plastic wheelie-bin in the backyard of a shop. The fire spread disastrously to the shop and caused very substantial damage to the premises. The direction given to the jury by the trial judge, in accordance with *R v Caldwell* [1982] AC 341, was that the prosecution had to prove –

> "(1) the defendant damaged by fire the building, the commercial premises, shown in the photographs; (2) that the defendant in doing what he did, created a risk which would have been obvious to an ordinary, reasonable bystander watching that the building, the commercial premises, would be damaged by fire; and (3) that when he, meaning a defendant, did what he did, either he had not given any thought to the possibility of there being such a risk, or having recognised that there was some risk involved in doing what he did, nonetheless went on and did the act."

The issue before the House was whether it could be a defence that the defendants were unaware, as was accepted, of the risk of the fire spreading in the way that it eventually did. It had previously been held in *Elliott v C (a minor)* [1983] 1 WLR 939 at 945 that –

> "if the risk is one which would have been obvious to a reasonably prudent person, once it has also been proved that the particular defendant gave no thought to the possibility of there being such a risk, it is not a defence that because of limited intelligence or exhaustion she would not have appreciated the risk even if she had thought about it."

The House of Lords in *R v G* held that *R v Caldwell* should no longer be regarded as good law, for the reasons set out *in extenso* in the opinion of Lord Bingham of Cornhill at paragraphs 32-35. Their Lordships answered the certified question by stating that a person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to –

> "(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.

27. Lord Bingham was careful not to throw any doubt on the decisions of the House in *R v Lawrence* and *R v Reid* [1992] 1 WLR 793. The latter case is of some significance for the observations of

Lord Goff of Chieveley at pages 810-11. He discusses the possibility that the defendant in a reckless driving case was indifferent to the risk created by his driving or has closed his mind to it, in either case failing to give any thought to the possibility of risk. He went on at page 811:

> "Every driver knows that driving can be dangerous; and if when a man is in fact driving dangerously in the sense described by Lord Diplock, he does not even address his mind to the possibility of risk, then, absent special circumstances (to which I will refer later) it is right that he should, if the risk was obvious, be held to have been driving recklessly, even though he was not in fact aware of the risk. It cannot be right that in such circumstances he should be able to shelter behind his ignorance, or be given preferred treatment as compared with another person who, having recognised and considered the risk, has wrongly decided to disregard it."

28. In jurisdictions, such as Jamaica, where the statutory offence of causing death by reckless driving continues to co-exist along with the common law crime of manslaughter, it is in their Lordships' view important that juries should ordinarily be made aware of the existence of the lesser offence. In that respect they agree with the view expressed by Lord Fraser of Tullybelton in *R v Seymour* [1983] 2 AC 493 at 500 that it is proper to charge both offences and direct the jury how to distinguish between them. Lord Fraser there said:

> "Since the common law crime and the statutory offence continue to exist together, and since (as is agreed) the distinction between the two depends on the degree of wickedness exhibited by the accused, it seems to me to be perfectly proper (to put it no higher) that the duty of assessing the degree of wickedness should be performed by the jury in order to decide which offence (if any) he has committed. That view has the overwhelming advantage in practice that it avoids the risk, which existed in the instant appeal, that a person who is accused only of manslaughter or culpable homicide may be acquitted of that charge and may then go unpunished, although he would have been convicted of the statutory offence if it had been charged as an alternative. Such a result would not, in my view, be in the interests of justice ..."

29. Their Lordships accordingly consider that in appropriate cases drivers in Jamaica should be charged with causing death by driving recklessly, and where a charge of manslaughter has been brought

judges should be ready, save in exceptional cases, to leave causing death by driving recklessly as an alternative offence. Juries should be directed on the concept of recklessness, on the lines of the statements in the House of Lords in *R v Lawrence* and *R v Reid.* They further consider that defendants should be charged with motor manslaughter only in cases where the risk of death from their driving was very high, and they anticipate that such cases will be rare. When it is suitable to bring a charge of manslaughter, they do not consider that it is inappropriate, notwithstanding Lord Roskill's views expressed in *R v Seymour,* to join with it a charge of causing death by reckless driving.

30. 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 recognised 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 and serious 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.

31. Their Lordships do not propose to answer the certified question in the terms in which it was framed. They have set out the law relating to motor manslaughter in Jamaica in the preceding paragraphs, together with the manner in which juries should be directed in cases where manslaughter is charged.

32. They must now turn to consider the content of the judge's charge in the light of the principles which they have expressed. It may be seen from the passages quoted from his directions in paragraph 10 of this judgment that he did not at any stage refer to the appellant's mental state or attempt to give the jury any definition of recklessness. Nor did he mention to them the possibility of the alternative verdict of causing death by reckless driving open to them under section 30(2) of the Road Traffic Act. In these circumstances their Lordships consider that the directions were seriously deficient and that the conviction of the appellant of manslaughter cannot stand.

33. Before they determine the course which they will take their Lordships must give brief consideration to the other grounds of appeal advanced by Mr Knox on behalf of the appellant. The first was that the judge's charge to the jury was unbalanced and unfair, so much so as to give rise to a miscarriage of justice. In advancing this proposition he pointed to a number of instances in which he submitted that the judge had placed excessive weight on the evidence of prosecution witnesses or unduly criticised evidence given by or on behalf of the appellant. Their Lordships do not propose to enumerate these, for they have given careful consideration to the charge as a whole, bearing in mind that 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. Having applied these criteria, their Lordships consider that the judge's charge, although not helpful to the appellant at a number of stages, was

not unbalanced to a degree which made it unfair or sufficient to found a claim that a miscarriage of justice had occurred.

34. Their Lordships feel that they must mention one other matter relating to the judge's directions. He dealt with a number of points on which the Crown had relied as constituting inconsistencies between the appellant's testimony in court and the contents of the written statement which he made in July 2000. He went on to say (page 58 of the record):

> "As I said to you, if you find that the previous statement and that it is inconsistent with what he says here in his evidence here before this Court, he – the law says that if that happens and you accept it and you find that it happened, his credibility would have been in trouble. He would not be a credit-worthy person. That is the effect of it. It is for you to say whether or not his credit is anyway affected as to how he said this happened. Matter for you."

The notable feature of this passage is that the judge instructed the jury that, *as a matter of law,* the appellant would not be a creditworthy person if they found that such inconsistencies existed. This is a clear misdirection and a usurpation of the jury's function of determining matters of fact. Their Lordships were concerned that the jury may have felt bound to reject the appellant's evidence on finding any inconsistency between its content and that of his statement, whereas it was for them as the tribunal of fact to take that into account and reach their own conclusions as to his credibility. Their Lordships have looked carefully at the rest of the judge's directions to see whether as a whole they give the jury the proper instructions about their role as fact finders. In a number of places he correctly told them that factual matters were for them to decide and repeated more than once that the credibility of the witnesses was a question for their decision. On the whole they consider that the error at page 58, when set against the other directions given in the course of the charge, was insufficient to leave the jury with the wrong impression about their function. Their Lordships therefore conclude, though not without hesitation, that this error of law did not result in a substantial miscarriage of justice, and they consider that it is an appropriate case in which to apply the proviso contained in section 14(1) of the Jamaican Judicature (Appellate Jurisdiction) Act.

35. Mr Knox also submitted that the absence of evidence about the appellant's good character and the consequent lack of a good character

direction vitiated the conviction. That evidence was given at sentencing stage, when Superintendent Quallo deposed that the appellant was a responsible and experienced officer, a settled family man involved in community activities and of impeccable character. He further told the court that the appellant had been driver to a senior officer and that he knew him to be a careful driver.

36. Mr Knox did not lay the blame for this omission upon the judge, who not only had no duty to raise the issue of good character but would have been ill advised to mention the appellant's character unless he was given information from which he could properly and safely do so. Rather he contended that it was a default on the part of defending counsel, which must lead to the conclusion that the conviction is unsafe and that there has been a miscarriage of justice: see the discussion in *R v Sealey* [2002] UKPC 52 at paragraphs 26 et seq. The basis of the contention is that since the resolution of the central conflict of fact in this case depended on accepting one or other version as truthful and correct, that is to say, it was an issue of credibility, the good character direction was of especial importance.

37. A good character direction has two limbs, the first relating to the defendant's credibility and the second to his propensity to behave as the prosecution has alleged: *R v Vye* [1993] 1 WLR 471. It was submitted that if the jury had been informed of the appellant's good character they would have been readier to accept his version, on the ground that a person with his background and record would have been more likely to be truthful and less likely to overtake a line of cars in a highly dangerous fashion.

38. The jury were made clearly aware from the evidence and reminded by the judge in his summing up that the appellant was an experienced police officer. They had the advantage of seeing and hearing him when he gave evidence and of forming their judgment about his apparent credibility from his testimony and his demeanour. They also had the evidence of the eye witness Mr McKennon and were able similarly to judge his credibility. Their Lordships do not wish in any way to minimise the importance of good character or of the proper direction being given by trial judges. They do consider, however, that in a case of the present type such a direction will be of less significance in assisting the jury to come to a correct conclusion than in other types of prosecution. While they must mark the fact that the failure to put in evidence of good character at the appropriate time was a regrettable omission on the part of counsel, their conclusion is that on balance

there was no substantial miscarriage of justice and they regard it as appropriate to apply the proviso.

39. The remaining question is that of the disposition of the appeal. It is plain that the conviction for manslaughter must be quashed. 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 misjudgement 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, which was left to them as an alternative offence under section 30(2) of the Road Traffic Act. That driving was so obviously dangerous in the circumstances that the jury, if manslaughter had not been left to them as a verdict, would have found the appellant guilty of causing the death of the two deceased persons by dangerous driving. The standard for a verdict of manslaughter, however, as appears from the authorities cited in this judgment, is that the risk of death being caused by the manner of his driving must be very high. As their Lordships have earlier stated (paragraph 29), that will in their view be satisfied only in rare cases. They do not regard the present case as reaching that standard on any view of the facts and they accordingly would not consider it justifiable to remit the matter for a new trial on the charge of manslaughter. They propose instead to substitute a conviction for causing death by dangerous driving, contrary to section 30(1) of the Road Traffic Act, and to remit the matter to the Court of Appeal for them to consider the question of sentence and impose an appropriate penalty.

40. Their Lordships will humbly advise Her Majesty that the appeal should be allowed, that a verdict of causing death by dangerous driving be substituted and that the matter be remitted to the Court of Appeal to determine sentence. The appellant must have his costs against the Crown.