JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 103/90

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. DERRICK WEST

F.M.G. Phipps, Q.C. & E.P. DeLisser for Appellant

Marcia Hughes for Crown

12th & 28th November, 1990

CAREY, J.A.:

On 6th July 1990, in the Home Circuit Court before Courtenay Orr J, and a jury, the appellant was convicted of causing the death of Stanford Bansfield by dangerous driving. He was sentenced to three years imprisonment and he was disqualified for holding or obtaining a driver's licence for 10 years.

After submissions before us on 12th November, we affirmed the conviction but varied the period of imprisonment to 18 months at hard labour. We promised to put our reasons in writing and this we now do.

The facts of this case fall within a narrow compass, and so far as the manner in which the appellant drove at the material time, this was described by a solitary witness, Lurline Anderson a newspaper vendor. According to her, after the victim Mr. Stanford Bansfield who was an elderly man of nearly 80 summers and herself chatted, he made his way across

the Washington Boulevard from Patrick City side towards the Washington Gardens side of the road. Approaching from the south end of the Boulevard which is quite wide (4 car lanes) in that area, was a small van travelling correctly on its near side. Mr. Bansfield crossed in front of that vehicle without any difficulty but was struck by another van driven by the appellant, which had pulled out to overtake the van in front of him. In carrying out this manoeuvre at speed, he collided with Mr. Bansfield who was by then about 10 feet from gaining the safety of the other side of the road throwing him into the air so that he landed on the sidewalk. Under cross-examination, this witness said that the victim was actually hit on the sidewalk. The road at this part is perfectly straight, it was daylight and visibility was excellent. The appellant did not stop after this mishap but was later seen further along the road at Dunrobin by a police officer walking around his van as if he was under the influence of drink. He smelt of alcohol and was unsteady on his feet.

The appellant said that Mr. Bansfield dashed across the road from the left embankment, and that he made a slight swerve to his left but nevertheless collided with an individual. He said he was travelling at a speed of 30 m.p.h. at the time. He did not stop because he feared being mobbed by a crowd. He acknowledged that he never applied his brakes. He also admitted taking alcohol but explained that it was since the accident and while waiting on a friend to accompany him to the Police Station at Constant Spring that he had accepted a drink of Brandy from the said friend.

We would observe that the Crown's main witness was not the best of witnesses. She was obviously not very intelligent an observation we do not make, disrespectfully. But that is not the same thing as saying that she was thereby rendered unreliable. Once it was accepted by the defence that the accident occurred on the right hand section of the road on the appellant's far side, then his driving became questionable. The

inevitable inference thereafter was that he was driving in a manner dangerous to the public. Mr. Phipps, Q.C., submitted firstly that this witness was unreliable. The jury who had the advantage of seeing and hearing her plainly did not think so. The variation which we identified in her testimony, in our view, could not affect the main or basic allegation of the Crown viz., that the accident took place on the appellant's off side, and if he were driving as a reasonable careful driver, he would have seen the pedestrian crossing the roadway. The accident was due to his fault caused by the manner in which he was operating his motor vehicle on that road on that day.

The next area of attack by Mr. Phipps was the treatment by the learned trial judge of the effect of drink as contributory to the appellant's handling of the motor vehicle. Learned counsel contented himself by saying his treatment was "inappropriate." Plainly, that is far from suggesting that the trial judge's treatment amounted to a misdirection. He said this at p. 13 -

> "Now another point arises, members of the jury. You have heard talk about this man smelling of alcohol and so on. You will have to decide on that, but I am giving you the law.
> If a driver is adversely affected by drink, this fact is a circumstance relevant to the issue of whether he was driving dangerously. So if you find that, as the prosecution is suggesting, this man had in 'a few', as we put it in Jamaica, and as two of the policemen said, he was unsteady, then members of the jury, that would be something for you to consider, take into consideration in deciding whether he drove dangerously down at Patrick Drive."

This was a proper and impeccable direction which Mr. Phipps did not attempt to challenge. Now in dealing with a criticism of police conduct made by Mr. DeLisser, counsel for the accused in the course of his address to the jury, that the police had

not charged his client for driving under the influence of drink although they were saying he was drunk, the learned trial judge drew from some experience of his while a Resident Magistrate in St. Mary. We do not propose to repeat his experience because it speaks of maladroit conduct on his part about which reticence should be recommended rather than public attention drawn thereto. Save for that solecism, which was therefore inappropriate, his directions in that regard remained faultless.

Finally, there was some faint argument that there was no evidence of dangerous driving. There was evidence that the appellant by the manner in which he chose to operate his motor vehicle at the material time, was dangerous to the public. He chose to overtake when it was unsafe to do so and collided with a pedestrian where he did. The jury could not accept that any 78 year old man could "dash across the road" as he stated. Then at no time did he apply his brakes. He said as much. Then there was evidence of his drunken condition after the accident which could explain his manner of driving at the time of the mishap. In our view, there was ample evidence on which the jury could come to the conclusion at which they eventually arrived. We were not persuaded by these arguments which we found unmeritorious.

With respect to the sentence imposed, we agree with counsel that the sentence was excessive. The learned judge was right to impose a custodial sentence having regard to the manner of driving of this appellant. Such a choice of sentence would act as a deterrent to mark the Court's disapprobation of drunken drivers. It must always be a matter of degree but this was not the most serious case of causing death by dangerous driving. The disqualification from holding a driver's licence for a very protracted period, was a serious punishment. In our view, justice would be served by varying the sentence to 18 months imprisonment at hard labour.

Before parting with this case, we cannot help remarking at the speed with which the transcript was submitted to the Registry of this Court. It was received in the same month of the trial. We hope that this is not an accident.