JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 212/87

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Morgan, J.A.

R. v. UROY ANDERSON

Mrs. J. Samuels-Brown for Appellant

Hugh Wildman for Crown

April 24, 25 & May 26, 1989

CAMPBELL, J.A.

The appellant was arraigned before McKain J. and a jury in the Home Circuit Court on November 10, 1987 for the offence of manslaughter. The jury brought in a verdict of causing death by dangerous driving on November 12, 1987 and a fine of $800.00 or 6 months imprisonment was imposed together with suspension of the appellant's driving licence for 12 months. Against this conviction, leave to appeal was granted by the single judge as the grounds of appeal formulated, complained of errors of law committed by the learned trial judge.

On November 12, 1986 at about 7.45 a.m., both the appellant and the deceased Zachariah Powell were on the Ferry Highway in Saint Andrew. They were in the area generally called Asphalt Paving. The appellant was driving a Bedford Tipper Truck westward from Kingston direction on the southern section of the dual carriage-way which traverses the area. The deceased was driving a red Isuzu Gemini motor car eastwards

towards Kingston in the right hand lane of the northern section of the dual carriage-way. The deceased had two friends as passengers in the car. Evidence for the Crown was adduced from Mr. Canal Rowe a friend of the deceased who was a passenger seated in the rear of the car, from one Mr. Eric Tinglin who was driving his own car eastward in the left lane but behind the red Isuzu on the northern section of the dual carriage-way and finally from Sergeant Simpson who, in response to a report on the accident, proceeded to the scene and gave evidence on events and observations there.

Mr. Tinglin's evidence was that there was a white car about four car-lengths in front of the red Isuzu Gemini. Both cars were being driven in the same direction and in the right lane. He was driving his car about six to seven car-lengths behind the red Isuzu Gemini but in the left lane. He saw the white car suddenly swerve to its left. The reason for this manouvre was that a Bedford Tipper truck had made a right turn across a passage-way between the southern and northern sections of the dual carriage-way and was heading straight across the northern section of the dual carriage-way in the path of the vehicles travelling eastwards. The white car succeeded in avoiding a collision with the truck. The driver of the Isuzu Gemini also swerved left, but notwithstanding, he crashed into the middle section of the truck. At the time of the collision, the front wheels of the truck were over the white line which separated the left lane from the right lane that is to say in the left lane of the northern section of the dual carriage-way but the rest of the truck was in the right lane of the northern section. The evidence of Mr. Canal Rowe is substantially to the same effect. He saw the Bedford Truck enter the passage-way. It came across the road where the deceased was driving. The deceased applied his brakes but to no avail, the car was so close to the truck when the latter proceeded to cross the road that there was a collision substantially

In the middle of the road. The further evidence of Mr. Tinglin is that he stopped his car on the road and went up to the car which was in the collision. He saw the driver hunched over the steering, Mr. Tinglin tried to open the car door on the driver's side but it could not open. He returned to his car until some other persons came along when he returned to the red Isuzu Gemini and together they prised open the car door on the driver's side. The driver by that time from his observation appeared dead. He was taken out and laid down on the side of the road. Mr. Tinglin said a passenger who was in the back seat of the car who happened to be Mr. Rowe spoke to him. Mr. Tinglin also said he saw another passenger in the front seat who, on his first visit to the car appeared unconscious with his head down on the dash-board.

On his second visit to the car, when the driver was taken out and laid on the side of the road, this passenger opened his eyes and set up. He was taken out and asked to sit.

Mr. Tinglin left the scene but returned about 9.30 a.m. He then saw that the Bedford Truck was parked on the soft shoulder of the left lane of the northern section of the dual carriage-way. He saw police officers at the scene. He pointed out to one of them, namely Sergeant Simpson, the point of impact where the accident occurred.

Sergeant Simpson gave evidence that he visited the scene about 8.10 a.m. He saw the Bedford Truck parked on the soft shoulder of the left lane of the northern section of the dual carriage-way as one faces Kingston. He observed broken glass and oil in the road. Most of the broken glasses were over on the soft shoulder where the truck was. Oil had spilled into the road as also on the soft shoulder. He saw the appellant who identified himself as the driver of the Bedford Truck. He volunteered that an Isuzu car was involved and that the three occupants of the car sustained injuries. The appellant on being requested to identify the point of impact, pointed to the soft shoulder.

Sergeant Simpson, following on this, further observed the roadway. He saw scratches in the road. He saw braking impressions commencing from the Ferry end of the road which continued in a straight line in the centre of the road for a distance of 97 feet where it ended still in the centre of the road, indicating the point of impact as being in the centre of the road. He saw Mr. Eric Tinglin who in the presence of the appellant, narrated what he Mr. Tinglin saw of the incident and showed the point of impact. There were dragmarks, dirt and oil spill at this point. From this point to the northern soft shoulder where the Bedford Truck was, measured 14 feet. The width of the road at the point of impact was 27 feet. The road was straight, asphalted and in good repair. The appellant who was present and could see and hear Mr. Tinglin did not dispute the point of impact shown by Mr. Tinglin nor his narration. Sergeant Simpson there and then pointed out to the appellant the offence of manslaughter, and arrested him therefor. Sergeant Simpson said that later in the day he proceeded to the Kingston Public Hospital and enquired of the injured persons. He saw Canal Rowe and Clacon James. He said he later went over to Madden's Funeral Parlour accompanied by relatives of the deceased who had gathered at the Hospital. He said that he saw the body of Zachariah Powell. He said the body was pointed out to him by the relatives. He attended a post mortem examination on November 19, 1986 at which he says one Hilroy Powell identified the said body as Zachariah Powell, his brother. Objection was taken to this bit of evidence of Sergeant Simpson as being hearsay but the learned trial judge overruled the objection stating that the evidence was admissible. Under cross-examination of this witness it was elicited that shortly after he arrived on the scene, a police photographer came there. It was not elicited from him whether he had instructed that the scene be photographed with or without emphasis on any special feature or whether he saw any photograph being taken.

Dr. Royston Clifford gave evidence of the injuries observed on a deceased identified to him as Zachariah Powell by one Hilroy Powell who was not called as a witness.

The appellant gave sworn testimony admitting that an accident occurred. His version is that he had crossed the road completely and was on the soft shoulder when the red Isuzu Gemini being driven at a speed collided with his truck on the soft shoulder abutting the left lane of the northern section of the dual carriage-way. He denied seeing Mr. Tinglin at the scene and following on this denial, he further denied hearing Mr. Tinglin narrating how the accident occurred and of seeing him pointing out the point of impact to Sergeant Simpson.

He gave evidence of seeing a photographer on the scene and that he saw him take photographs. He did not give any directions on what was to be photographed. The appellant admitted as true that close to the white line and scattered all over the road there was broken glass from the windscreen and that there was a concentration of broken glass on the soft shoulder. It is to be observed that this is in substance what Sergeant Simpson said because under cross-examination of him, the question and answer were as follows:

> "Q. In terms of the broken glass and oil which you said you saw in the road, am I correct in saying it was scattered all over the road?
>
> A. Well, yes it was scattered over a wide area."

A document purporting to be a photograph of the area in which the collision took place was sought to be admitted in evidence through the appellant. It was ruled inadmissible. On the totality of the evidence as summarised above the jury brought in the verdict earlier stated.

The grounds of appeal filed complain against the learned trial judge's rulings on evidence and are summarised thus:

(a) The learned trial judge misdirected herself in allowing inadmissible evidence to wit hearsay evidence in proof of the death of Zachariah Powell which was a vital element to be proved in the charge against the accused.

(b) The learned trial judge fell into error when she wrongly applied the rule against the admission of hearsay evidence, thereby disallowing the putting of documents, to wit photographs to a witness for the Crown for the purpose of the photographs being identified and adopted by that witness and thereby being admitted in evidence through him where such evidence was a material and vital aspect of the defence case.

(c) The learned trial judge fell into error when she wrongly disallowed the photographs being put to the accused for the purpose of his identifying them and adopting them as a part of his defence.

(d) The learned trial judge wrongly exercised her discretion in refusing the defence application for an adjournment in order to call, to give evidence for the defence, the police officer who was the photographer of the locus in quo and to have admitted in evidence through him the said photographs. The learned trial judge further compounded her error in her summation to the jury on the materiality of the proposed evidence of the photographer."

Grounds "b" and "c" do not have any factual basis having regard to the evidence. It is therefore unnecessary to consider whether the learned trial judge had misapplied the rule permitting a document being put to a witness, albeit not prepared by him, and his being cross-examined in relation thereto. The learned trial judge certainly did not disallow the document, to wit, the photograph being put to any witness, nor did she disallow it being put to the appellant. In the case of the witness who was Sergeant Simpson, the record eloquently speaks on what took place. Sergeant Simpson gave his evidence on November 11, 1987 between 10.26 and 11.18 a.m., he was, nearing the end of cross-examination, asked by defence counsel if a police photographer came on the scene. He answered in the affirmative and further stated that this photographer came shortly after him. He Sergeant Simpson, arrived on the scene at 8.10 a.m., and at that time the Bedford Tipper was on the soft shoulder of the left lane of the northern section of the dual carriage-way. He was not asked, nor did he give evidence of having

instructed the photographer to protograph the scene or any particular section thereof or of any photograph having been taken. We assume he left the court after giving his evidence. A short adjournment was taken until 11.46 a.m., to accommodate the arrival of Dr. Clifford. On resumption of the trial Mrs. Samuels-Brown the defence counsel informed the court that she had only become aware of the photographs on the previous day (November 10) and that she intended to call this photographer for the defence. However to obviate this necessity, she was applying to have Sergeant Simpson recalled for the latter to be shown the photograph and have it admitted in evidence through him. The learned judge refused the application on the ground, rightly in our view, that since Sergeant Simpson was not the maker of the document nor had he authorised its making, it could not be admitted in evidence through him. It is thus patently wrong to complain of the refusal of the learned trial judge to allow a document to be put to Sergeant Simpson when, in fact, it was the application to recall him which was refused when the ultimate purpose for his recall was made known.

Turning to ground (c) the record shows that the photograph was shown to the appellant, he was asked if he recognized it as a photograph of the scene of the accident, and he answered in the affirmative. He was then asked to give evidence of particulars in the photograph which he recognized.

The Crown objected to this further evidence. Before the learned trial judge could rule on the objection, defence counsel asked the appellant if he "adopted" the photograph. The learned trial judge retorted in graphic language thus "He could adopt it and take it right through the Adoption Board, it is not going to help you." Defence Counsel had earlier stated as her view of the law that once the appellant recognized the document as a photograph of the scene of the accident and adopts it, the necessary basis was established for the photograph to be admitted in evidence through him. Defence Counsel formally applied for the photograph

to be admitted in evidence on this basis. The court ruled that it was inadmissible "at this stage."

Here again it is totally wrong and improper to appeal on the ground of a refusal by the learned trial judge to allow the photograph to be put to the appellant in the teeth of evidence that the learned trial judge did allow the appellant to be shown the photograph, did allow him to give evidence that he recognized and adopted the same. The real but unexpressed complaint of Mrs. Samuels-Brown, is, that the learned trial judge should have allowed the photograph to be admitted in evidence through the appellant. This the learned trial judge correctly refused as she would be admitting self-serving evidence. She would additionally be admitting inadmissible hearsay evidence and finally she would be misapplying the rule pertaining to third party documents being shown to a witness. This rule applies to cross-examination, and cannot be extended to examination-in-chief so as to let in self-serving evidence.

With regard to ground (d), the record shows that on the admission of defence counsel, she became aware of the photograph on November 10, 1987 and that having studied them she formed the view that she would desire the photographer to give evidence for the defence. The court having adjourned at 1.00 p.m. on November 10, defence counsel would have had that afternoon to set in motion arrangements to have the police officer as a witness, if necessary, through a subpoena. At about 11.46 a.m., on November 11, 1987 when defence counsel made her admission, she was informed by the learned trial judge "ex abundante cautela" that she was entitled to call the photographer for the defence if she so wished. Defence counsel intimated that she was attempting to get in the photograph through Sergeant Simpson; the learned trial judge told her that she could not do so. She was asked if there was no chance of getting the photographer. Her answer was that she did not know but she would try. It is not on the record that she sought the assistance of the Court. The evidence of Dr. Clifford was taken and concluded at 12.00 a.m., at which time

defence counsel asked for a short adjournment on behalf of the appellant to enable him to re-energise himself. The court adjourned until 2.00 p.m. and in fact resumed at 2.13 p.m. The appellant gave sworn testimony and the court adjourned for the day at 3.55 p.m., on the intimation that the photographer was not then available, but hopefully would be available the following morning. By 1.35 p.m., on November 12, 1987 it would appear that the photographer was still not present, because it was then that the learned trial judge commenced her summing-up. Against the background of these cold facts it cannot be seriously argued that the learned trial judge did not grant defence counsel ample time to get her witness.

Contrary to the complaint of defence counsel, the learned trial judge granted her an early adjournment at 3.55 p.m., to enable her to arrange for her witness to be present at the commencement of the hearing on the 12th November. This was despite the fact that defence counsel had from 10th November to arrange for her witness to attend. The time of the judge and jurors was wasted for the whole morning of November 12, 1987. It is in our view less than fair and just for a complaint to be raised against the learned trial judge in the context of the indulgence shown to defence counsel. It may be that learned defence counsel relied on a reason given by the learned trial judge for the refusal of the adjournment because she submitted that her grievance was further exacerbated by the summation of the learned trial judge on the proposed evidence of the photographer.

The learned trial judge in her summation said:

> "Now, there has been a lot of delays, most of which we could not help, and you heard counsel for the defence this morning applying for extra time to go and find a witness and I refused. I refused because the case has been dragging on for a long time. The facts of the case are matters for you. The witness who was coming here was not an eyewitness, what he tells you, what he shows you could establish nothing. It might support the defence case, but of course, the prosecution would still

> "have to satisfy you, because the accused is innocent until you by your verdict say otherwise. 'What he is telling you could only go to support what the accused man has told you and if what the accused man has told you, and if what the accused man himself has told you has satisfied you already then that would be the end, he would need no more. So the fact that the extra witness did not come cannot influence the prosecution's case, and it is the duty of the prosecution to satisfy you. When I said that would be the end I was not judging the guilt or innocence of the case, because those are matters of fact for you."

The learned trial judge's statement that she refused further adjournment because the case has been dragging on for a long time can generally pass as unobjectionable. The further statement that the proposed witness not being an eyewitness could not establish anything, is again unobjectionable in the particular context of the case before her, and was certainly not prejudicial even though undesirable.

The further statement of the learned trial judge is most unfortunate and amounts to a misdirection. She said:

> " .... that evidence of the photographer might support the defence case,"

in that:

> "what he is telling you could only go to support what the accused man has said,"

however:

> "...if what the accused man himself has told you has satisfied you already, then that would be the end, he would need no more. So the fact that the extra witness did not come cannot influence the prosecutor's case."

The learned trial judge has certainly failed to reflect on the true purpose of adducing supporting defence evidence which is to tilt the scale in favour of the accused in the event the jury may possibly entertain some reservation on the truth of what he says.

This unfortunate and undesirable exposition by the learned trial judge did not however operate to the prejudice of the appellant nor result in any miscarriage of justice because the photographer could only be called to produce the photographs which he on his own volition took. The evidence of the appellant is that he did not give any directions on any particular points to be photographed nor did Sergeant Simpson.

Sergeant Simpson and the appellant were however ad idem that though broken glass and oil were concentrated on the soft shoulder, there were also broken glass and oil scattered on the roadway. The appellant himself admitted that there were brake marks. He did not say they were in a position different to Sergeant Simpson. His evidence however was that they were caused by the white car which had passed his tipper truck without mishap. The photographer could not support him on this because he did not see, and therefore cannot know the path which the white car took when it passed and whether it had braked so as to leave any brake mark. He could not support the evidence of the appellant that the broken glass on the roadway came about when the appellant, as stated by him, reversed his tipper truck into the road and back onto the soft shoulder to disengage itself from the red Isuzu Gemini which had crashed into it on the soft shoulder. The photographer on the evidence came on the scene after Sergeant Simpson who, on his arrival saw only the tipper truck on the soft shoulder. Thus, the photographer at best would be producing a photograph showing the position of the tipper truck, the position of dragmarks, and broken glass and oil, but in respect of these, the appellant and the Crown are not in dispute. The matters in dispute were whether at the time of the accident the tipper truck was on the soft shoulder, or in the roadway; whether the broken glass, oil and dragmark in the road are explicable on the evidence of Eric Tinglin and Canal Rowe on the one hand, and the appellant on the other hand. It is significant that no effort was made by the defence to call Sergeant Baker, who on the appellant's evidence, was on the scene within five minutes, especially as it was he who the appellant said

instructed him to disengage his tipper truck from the red Isuzu Gemini.

Finally, complaint is made that proof of death was not established on admissible evidence but on inadmissible hearsay evidence given by Sergeant Simpson who gave evidence that in his presence one Hilroy Powell whom he did not know before, identified the body of the deceased as that of his brother Zachariah Powell to Dr. Royston Clifford. Hilroy Powell did not give evidence.

The learned trial judge fell into error in admitting Sergeant Simpson's evidence in identification of the deceased. Had this evidence with that of Dr. Clifford been the only evidence of the identity of the deceased, we would have been constrained to allow the appeal because an essential element of the offence would not have been proved. However, there was ample evidence 'aliunde' from which on a proper direction the jury could have been satisfied beyond any reasonable doubt that Zachariah Powell died as a result of the collision of the car driven by him with the tipper truck.

The evidence of Canal Rowe is that he was a friend of the deceased for about five years. The deceased was a fisherman like him and they used to fish together at Beacham Beach in Clarendon. He knows the deceased's house. He actually went to deceased's house at 4.00 a.m., on that fateful morning for the deceased to drive the car to Kingston. Rowe's evidence is that when Zachariah Powell was pulled out from the car and stretched out on his back in the road, there was no response from him, there was no struggling when they stretched him out. From what he saw, he thought that Zachariah Powell had died. He has never seen him alive since then. He was not cross-examined on this matter to indicate that the death of Zachariah Powell was at that stage considered a live issue.

The evidence of Eric Tinglin is that when he saw the driver of the Isuzu Gemini car he was hunched over the steering. The witness tried to open the driver's door, it could not open, he returned to his car and waited until other persons came. Together with them, he

returned to the Isuzu Gemini. They prised the driver's door open. The driver by this time, from his own observation, appeared dead. He was taken out and laid down on the side of the road. Again he was not cross-examined by the defence on this issue.

The appellant himself admitted to Sergeant Simpson that there were three persons in the Isuzu Gemini and that they had sustained injuries.

The issue of death only arose later when presumably the defence became aware of the fact that Hilroy Powell would not be available to give evidence. By then in our view uncontradicted evidence had been adduced from which death could be inferred, especially from Canal Rowe's evidence that he has never seen Zachariah Powell alive since that morning. They are friends, they fished together, and he knows the deceased's house. There is no reason for Zachariah Powell to have distanced himself from the witness. The irresistible inference is that what in effect Rowe is saying is that Zachariah Powell to his knowledge was dead when he was taken from the car.

Though we find in favour of the appellant that there are misdirections amounting to errors of law as hereinbefore mentioned no substantial miscarriage of justice has been occasioned thereby because the evidence in support of the verdict of the jury was most cogent. In our view that verdict was most charitable since the evidence would have supported a verdict of manslaughter for which the appellant was arraigned.

We therefore apply the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act and accordingly dismiss the appeal and confirm the conviction and sentence.