JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 78/99

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

REGINA V. RHONE WARREN

Delroy Chuck & Garth Lyttle for the Appellant

Marva McDonald-Bishop & Trecia Hutchinson for the Crown

January 18 and February 23, 2000

FORTE, P:

The applicant having been indicted for the offence of manslaughter was tried and convicted in the St. Catherine Circuit Court on the 13th April, 1999 for the offence of causing death by dangerous driving. He was sentenced to five years imprisonment at hard labour, and disqualified from holding or obtaining a driver's licence for a period of two years. He now applies for leave to appeal against his conviction and sentence. The application is granted and the hearing of the application treated as the hearing of the appeal.

The case for the prosecution was simple and uncomplicated. At about 9.00 a.m. on the 10th June, 1997 two ladies were walking on the left hand side of the road going to their home in the village of James Mountain in the Sligoville district of Saint Catherine. As they walked, one of them, the witness Mavis Edwards heard the sound of a motor

vehicle approaching. At this time the ladies were walking "one in front of the other." She looked back and saw a motor vehicle coming at "great speed". This caused both ladies to step off the road onto the bank. This, however, did not prevent the collision which took place thereafter. As they stood there "as far back as possible", the appellant, driving a Toyota Camry motor car, alleged by the witness to be going at a fast rate of speed, left the roadway, and hit both ladies, over the fence and into the yard beyond. After the collision, the appellant was seen to leave the car, and run away. Both ladies were taken to hospital, where the deceased succumbed to her injuries.

In his defence, the appellant stated on oath, that on the day of the incident, he was a timekeeper and supervisor of road-work being done between James Hill and Sligoville. There was another supervisor, Mr. Gayle and about 25-26 persons at the site. They were spreading "grit" in the road with the aid of a backhoe. He was sitting on the backhoe, when a white Toyota Corolla motor car drove up. Six men, each armed with a machete, alighted from the car, and were demanding work. They had a dispute with the other supervisor Mr. Gayle, and as a result chopped him. He accompanied Mr. Gayle and others to the police station where a complaint was made.

When he later returned to the site, the six men and the Toyota car were still there. He resumed sitting on the backhoe. While he was sitting there, the six men were approaching him with machetes. They were calling him police informer. In fear of his life he jumped off the backhoe, and jumped into a Camry motor car in which his brother was sitting. He drove off. The six men jumped into the Corolla motor car and started to chase him. He drove at 35 mph coming from Sligoville in the direction of where the incident occurred. He was coming down a hill, down James Mountain into a corner

where there was gravel on the road. The car skidded and then collided with the ladies ending up with the left front wheel and the left back wheel in the bush. He ran away from the scene because "de man dem was coming at me." Asked why his motor vehicle ended up at the point where it did, the appellant answered:

> "Di man dem chasing me and a wash in the loose."

He admitted that there were a lot of people in the square at the time of the collision, and that the ladies were not in the street, but maintained that he was travelling at 35 mph, and that the men were chasing him. Asked if the men chased him into the square, he answered that the car came right into the square, after his car, and that when he ran away, the men were still chasing him. Coincidentally, as it turned out the deceased was a relative of the appellant.

On this evidence, the appellant asked the jury to find that he drove as he did because of "duress of circumstances" i.e. the necessity arising because of the fear for his life, caused by the men with evil intent towards him, chasing him. Nevertheless, the jury convicted him, and before us he now complains of the failure of the learned trial judge to direct the jury in this area of his defence. The ground reads as follows:

> "1. That the Learned Trial Judge failed to direct the Jury on the live issue of duress which is the main defence available to the applicant. Thus, even though adverting to the perceived threat to his life, viz:
>
> 'You see, basically what the defence is saying is that the accused was in such a state of mind, running for his life, that probably ordinary driving sense had departed from him.' ..." (Emphasis added)

Before getting into the merits of the complaint, it is necessary to examine the question raised in response by Mrs. McDonald-Bishop, for the Crown, as to whether such a defence can avail an accused on a charge of causing death by dangerous driving.

It has long been settled that the defence of duress is not available to an accused where the offence is murder, attempted murder or some forms of treason. However, it has always been debatable as to whether it would avail in respect of other offences. The question raised in this appeal, may however be answered if the English cases cited in arguments are acceptable in this jurisdiction.

We start with the following dicta of Woolf, L.J. in ***R. v. Conway*** [1988] 3 All E.R. 1025 in which he was dealing with a case of reckless driving:

> "We conclude that necessity can only be a defence to a charge of reckless driving where the facts establish 'duress of circumstances', as in ***R v Willer,*** ie where the defendant was constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or some other person."

Woolf, L.J. thereafter adopted the opinion of the authors of Smith and Hogan Criminal Law (6th Ed. 1988 p. 228) that "duress of circumstances" is a logical consequence of the existence of the defence of duress as that term is ordinarily understood i.e. "do this or else" and then continues:

> "This approach does no more than recognise that duress is an example of necessity. Whether 'duress of circumstances' is called 'duress' or 'necessity' does not matter. What is important is that, whatever it is called, it is subject to the same limitations as the 'do this or else' species of duress."

He concluded thus:

> "It follows that a defence of 'duress of circumstances' is available only if from an objective standpoint the defendant can be said to be acting in order to avoid a threat of death or serious injury."

In following the decision in ***Conway***(supra) Simon Brown, J in the case of ***R v Martin*** [1989] 1 All E.R. 652 at p. 653(h) summarises the principle thus:

> "... English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure on the accused's will from the wrongful threats or violence of another. Equally however it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'.
>
> Second, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.
>
> Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result; second, if so, would a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was Yes, then the jury would acquit; the defence of necessity would have been established."

The law in England seems therefore to be reasonably settled. However, none of the cases dealing with this subject, relate to circumstances where a death has been the result of the manner in which the motor vehicle was driven. Would the defence for instance, avail a person charged for manslaughter as was the appellant in this case? The reason given by the authorities for excluding the defence in the case of murder is the

moral concept that a person ought not to take the life of another in order to save his own. Should a person therefore be excused, if in order to save his own life he is reckless as to whether his conduct would result in the death of another? The answer to this question however, ought to take into account, the fact that in murder a particular intent either to take life or do serious injury must be present whereas in manslaughter, no such specific intent is required. If therefore, a person is acting under "duress of circumstances" or necessity and, for that reason, he is put in a state of mind where he is reckless as to the consequence of his act, or his state of mind is such that he cannot reason as a normal reasonable person would, then in my judgment he ought to be the beneficiary of such a defence.

We accept as good law for this jurisdiction, the principles as outlined by Simon Brown, J in the case of ***R. v. Martin*** (supra). We recognize that a person acting under the stress of threats to his life, or serious injury, which is either expressed or implied from the conduct of others, in circumstances where he reasonably believes that his life is in danger or that he might be seriously injured, would be entitled to avail himself of such a defence in respect of the offence of manslaughter, arising out of the driving of a motor vehicle. A necessary prerequisite of the success of such a defence, would of course be a positive answer to the question whether a sober person of reasonable firmness sharing the same characteristics of the accused, would respond to the situation in the same way that the accused did. We conclude, therefore, that the defence was available to the appellant.

The substantive complaint in the sole ground of appeal must now be considered. Did the learned trial judge give the required direction to the jury, and if so was it adequate. The learned trial judge first dealt with this aspect as follows:

> "If you the jury are satisfied that the negligence proved is of a very 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 in a high degree the risk of causing substantial personal injury to others, then the crime of manslaughter would be established.
> I am going to read over a section here for you, and the reason I am going to read it over is because it's on that limb that the defence is asking you to find the accused not guilty.
> 'If you the jury are satisfied that the negligence proved is of a very high degree and of such a character that any reasonable driver endowed with ordinary road sense, and this is important, 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 in a high degree the risk of causing substantial personal injury to others.'
> You see basically what the defence is saying is that the accused was in such a state of mind, running for his life, that probably ordinary driving sense had departed from him. They are also saying, a second thing, and I am going to remind you of it again, that driving along at thirty-five miles an hour he went into some gravel and he skidded, stepped on his brake in gravel perhaps or whether he skidded and stepped or stepped on his brake and skidded that the car washed and hit down the people. So there are two aspects.
> The first aspect was that he was running for his life that because of the gravel on the road and his applying the brake or whatever the car skidded hitting down these people, these are matters of evidence and these are matters for you. (Emphasis added)

In these directions, the learned trial judge in directing the jury as to what must be established by the prosecution, indicated, and repeated for emphasis having regard to the

defence, that they must find before concluding that manslaughter had been established that the accused must have been in full possession of his faculties. He then reminded them that the defence was saying that the accused was not, that is to say, he was in such a state of mind running for his life, that ordinary driving sense had departed from him.

In rehearsing the testimony of the appellant, the learned trial judge returned to the subject. He stated:

> "The fact of the matter is he is saying that because of the state of mind that he was in, his driving was affected causing him to get into a state and that is why he hit the two people culminating in the death of Mavis, sorry, death of Thelma Edwards."

Then again at page 34:

> "The defence is saying, at the very least, that the accused was driven by fear and in his fear as he came upon James Mountain square he saw two ladies among a hundred others that his car skidded in gravel and plowed into these ladies hitting them from the side of the road into a neighbouring yard."

The learned trial judge after an admirable direction on manslaughter as it applied in the instant case, and on causing death by dangerous driving left the following verdicts for the jury's determination: (page 35)

> "So that your possible verdicts are, guilty of manslaughter or not guilty of manslaughter, in which case you don't have to go and consider causing death by dangerous driving. But if you reject manslaughter because you do not say that his driving was of such a great degree of recklessness, only then you need to consider causing death by dangerous driving, then your verdict would be either guilty of causing death by dangerous driving or not guilty of any offence at all."

On a careful examination of these directions, it can be gleaned that the learned trial judge did in fact leave for the jury's consideration, the question whether the

appellant was in full possession of his faculties, when he drove the car in such a manner so as to cause the death of the deceased. He emphasised that ingredient of the offence, and immediately thereafter invited the jury to consider that the defence was saying that the "appellant was in such a state of mind running for his life that ordinary driving sense had departed from him." Having told them that it was necessary for them to find that the appellant was in full possession of his faculties before manslaughter was established, it follows that the jury must have known that if they accepted that the appellant was in such a state of mind, that ordinary driving sense had departed from him, they would be bound to find that manslaughter had not been established. However, we cannot say that the interpretations given to the passages cited above are such that a jury would readily grasp, given the manner in which the directions were given. In any event the directions were inadequate in the circumstances.

We accepted the submissions of Mr. Chuck that the learned trial judge gave no directions to the jury as to the legal implications, in the event that they found that the appellant was driving dangerously but accepted his allegation, that he was in fear of his life, as a result of being chased by the six men in the white Toyota Corolla motor car. In our judgment the jury ought to have been told that if they found that the manner in which he drove the car whether recklessly or dangerously, was a result of a reasonable belief that his life was in danger, or that he would be seriously injured because the men with obvious evil intent were chasing him, he would be entitled to an acquittal if a sober man of similar characteristics would in the circumstances have driven the car in the way the appellant did.

That being so, we find that the directions in respect of the offence of manslaughter, was not adequately left with the jury, and in respect of the alternative offence of causing death by dangerous driving, the jury received no help from the learned trial judge, as to this particular defence. We, therefore, conclude that the complaint of the appellant is valid.

Accordingly, the question that follows, is whether the misdirection/non-direction is fatal to the conviction given the particular circumstances of this case.

Mrs. McDonald-Bishop, Crown Counsel has argued that the appellant in his defence never admitted that he was driving recklessly or dangerously at all. In fact he maintained that he was travelling at 35 mph driving carefully on his correct side of the road, in spite of being chased, and that the accident was contributed to by the car skidding in the gravel as he came around a corner coming into the square. She contended that the appellant was not maintaining that he drove recklessly or dangerously and did so, as a result of the "duress of circumstances" which he was under with the men chasing him to do him serious injury. In those circumstances, she submitted the appellant would not be entitled to the directions which he contends should have been left with the jury. For this submission she relies on the following dicta of Caulfield J in the Court of Appeal of England in the case of ***Stanley Arthur Denton v. R*** [1987] 85 Cr. App. R. 246 at 248:

> "In view of our ultimate decision it is not necessary to review, still less to comment, on the law on this alleged defence of necessity. This is so because this Court takes the view that even if necessity as a defence can be raised on a charge of reckless driving, it certainly could not be raised on the facts relied upon by the appellant in his defence. The appellant did not assert that he had to take risks of causing harm to others to escape from his pursuers or that

> he had to drive recklessly or that he did not give the nature of his driving a thought. He asserted in terms, 'I did not take risks, I drove carefully throughout.' In our view such assertions exclude any possible defence of necessity, even assuming there is such a defence. The necessity, if any, was to drive, not to drive recklessly."

The danger of accepting that dicta as a correct approach to the question in that case, as in the instant case, is that the jury could have come to the conclusion that the accused was in fact driving recklessly, but believed that he was doing so as a result of the fear of being injured by men whom he believed were intent on doing so. In the instant case, it is quite possible that the jury could have disbelieved the appellant as to the manner in which he was driving the car, but nevertheless believed that though he was driving in the manner alleged by the prosecution, he was doing so as a result of the men chasing him. For those reasons, we do not accept this approach contended for by counsel for the Crown.

How then should the appeal be disposed of? Is this a case suitable for the application of the proviso? The jury obviously even with the defect in the summing up came to the conclusion that the appellant was driving dangerously. Although, the appellant said he was being chased, the only other car that came on the scene was the car in which the deceased and her sister, the witness were taken to the hospital. In addition the appellant throughout his testimony insisted that he was not travelling at a fast rate of speed, but instead was travelling at 35 mph in spite of being in fear of serious injury as a result of the men chasing him. Nor did he admit to driving dangerously or recklessly. On the other hand the prosecution's case though simple must have been convincing to the jury. At the end of the evidence, given the frailties of the defence, the prosecution was left with a strong case.

Having regard to these particular circumstances, it is our judgment that had the jury received proper directions, they would nevertheless have returned the same verdict. For these reasons, we find that this is a proper case to apply the proviso and we so do. The appeal against conviction is therefore dismissed.

We turn now to the question of sentence. It was submitted that the sentence of five years is manifestly excessive given the facts of the case, and the antecedents of the appellant. In this submission we find merit, and consequently allow the appeal against sentence, set aside the sentence of 5 years imprisonment and substitute therefor a sentence of three years to commence on 13th July, 1999. The period of disqualification from holding or obtaining a driver's licence remains at two years.