[2020] JMCA Crim 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 93/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA

ANN-MARIE WILLIAMS v R

Lord Anthony Gifford QC and Miss Jutina Wilson for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Miss Paula Sue Ferguson for the Crown

25, 26, 27 February 2019 and 6 November 2020

PHILLIPS JA

[1] The facts of this case are rather tragic. On 3 January 2011, Mrs Ann-Marie Williams (the applicant) was driving her Toyota Avalon motor car along Old Hope Road, in the parish of Saint Andrew. She was travelling in the left lane towards the Barbican and Liguanea direction. Her motor car then swerved into the right lane, climbed the sidewalk with great speed, and continued driving along the sidewalk, eventually colliding into a bus stop, killing Miss Esmeralda Evans and Mrs Jo-Anna Scarlett and injuring many others. The applicant was subsequently charged with two counts of causing death by dangerous driving and was tried for the said offences before Fraser J

(as he then was) in the Home Circuit Court. The jury having rejected her defence of automatism, the applicant was convicted of those offences. On 10 December 2015, she was sentenced to one year imprisonment at hard labour on each count, to run concurrently, and she was also disqualified from holding or obtaining a driver's licence for two years.

[2] Immediately after being sentenced, Lord Anthony Gifford QC for the applicant advised the court of her intention to seek leave to appeal the convictions and sentences. Subsequently, the applicant was granted bail pending appeal. Her application for leave was first considered by a single judge of this court. It was refused on the basis that adequate directions had been given by the learned trial judge on: the ingredients of the offence of causing death by dangerous driving; the burden of proof; the defence of automatism; expert evidence; and discrepancies. The single judge further stated that there was no basis upon which the learned trial judge ought to have upheld the no case submission, nor was there any basis upon which leave could be granted to appeal the sentences imposed.

[3] That refusal by the single judge prompted the renewal of the applicant's application for leave to appeal her convictions and sentences before us. The grounds of her application related to the learned trial judge's ruling on the no case submission; his directions on expert evidence and her defence of automatism; incompetence of counsel; and whether the custodial sentences that had been imposed were manifestly excessive.

[4] For the determination of this application, it is necessary to conduct a thorough review of the case for the Crown and that of the defence.

The Crown's case

[5] Evidence from several witnesses was adduced on the Crown's case. The first was Mr Dale Miller. He stated that on 3 January 2011, at about 5:30 pm, he was standing at a bus stop along Old Hope Road, Kingston 6, with his mother Miss Esmeralda Evans (deceased) and other persons. There was not much traffic "to speak of", it was "just flowing in its usual manner". He described the weather conditions that day as being "great", indicating that "there was no rain". His mother was standing directly underneath the bus stop, "in line with the pole of the bus [stop]", while he was standing closer to the road, facing the Liguanea direction.

[6] He then heard a loud crash and rumbling. He spun "around [though not completely] in the direction down the road", when he saw a car that "hit [him] from the sidewalk into the road ... with great speed". He was thrown into the road towards the Liguanea direction. The motor car hit him on the "lower portion of [his] back, more towards [the] buttocks". He suffered injuries and damage but he, nonetheless, went in search of his mother. He noticed that "[t]he [entire] car was jammed into the bus stop". It was in fact "on the sidewalk, underneath the bus stop". He "stooped down and saw [his] mother pinned under" what he described as a "creamish white" motor car. He called out to her while holding on to her hand but indicated that "her hand just drop like that" and there was no response, "so [he] knew she was gone". He was not able to say who the driver of the motor car was, or if the driver was male or female.

[7] Thereafter, police officers came from the Matilda's Corner Police Station, which was close by, and took him and other injured persons to the University Hospital of the West Indies (UHWI). He was treated and released later that night, and thereafter gave a statement to the police. However, since the incident he never saw his mother alive again, and he was present at her funeral.

[8] Mr Andrew Scarlett is the son of Mrs Jo-Anna Scarlett (deceased). He stated that on the date of the incident, he visited the scene at about 7:00 pm where he saw two females lying motionless under the bus stop, one of whom was his mother. He last saw her alive that day just before she had left for work. He identified her body at the post-mortem examination and was present at her funeral.

[9] The key witness for the prosecution was Sergeant Robin Williams, an accident reconstruction expert. He was assigned to the Traffic Headquarters Division of the Jamaica Constabulary Force (JCF) in the parish of Kingston, and had been assigned to the Forensic Unit since 2003. As a part of his duties at the Traffic Headquarters Division, he would visit fatal accident and collision scenes, collate empirical evidence and produce forensic reports. He indicated that he had received training from various consultants located locally and overseas, at the end of which he obtained several certificates in forensic reconstruction, both at the standard and advanced level. He indicated that training in mathematics and physics is an integral part of his training courses, and stated further that he holds certificates in those subjects, a Bachelor of Science in Information Technology, and he is also a certified computer technician. His education, training and expertise had been employed at approximately 200 accident

scenes, and he had attended court to give evidence based on reports he had generated relating to accident scenes "too many times to count". He outlined the procedure utilised upon visiting accident scenes and those related to the compilation of his report.

[10] On the date of the incident at about 5:50 pm, Sergeant Williams stated that he visited the accident scene after receiving a report. He made certain observations and took photographs and measurements. From the forensic evidence gathered and with the application of principles of mathematics and physics, a forensic report was compiled which included his opinion. His signature was affixed to each page of that report, and it was given to the investigating officer. Having refreshed his memory from this report, he detailed his findings in relation to the accident.

[11] Sergeant Williams testified that he had noticed a white Toyota Avalon motor car, registered 9690 EQ, located on the sidewalk, on the right-hand side of Old Hope Road, facing the Barbican and Liguanea direction. The motor car was left-hand driven and measured about 12 feet in length. It had major damage to its front end and was resting against the remaining metal column of a bus stop, measuring 4 feet 10 inches wide and 9 feet 5 inches in length, with a Digicel logo affixed to it. The car "went all the way and stopped on the remaining metal column" of the bus stop. Beneath the motor car were sections of a metal column and two severely injured females pinned under the motor car's front end (matching the description given by the first two witnesses).

[12] The damage to the bumper bracket of the motor car was 9 inches deep. The bonnet of the motor car was severely indented, the right side of the front bumper was

mangled, the sunroof was cracked, and the front windscreen displayed multiple cracks. The airbags for both the front passenger and driver's side were deployed. The right front fender had scrape marks measuring 3 feet in length, and the right front indicator was missing. The right front tyre was deflated and had a tear in it measuring approximately 2 inches wide. The side wall rubber of the tyre (outer portion of the tyre) had a tear in it and displayed abrasions. The wheel rim (the metal portion on which the tyre fits) had a chip on it. The right front tyre had a chip that appeared to be relatively fresh.

[13] The metal supporting column of the bus stop was completely torn down. A section of the roof of the bus stop was resting on the roof of the motor car. Abrasions were observed on the perimeter wall to the right side of the applicant's motor car.

[14] Sergeant Williams stated that the road surface was made of asphalt measuring 29 feet 9 inches wide. This, he said, is wide enough for the passage of vehicles flowing northerly towards Liguanea and southerly towards the office of the Commissioner of Police. No central white lines for lane designation or speed limit signs were present, but he knew the area was a built-up area because a church, school, police station, plaza and the Jamaica Society for the Blind were located in the vicinity. He testified that the speed limit in a built up area is 30 miles per hour or 50 kilometres per hour. There is a sidewalk along both sides of the roadway. The sidewalk on the left, facing Liguanea, measures 4 feet 10 inches wide, while that on the right, where Sunnerville Gardens is located, is 7 feet 9 inches wide and 5 inches high. The bus stop where the accident occurred is located on the Sunnerville side of the road.

[15] A "relatively fresh gouge mark" was seen on the right hand side of the curb, on the same side as the bus stop, along the yellow section of the concrete curb. Sergeant Williams defined a gouge mark as "a crater ... [that] can be different lengths ... usually made when vehicles collide with other vehicles or with concrete structures". He stated that the distance between the gouge mark and the bus stop was 73 feet 5 inches.

[16] A black smudge mark was observed along the sidewalk of the curb with the fresh gouge mark measuring 5 inches high, and located at the same distance away from the bus stop as the gouge mark. A second smudge mark measuring 3 inches wide was observed along the same curb, at a distance of 44 feet 3 inches from the bus stop.

[17] Sergeant Williams indicated that if the motor car was travelling towards the Barbican and Liguanea direction, it would have been travelling in the left lane. The motor car was found on the right side of the road. In explaining how this would have occurred, Sergeant Williams said "[t]he vehicle would firstly have to have been steered away from the left lane into the right lane and then from the right lane onto the sidewalk". He indicated that that would have been an "improper" use of the road. In explaining how the motor car would have ended up on the sidewalk he said that:

> "if the vehicle was travelling say about 50-kilometres per hour, that speed is relatively slow, [so] when it hit the sidewalk it would meet with negligible resistance, but it would still mount it...
>
> At say two miles per hour, when you get to the concrete curb, it is going to affect the vehicle, because you are going to feel resistance, like the vehicle bucking and so on. ... [B]ut a vehicle travelling at 50 kilometres and above, would be met with most negligible resistance, because the vehicle

> would have sufficient momentum or power to overcome the resistance offered by the curb."

[18] No tyre marks, skid marks or drag marks were observed at the scene. "Skid marks are really made when the brake is applied and the wheel of the vehicle they lock up, so that the vehicle begins to slide. It is a sign of the driver having taken some action to stop the vehicle". If brakes were applied, skid marks would have been visible.

[19] However, he indicated that the presence of the gouge mark "is a sign as to where the right front wheel rim of the Avalon motor car made contact when it was being steered onto the sidewalk". The gouge mark was on an angle, and so "[i]f the original path of the vehicle was kept ... when it rolled up onto the sidewalk then the vehicle would have slammed into the perimeter wall". The fact that the motor car did not slam into the perimeter wall meant that it was steered away from the perimeter wall. He did, however, observe abrasions on a section of the wall leading to the bus stop.

[20] The bumper bracket is made up of mostly steel and is one of the strongest parts of any vehicle. It "rests right behind the bumper, it acts as a support for the bumper". The damage to the bumper bracket of the motor car was 9 inches deep, and could have been caused by the damage to the supporting metal column of the bus stop that was torn down. The damage to the bumper bracket indicates that "the vehicle would have had ... to be travelling at a speed that could generate sufficient force that could break the metal column of the bus [stop]". Sergeant Williams also stated that the presence of

the applicant's car "all the way" under the full 9 feet 5 inches of the bus stop indicates that the bus stop was subject to "a violent impact" caused by high velocity or speed.

[21] In applying principles of mathematics and physics to his observations, Sergeant Williams stated that when the motor car moved from the left lane to the right lane it would have covered a distance of 16.49 metres or "50 odd feet". The motor car took 1.25 seconds "for the second phase of its manoeuvre, the swerving from the right lane onto the concrete footpath", and "would have covered a distance of 13.48 metres" in "0.99 seconds". For a road that is 29 feet 9 inches wide, the applicant's motor car would have moved a lateral distance, that is, sideways of 8.3 metres or 27 feet 2 inches.

[22] Having detailed his observations and findings, Sergeant Williams concluded that:

> "The driver of the vehicle in question, would have had to be travelling well in excess of 50 kilometres per hour ... [T]he absence of a skid mark along the road surface or along the sidewalk ... is a sign that the driver might not have perceived a hazard or if she did, her action under the circumstances was inadequate ... [T]he reason or reasons as to why the car would have swerved onto the sidewalk is unknown to me ... [B]ased on the manoeuvre and the damage ... to the extent that the right front bumper of the vehicle was mangled ... and the perimeter wall had multiple abrasions ... it is reasonable, I conclude, that the driver ... had the presence of mind to steer away from the wall to avoid ... full contact. As to why the driver did not stop on the sidewalk or manoeuvre the vehicle back on the road surface is unknown to me... Simply put, the driver failed to keep left, veered right and ended up on the sidewalk, veered left and continued on the sidewalk where it collided with the bus [stop]."

[23] He testified further that if there had been no presence of mind to steer the motor car away from the wall, he would have expected to see "at least the right front section of the vehicle and possibly the right side of the vehicle, all being mangled against the wall, in which event, the vehicle would not have been able to reach the bus stop".

[24] Photographs of the scene taken by Sergeant Williams were tendered and admitted into evidence. A number of those photographs were shown to the court displaying, for instance, the perimeter wall; the motor car facing the northerly direction towards Barbican and Liguanea; the right hand side of the sidewalk with the gouge mark; a 9 inch indentation on the bumper bracket; the deployed airbags; the bus stop; the right front wheel of the motor car and rim; and the black smudges.

[25] Sergeant Williams stated that he spoke to the applicant that night, who identified herself as the driver of the motor car, and indicated that she had given him her driver's licence.

[26] Under cross-examination, Sergeant Williams maintained that his calculations were correct. He stated that if the applicant had been travelling below 50 kilometres per hour the numbers would be different. He disagreed with counsel's suggestion that he was incapable of describing the applicant's driving conduct because he had not been present when the incident occurred. Although he agreed that he was not present to witness the accident as it occurred, he stated that his professional experience, knowledge and training had enabled him to arrive at his conclusions.

[27] He maintained that the distance from the gouge mark to the bus stop was 73 feet and 5 inches, and rejected counsel's submission that that distance would have placed him at the entrance of Sts Peter and Paul Preparatory School. He maintained that the sidewalk was elevated and he refused to accept counsel's suggestion that no gouge mark was present as the area was painted white. He accepted that it was possible that the cut he had seen on the right front tyre could represent a blowout of the right front wheel tyre, and that he could not tell when that damage was done to the tyre. But he stated that a tyre could not "blow out or lose control" if a motor car is travelling at 45 miles per hour. He explained to counsel that the speed of the motor car was different from the sideways motion of the motor car.

[28] In response to a suggestion from defence counsel, Mr Garth Lyttle, Sergeant Williams stated that he had measured three sets of abrasions on the perimeter wall measuring: 1 foot 10 inches; 2 feet 7 inches; and 2 feet 10 inches in length, caused by the right front section of the motor car. He indicated that his findings were not based on assumptions, but were grounded in mathematics and physics. He disagreed with suggestions that he had selectively omitted photographs of Sts Peter and Paul Preparatory School.

[29] In re-examination by Crown Counsel, Sergeant Williams stated that a tyre blowout could have been caused by contact with concrete at high speed.

[30] In answer to questions from the court, he said that the lateral movement of a motor car is totally independent of speed, and how far you move across a road

determines how long it takes to move across that road. In essence, speed cannot be calculated on lateral movement, and in the instant case, there was also forward movement.

[31] Mr Joseph Harris' testimony was the subject of serious debate during the trial and in this application for leave to appeal. He stated that he was a mechanical engineer, although in cross-examination he admitted that he had no formal education in that area and had obtained his training from "a simple garage". On the date in question, at about 5:30 pm, he was driving his motor car along Hope Road on the way to a wholesale located on Old Hope Road, "on the right side of Liguanea Police Station, in between the Texaco gas station and the police station". Heavy traffic was preventing him from making the right turn, so he proceeded down past the bus stop and parked on the left side of the road "[d]own to St Peter and Paul Church" on Old Hope Road, locked up his motor car, and walked across to the right side of the road to the wholesale inside the Plaza. While there, he heard a very loud impact and then screaming shortly thereafter. He went in the direction where he had heard the sound and saw a cream motor car under the bus stop. He saw injured persons and two females under the motor car. He had also seen an eight or ten years' old "young girl" under the applicant's motor car.

[32] In cross-examination, he indicated that traffic was heavy coming from downtown Kingston heading towards Liguanea. It was "double lane of traffic". Traffic was behind him when he was attempting to turn into the plaza on Old Hope Road. He passed the bus stop and parked a "metre from the bus stop" on the sidewalk, where the accident

had occurred, parallel to Sts Peter and Paul Church, about 25 feet from the bus stop. He was parked on the sidewalk in a manner that allowed "pedestrian traffic to pass same way". He only moved his motor car when the investigators were finished processing the scene. When asked about the distance between where he had parked his motor car and the bus stop, his answer was that the motor car "was a near miss from [his] car". He rejected a suggestion that he was not present that evening. He also disagreed with defence counsel's suggestion that, based on where his motor car had been parked, the applicant's motor car could not have passed his motor car to collide into the bus stop.

[33] The next witness was Miss Annmarie Bernard. She had identified the body of her aunt, Miss Esmeralda Evans, to Dr S L Kadiyala Prasad in the presence of the investigating officer at the post-mortem examination.

[34] Mr Donovan Lewis is a certifying officer or motor vehicle examiner. His core functions, as a motor vehicle examiner, include testing applicants for driver's licence competencies, and the inspection and certification of motor vehicles under the Road Traffic Act for roadworthiness. He testified that on 4 January 2011, he examined a 1995 Toyota Avalon motor car, registered 9690 EQ, to ascertain whether there were any visible defects on the motor car that contributed to the collision. He observed the following: deployed airbags; damaged windscreen and sunroof; pushed in bumper brace; dented bonnet; deflated right front tyre; dented and scratched right front rim; punctured left front tyre; and a broken right headlight. He indicated that no defects were seen on the applicant's motor car that could have contributed to the accident. He

maintained that view, even after being recalled (at his request) to clarify an error he had inadvertently made in his testimony, relating to damages to the rear of another motor vehicle which was involved in a different accident.

[35] Inspector Gregory Silvera was the investigating officer and the Crown's final witness. He testified that he had commenced his investigations into the accident the day after it had occurred having received instructions to do so. He had visited the scene of the accident where he made certain observations, and he had also viewed the motor car, which was at the Matilda's Corner Police Station. He also visited UHWI where he spoke to a number of injured persons and the families of the deceased women. The bodies of the deceased women were identified by their family members at a post-mortem examination, in his presence and that of Dr Prasad, and he had subsequently received post-mortem reports relating to their deaths. He also visited the Motor Vehicle Examination Depot and made enquiries of Mr Donovan Lewis. Contact was also made with the accident reconstruction unit of the JCF, led by Sergeant Williams, and sometime thereafter, Inspector Silvera received a report from him. Inspector Silvera also spoke to the applicant at UHWI on a later date, and ultimately arrested and charged her.

[36] The post-mortem reports of Mrs Jo-Anna Scarlett (deceased) and Miss Esmeralda Evans (deceased) were also tendered and admitted into evidence. They were read into evidence pursuant to an agreement between counsel. The post-mortem report for Miss Evans referenced multiple abrasions, fractured ribs, punctured lungs, lacerated spleen, liver and kidney. The cause of her death was listed as: "(1) haemorrhage and shock,

(2) haemothorax and haemoperitoneum, [and] (3) multiple injuries". The post-mortem report for Mrs Scarlett also detailed multiple injuries such as lacerations, fractured bones including the ribs, haemorrhage to the brain and spinal cord, and abrasions. The cause of death was listed as: "(1) haemorrhage and shock and (2) multiple injuries".

[37] At the close of the Crown's case, a no case submission was made, but was rejected by the court. This is discussed in more detail below.

The defence's case

[38] The applicant gave an unsworn statement. She stated that she was a senior communications officer. On the day of the accident, she was travelling northerly on Old Hope Road, towards the intersection of Barbican and Liguanea. This is a road routinely traversed by her for years, every day, two to three times per day. It was peak hour, and at that time there was "bumper to bumper traffic". Traffic was moving slowly and she was travelling at 25 kilometres per hour. As she approached the second pedestrian crossing, across from the entrance to Sts Peter and Paul Church, she was travelling behind a white van and she stopped. Next she says:

> "I recall seeing a bright red light, very bright, and I do not recall what happened after. My next recollection: I saw persons running in all directions. I was confused. I was wondering what was happening, and then a lady in a bright yellow, I recall, took me from the vehicle and escorted me to the police station across the road. At the time I didn't know it was a police officer; I later learnt that she was an officer."

[39] She stated that she was unable to fully account for all the events that had transpired at the police station, but she was taken to her doctor in Liguanea and was discharged from there. After arriving home, she did not feel well and was referred to Dr Carl Bruce at UHWI where she received "a series of assessments and treatments, including a neck injury". She was discharged 10 days or two weeks after. She stated that "I too am at a loss as to what took place that day. I was a young mother, doing my usual duties, and that day was no different".

[40] She stated her duties at her company, and described herself as a humanitarian working at the Golden Age Home and with the Cancer Society. Prior to the accident, she had never been in conflict with the law, and had only previously received one traffic ticket for a seat belt violation. She stated that the images displayed in court were hard for her to look at, and that "[t]here is no way, as a mother and my love for senior citizens that I work for, could I have deliberately, carelessly, or recklessly [driven] that motor vehicle to avoid a wall and send it into a bus stop". After revisiting the scene with her attorney, she saw two pedestrian crossings, but no gouge marks were present. She also stated that in her estimation, the distance from the bus stop to the entrance of Sts Peter and Paul Church is 70 feet and not 73 feet 5 inches.

[41] She stated that she was heartbroken and, despite what the evidence says, she did not know what happened that night. While she did not deny driving the motor car, she was unable to explain what took place on that "horrible day".

[42] Dr Carl Bruce was called to testify on the applicant's behalf. He is a medical doctor and neurosurgeon at UHWI. He listed his qualifications stating that he possesses a Bachelor of Medicine and Surgery and a Doctorate Degree from the University of the West Indies. He is also a Fellow of the Royal College of Surgeons, Edinburgh, the American College of Surgeons and the Caribbean College of Surgeons. He indicated that the applicant had been admitted to UHWI on a referral from a general practitioner and family physician. He ascertained her history, and conducted an examination and an evaluation.

[43] He indicated that the applicant had no cardio pulmonary distress (shortness of breath or any recognizable cardiac disease at the time). She was able to say who she was "but [was] not orient in time or place... she couldn't tell you … the day, month, year". Pulse and blood pressure measurements were taken which revealed that her blood pressure was high. Her motor nerves were intact, but there were restrictions in the range of motion in her neck. She had a head injury with concussion and whiplash injury (muscular injury to the neck). In his opinion, her head injury was due to a syncopal attack (fainting spell or a seizure) which he described as a partial or complete loss of consciousness when the patient is not usually aware of themselves or their surroundings. It is temporary and due to a decrease in blood flow to the brain. In response to a question from counsel, Dr Bruce stated that a syncopal attack could be a disabling act at a particular time, which could result either in a partial or complete loss of awareness.

[44] Under cross-examination, he stated that the applicant had not been his regular patient, and that he had never treated her before and so had no history with her. He said that the applicant's concussion could have been caused by a blow to the head, and further, that if she had been involved in an accident and the airbags of the motor car had been deployed, it could have caused a concussion. He also stated that if a motor car collided into a solid object it could cause whiplash, and that all the injuries he had observed could have resulted from the accident. He indicated that although a CT scan could have assisted in his treatment of the applicant, he did not request one as the protocol for the use of a CT scan did not require it for a first seizure as occurred in the applicant's case. He also did not request an ECG test. He stated that his findings were all based on a clinical diagnosis. He also acknowledged that the applicant did not have a seizure in his presence.

[45] At the close of the case for the defence, the learned trial judge gave his summation to the jury, and the applicant was convicted and sentenced as indicated in paragraph [1] herein.

The application for leave to appeal and the issues therein

[46] Before submitting on this application, Lord Gifford sought and obtained permission to abandon the previous grounds of appeal that had been filed, and to argue supplemental grounds of appeal. The supplemental grounds of appeal are as follows:

> "1. The learned judge erred in not upholding the no case submission made on behalf of the Applicant, since the

case for the Prosecution depended solely on the evidence of the expert Sergeant Robin Williams, who had sought to reconstruct how the fatal accident happened, but whose conclusions were irreconcilable with the evidence of the prosecution witness Joseph Harris that he had parked his car on the very place, on the sidewalk of Old Hope Road, over which the expert witness said that the Applicant's car must have travelled.

2. The learned judge failed to give to the jury any or any adequate warning or guidance as to the need for special caution when the evidence of an expert witness is fundamental to the prosecution's case, and where it cannot be reconciled with the evidence of another witness; but rather by constant repetition of the expert's opinion that the Applicant had 'presence of mind' to steer away from the wall, he encouraged the jury to accept the expert's evidence.

3. The learned judge failed to direct the jury accurately on the case for the Applicant as put in her unsworn statement. The Applicant had said '*I recall seeing a bright red light, very bright, and I do not recall what happened after*'. But the learned judge on several occasions directed the jury that her case was that the light came from an external source and that if the light was caused by an internal factor she would not be entitled to rely on the defence of automatism.

4. The fair trial of the Applicant was compromised by the conduct of her attorney-at-law in putting to the witness Joseph Harris that his car was never parked on the sidewalk that day, and in seeking generally to discredit him, so that the jury would have been less likely to accept his evidence, whereas the Applicant's case was that she had a syncopal attack and could not say what had happened at all.

AGAINST SENTENCE

5. Having regard to the good character of the Applicant, the evidence called as to her humanitarian work, her family situation and all the mitigating circumstances,

this was an exceptional case in which an immediate custodial sentence was manifestly excessive.

6. The sentence imposed on 10th December 2015 for offences committed on 3rd January 2011. Given that she has had to wait in suspense, albeit on bail, for eight years, it would now be oppressive to uphold the concurrent sentences of one year's imprisonment."

[47] In our view, based on those grounds and the submissions made by counsel, six issues arise for consideration:

1. Did the learned trial judge err by not upholding a no-case submission made on the applicant's behalf in the light of the apparent irreconcilable differences between the expert evidence of Sergeant Williams and that of Mr Harris? (ground 1)
2. Were the learned trial judge's directions to the jury with regard to expert evidence adequate? (ground 2)
3. Did the learned trial judge give accurate directions to the jury on the defence of automatism? (ground 3)
4. Was the applicant's trial compromised by her attorney's cross-examination of Mr Harris? (ground 4)
5. Having regard to all the circumstances of the case, were the custodial sentences imposed manifestly excessive? (ground 5)

6. Whether the custodial sentences imposed should be quashed having regard to pre-trial and post-conviction delay totalling eight years. (ground 6)

No case submission

[48] As indicated, at the close of the Crown's case, the applicant's counsel made a no case submission on the basis that, in his view, there had been no evidence to prove an essential element of the offence, and that the evidence adduced by the prosecution had been so discredited by cross-examination, that no reasonable tribunal of fact could rely on it.

[49] On the first limb, counsel submitted that the prosecution's witnesses did not see and so could not speak to the applicant's driving conduct, which is a prerequisite to proving the offence. He stated that the closest evidence to that effect which had been elicited on the Crown's case came from Sergeant Williams. However, his testimony was based on speculations, inaccurate mathematical calculations and theories. Additionally, pursuant to **R v Conteh** [2003] EWCA Crim 962, the evidence in the instant case was not sufficient to ground the charges of causing death by dangerous driving.

[50] On the second limb, he indicated that based on Mr Harris' evidence, he would have parked his motor car on the "very same sidewalk" where the bus stop was located, 18 feet away, and then proceeded to a wholesale. If that is so, the applicant's motor car would have collided into Mr Harris' motor car, before colliding into the bus stop. That, he said, was an "irreconcilable conflict on the Crown's case", which "vitiated

the entire Prosecution's case", and it also suggested that Mr Harris had not been present when the accident occurred. He took issue with Mr Harris describing himself as a mechanical engineer without proper formal training and qualifications in that field.

[51] In response to these submissions, Crown Counsel relied on **R v Galbraith** [1981] 2 All ER 1060 in asserting that:

> "Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

Crown Counsel stated that the only issues which arose in the instant case were questions of fact for the jury to determine.

[52] In relation to whether there was evidence as to the applicant's driving conduct, Crown Counsel submitted that the Crown's witnesses had not been so "manifestly discredited". Crown Counsel also submitted that "there was an element, albeit a small one" of circumstantial evidence involved in the instant case. The expert evidence gave some indication as to the manner of driving and so too the post-mortem reports which detailed multiple injuries consistent with the manner of driving. As with any other expert, it was open to the jurors to make their own determination as to whether to accept his evidence or reject it.

[53] In relation to the discrepancy between Mr Harris' evidence and that of Sergeant Williams, Crown Counsel submitted that that discrepancy did not assist the defence because it gave rise to two interpretations: (i) Mr Harris' motor car was parked outside the range of what Sergeant Williams considered to be the crime scene; or (ii) it was fully within range and the same level of control that Sergeant Williams spoke to would have been exercised by the applicant, to prevent a collision with Mr Harris' motor car, and ultimately colliding into the bus stop. Crown Counsel also submitted that, even if one accepts that Mr Harris was not present, that would not assist the defence because there would still be the evidence of the gouge mark 73 feet 5 inches away from the bus stop and the dented bumper bracket which shows, at the very least, that the applicant's motor car mounted the sidewalk at great speed. The contention that Mr Harris was not present would also strengthen the Crown's case as it would show that there was nothing obstructing the applicant's motor car. On any interpretation, it is a finding of fact for the jury. He stated that no irreconcilable discrepancy had arisen and if it had, it was one that touched and concerned questions of fact for the jury.

[54] In making his ruling on the no case submission, the learned trial judge indicated that he had considered the submissions made by both counsel. He accepted that the principles stated in **R v Galbraith** govern the application. He stated "that a jury is entitled to accept or reject any part or all of the evidence of a witness, or of more than one witnesses". There were indeed discrepancies between Mr Harris' evidence and that of Sergeant Williams but those discrepancies, he said, should be left for the jury to determine whether they exist. He accepted that the complaints being made by the

applicant's counsel, and which form the basis of his no case submission, fell within the principle cited by Crown Counsel from **R v Galbraith**. On those bases he found that there was a case to answer on both counts of the indictment.

[55] In the application before us, Lord Gifford indicated that after careful consideration he could not rely on ground 1 (relating to the no case submission). He stated that the authorities make it clear that there would be an irresistible inference that the applicant was driving the car consciously, unless the defence of automatism was properly raised. Moreover, even without Sergeant Williams' accident reconstruction report, there would have been a case to answer since the applicant admitted to Sergeant Williams that she was the driver of the motor car which had crashed into the bus stop. The learned trial judge would therefore have been correct in rejecting the no case submission, and Lord Gifford was, in our view, correct in not pursuing ground 1 before us.

Expert evidence

[56] Despite Lord Gifford's concession on the ground of appeal related to the no case submission, he submitted that the conflict between the evidence of Sergeant Williams and that of Mr Harris "remains of great significance". He stated that in assessing Sergeant Williams' evidence, the jury had to consider whether it was reliable. As a consequence, pursuant to the English Court of Appeal decision in **R v Holdsworth** [2008] EWCA Crim 971, the learned trial judge ought to have explained to the jury that there was need for "special caution" in their assessment of Sergeant Williams' evidence, since his evidence was fundamental to the Crown's case. But no such direction had

been given, and the directions that had been given were unbalanced as the learned trial judge seemed to have "belittled the credibility of Mr Harris' evidence", without giving the same scrutiny to Sergeant Williams' testimony.

[57] In response to these submissions, Miss Paula Llewellyn QC, the Director of Public Prosecutions (DPP), stated that the learned trial judge had given adequate directions to the jury on how to examine the expert evidence given by Sergeant Williams, and the discrepancy between Mr Harris' evidence and that of Sergeant Williams. She combed the learned trial judge's summation and highlighted various portions which, in her view, indicated that the directions given to the jury had indeed been sufficient, and which, she posited, rendered ground 2 without merit.

[58] Before we can determine whether the learned trial judge gave adequate directions on Sergeant Williams' expert evidence, it is important to state the law on this issue. The learned authors of Blackstone's Criminal Practice, 2020, at paragraph F11.41, make it clear, in reliance on Lord Taylor's CJ dictum in **R v Stockwell** (1993) 97 Cr App R 260, that "[w]hen expert evidence is given on an ultimate issue, it should be made clear to the jury that they are not bound by the opinion, and that the issue is for them to decide". That principle was applied in another English Court of Appeal decision in **R v Fitzpatrick** [1999] Crim LR 832, where the court also stated that there is no requirement that such a warning be conveyed in any particular way. Indeed, the court said:

> "We have been referred to the decision of this court in *R v Stockwell* (1993) 97 Cr App Rep 260 and to the observations at the end of the judgment in that case, to the effect that it

> is important that the judge should make clear to the jury that they are not bound by the expert's opinion and that the issue is for them to decide. We agree. Of course, it is important that the jury knows it is not obliged to accept any evidence. It does not follow that this principle should be elevated into an inflexible requirement that that should be made clear to them in any particular way."

[59] The learned authors of Blackstone's also state that:

> "In deciding what weight, if any, to attach to the evidence of an expert, the jury are entitled to take into account his qualifications and experience, his credibility, and the extent to which his evidence is based on assumed facts which are or are not established."

[60] Queen's Counsel for the applicant tried to persuade the court that "special caution" was required where expert evidence is fundamental to the prosecution's case, as was stated in **R v Holdsworth**. However, it is important to note, the ratio in that decision was not based on a complaint as to the adequacy of directions given by a trial judge with regard to expert evidence, but whether fresh evidence from a medical expert that had been adduced in the Court of Appeal, may have pointed to another cause of death in a murder case, and could have reasonably affected the minds of the jury. In any event, the law in relation to the appropriate directions to be given to the jury on expert evidence remains unchanged and, as indicated, there is no rigid structure by which those directions are to be given. It is sufficient if a judge conveys to a jury, that they are not bound by the opinion of the expert, and in assessing what weight to give to the expert's evidence, regard is had to qualifications, experience, credibility, and the extent to which the expert's evidence is based on fact.

[61] On our perusal of the transcript, it reveals that the learned trial judge gave comprehensive directions on expert evidence to the jury. At pages 39-41 of his summation, the learned trial judge reminded the jury that expert evidence had been elicited from three witnesses: Sergeant Williams, Dr Prasad (for the prosecution) and Dr Bruce (for the defence). He told the jurors that:

> "Expert evidence is permitted in a criminal trial providing technical information and opinion: in this case, in the field of accident investigation and forensic reconstruction, forensic pathology and medicine, which were in the particular witness' expertise and which are likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called, and it is important that you should see it in its proper perspective, which it is before you as part of the evidence as a whole to assist you in regard to particular aspects of the evidence. In respect of Sergeant Williams, he sought to assist you in relation to how the accident could have occurred.
>
> In respect of Dr. Prasad Kadiyala, his evidence was received by way of the tendering of post mortem examination reports in evidence, he sought to assist you of the injuries suffered by the deceased women and the cause of their deaths. In respect of Dr. Carl Bruce he sought to give you his opinion in relation to what he thought was happening to the accused woman at the time of the accident. **An expert is called to express his opinions in respect of his findings and on matters which are put to him relevant to the evidence. You are entitled and would no doubt have wish [sic] to have regard to the opinions expressed by the expert, when coming to your conclusions about the aspect of the case on which their evidence has been received**.
>
> **You should bear in mind, however, if having given the matter careful consideration you do not accept the evidence of the expert you do not have to accept it or act upon it**. Having said that, in relation to the Post-mortem Examination Report[s], you will recall that Dr. Prasad Kadiyala was not called as a witness because the

> prosecution and defence agreed to have two Post-mortem Examination Reports received in evidence. There is no dispute in relation to the evidence contained in those Post-mortem Examination Reports… it would be open to you to accept them and act upon their contents, based on the agreement between the prosecution and the defence.
>
> **Generally speaking, however, in relation to all expert witnesses, including the Post-mortem reports, you should remember that the expert evidence relates only to specific parts of the case and that whilst that evidence may be of assistance to you in reaching a verdict, you must reach your verdict, having considered all of the evidence**." (Emphasis added)

[62] While refreshing the jury's memory as to evidence that had been elicited from Sergeant Williams during the trial, the learned trial judge, once again told the jury that Sergeant Williams was "the key witness for the Prosecution". In referencing his education, qualification and experience, the learned trial judge said:

> "…evidence of his training and experience was elicited to provide the foundation for him to be viewed as an expert. And as I said earlier, if you wish to take account of what the experts said in this case, it is up to what you accept and what you find that will determine the outcome in this matter." (See page 46 of the summation)

[63] Before summarising the case for the defence, the learned trial judge told the jury the following:

> "As I have said before, the prosecution's case depends largely on what you make of the evidence of Sergeant Robin Williams. So, look at his evidence very

carefully, as you seek to determine your findings in this case." (See page 73 of the summation)

[64] After defining inconsistencies and discrepancies and directing the jury on how they were to be assessed, the learned trial judge explicitly identified a discrepancy between Sergeant Williams' evidence and that of Mr Harris, and directed them on how to treat with that discrepancy. At pages 16-19 of his summation, he stated that:

> "By way of example of what you may consider to be a discrepancy, you will recall that Sergeant Williams' evidence is that he concluded from his observations and calculations, that the [accused's] car would have mounted the sidewalk from where he observed the gouge marks on the sidewalk, 73' 5" from the bus stop, come into contact with the wall and drove along the sidewalk into the bus stop. And Sergeant Williams also gave the width of the sidewalk on that side of being 7' 9". You might also recall the evidence of Mr. Harris, who said he was a mechanical engineer. He said [his] car was parked on the sidewalk, a short distance down from the bus stop. I think he gave an estimate of about 25 feet.
>
> Now, if the evidence of Sergeant Williams is accepted, you will have to consider whether or not Mr. Harris' car would have been on the sidewalk at the time of the accident, and the accused car still get to the bus stop without colliding with Mr. Harris' car.
>
> If the evidence of Mr. Harris is accepted, then you may well conclude that the evidence of Sergeant Williams, that the car would have been driven along the sidewalk, from it came onto the sidewalk until it collided in the bus stop, would have to be wrong.
>
> Now, the prosecution was asking you to find either that Mr. Harris' car was parked outside of the range of the distance of 73' 5" inches identified by Sergeant Williams or that the [accused's] car would have been steered around Mr.

> Harris' car, as it is clear that the accused's car did end up in the bus stop.
>
> You should bear in mind however, when you consider that comment from the prosecution, that Sergeant Williams did not suggest that the accused car left the sidewalk once it mounted the sidewalk before it came to a rest at the bus stop.
>
> The defence on the other hand is saying that Mr. Harris styled himself as a mechanical engineer, is a witness of convenience and that he was not there at the time of the incident and his car was not parked there. And in determining whether you accept the view of the defence, you might also recall that Mr. Harris spoke of seeing something that nobody else spoke about. For example, seeing a young female under the car about eight or ten years old.
>
> So, remember, it is open to you, to accept or reject what any witness has said, either in whole or in parts and given the fact that it is accepted that the accused's car did end up in the bus stop, lined up with, and close to the wall, you have to determine if you find there to be a discrepancy on the evidence of Sergeant Williams and Mr. Harris, and if so, what effect, if any, you find that discrepancy or those discrepancies have on the credibility of Sergeant Williams or Mr. Harris, or on the credibility of both of them.
>
> I have highlighted one example of what you may consider to be a discrepancy. Bear in mind, however, that if you find any other [inconsistencies] or any other discrepancies in any of the evidence, please treat them in the manner I have directed you."

[65] He once again highlighted this discrepancy after summarising Mr Harris' evidence, and pointing to the inconsistencies therein, when he said to the jury that it was:

> "… a matter for you to determine what you think especially based on what Sergeant Williams is saying happened and based on the fact that everybody is agreeing that the car ended up, car of the accused ended up in the bus stop. So you have to determine what you make of Mr. Harris, if he assists you in any way at all or not. I will just tell you the final suggestion that was made to him: that he was not a mechanical engineer." (Pages 69-70 of the summation)

[66] Having perused those detailed excerpts of the learned trial judge's summation, we find ourselves unable to agree with Lord Gifford's submissions on ground 2. The learned trial judge identified the expert evidence that had been elicited during the trial on the case for both the prosecution and the defence. He specifically told the jury that they did not have to accept the evidence of the expert or act upon it. He asked them to weigh the evidence in the light of the experience, education, qualifications of the experts, and having regard to whether they found them to be credible. He indicated to the jury that the expert evidence was only a part of the evidence as a whole, and that they could only reach a verdict having considered the evidence as a whole.

[67] The learned trial judge detailed the most significant discrepancy between Sergeant Williams' evidence and that of Mr Harris, and gave adequate directions to the jury on how to review their evidence. In fact, the learned trial judge told the jury that if they accepted Mr Harris' evidence, then Sergeant Williams' testimony that the car, once it came on the sidewalk, could have been driven along the sidewalk until it collided into the bus stop, would have been wrong. The Crown theorised that Mr Harris' motor car could have been parked outside the range of distance of 73 feet 5 inches identified by Sergeant Williams, and that the applicant's motor car would have been steered around

Mr Harris' motor car since it ended up in the bus stop. However, the learned trial judge told the jury that they should bear in mind that Sergeant Williams had never suggested that the applicant's motor car had left the sidewalk after mounting it before colliding into the bus stop. Accordingly, in all these circumstances, there is no merit in ground 2 and it must also fail.

Automatism

[68] Lord Gifford stated that the learned trial judge was correct in finding that the applicant had relied on the defence of automatism as the proper foundation for that defence had been laid by Dr Bruce's evidence. Lord Gifford submitted that the learned trial judge was also correct when he directed the jury that "the defence of automatism requires that there was a total destruction of voluntary control on the accused's part" (see **Hill v Baxter** [1958] 1 QB 277; **Bratty v Attorney General for Northern Ireland** [1961] 3 All ER 523; and **R v Stripp** (1978) 69 Cr App Rep 318). However, he submitted that the learned trial judge fell into error when he referenced "external" and "internal" factors as a part of his directions on automatism to the jury, as those words do not appear on the evidence, and had the effect of limiting the ambit of the applicant's defence to an "external" or "internal" source.

[69] The learned DPP, in response, submitted that the learned trial judge's directions on automatism were adequate. She stated that perhaps the learned trial judge may have even assisted the defence in finding that the defence of automatism arose, as there was no evidence from Dr Bruce to support this "bright light" coming from any psychological or physiological factor. Miss Llewellyn stated further that the learned trial

judge's reference to "external" factors could be inferred on the evidence because the defence spoke to the existence of a "bright light" without indicating whether it came from an "internal" or "external" source. In any event, she submitted that the evidence against the applicant was so overwhelming that even if the court were to accept that there was indeed a misdirection, no miscarriage of justice would have occurred by the learned trial judge's reference to a "bright light from an external source" (see **R v Joseph Lao** (1973) 12 JLR 1238).

[70] **Attorney General's Reference (No 2 of 1992)** [1993] 4 All ER 683 is instructive on the defence of automatism. In that case, the respondent, who was a lorry driver, after driving for a total of six hours and covering 343 miles, with minimal breaks, had steered, apparently deliberately, onto the hard shoulder of a road. He drove 700 metres along that shoulder before crashing into a stationary white van that had its hazard lights flashing. In front of that vehicle, was a recovery vehicle with a rotating yellow light. Standing between these two vehicles, were the victims, who died when the applicant's vehicle collided into the van, thereby pushing the van into the recovery vehicle.

[71] The prosecution argued that the respondent fell asleep at the wheel, the respondent having admitted that he was tired, but decided to push on to the next service station and must have fallen asleep. Both the prosecution and the respondent relied on expert evidence. The respondent's expert was a chartered psychologist who testified that the respondent had a condition called "driving without awareness" which he said was not a scientific term "but a provisional, or interim, descriptive phrase coined

at a conference he had attended". He testified that a person in that state would be unaware of what was happening but accepted that that loss of awareness was not total. The learned judge left the defence of automatism to the jury, which acquitted the respondent.

[72] The Attorney General thereafter referred to the Court of Appeal, the question of whether the defence of automatism was open to the respondent. The Attorney General contended that even if the evidence was taken at its highest, based on the authorities of **Hill v Baxter**; **Bratty v A-G for Northern Ireland**; **Watmore v Jenkins** [1962] 2 All ER 868; **Roberts and others v Ramsbottom** [1980] 1 All ER 7; and **Broome v Perkins** [1987] RTR 321, automatism is a defence in driving cases only where there is such total destruction of voluntary control that the defendant cannot be said to be driving at all. Counsel for the respondent conceded that he could find no authority which ran counter to the principles illustrated in those cases, and he also conceded that the term "driving without awareness" amounted to "reduced or imperfect awareness".

[73] In arriving at its decision, the Court of Appeal reviewed a number of cases which drew a distinction between insane and non-insane automatism. The court stated that based on those authorities, if the defence of automatism is said to arise from "internal" causes, such as an epileptic seizure, a stress disorder or even sleepwalking, then pursuant to the rules in **M'Naghten's Case** [1843-60] All ER Rep 229, the verdict should be one of not guilty by reason of insanity. But if automatism arises from "external" causes, such as hitting the driver on the head, then a successful defendant is entitled to be acquitted.

[74] The court stated that where the defence of automatism is raised, the court must first decide:

> (i) whether the proper evidential foundation had been laid for that defence to be left to the jury; and
>
> (ii) whether the evidence shows that there was insane automatism (which falls within the **M'Naghten** Rules) or non-insane automatism.

The court found that the proper evidential foundation had not been laid, and so the defence of automatism ought not to have been left to the jury. It stated that "the defence of automatism requires that there was a total destruction of voluntary control on the defendant's part. Impaired, reduced or partial control is not enough".

[75] Once the defence of non-insane automatism is raised, it must be disproved by the prosecution (in contrast to a defence of insanity which must be proved by the defence). However, there is an evidential burden on the defence to produce some evidence of automatism before the prosecution can be required to address it (see **Hill v Baxter** and **Bratty v A-G for Northern Ireland**). How then is the proper evidential foundation for the defence of automatism laid? In **Bratty v A-G for Northern Ireland**, Lord Denning in the House of Lords asked a similar question and answered it this way at page 535:

> "The presumption of mental capacity of which I have spoken is a provisional presumption only. It does not put the legal burden on the defence in the same way as the presumption of sanity does. It leaves the legal burden on the prosecution, but nevertheless, until it is displaced, it

> enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Not because the presumption is evidence itself, but because it takes the place of evidence. In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say 'I had a black-out': for 'black-out' as Stable J said in *Cooper v McKenna* ([1960] Qd R at p 419) 'is one of the first refuges of a guilty conscience, and a popular excuse'. The words of Devlin J in *Hill v Baxter* ([1958] 1 QB 277 at p 285) should be remembered:
>
> > 'I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent.'"

[76] In **R v Stripp**, the Court of Appeal accepted the law on automatism as set out in **Bratty v A-G for Northern Ireland**, and indicated that in order for the defence to displace the presumption of mental capacity, it "must give sufficient evidence from which it can be reasonably inferred that the act was involuntary".

[77] **R v Pullen** [1991] Crim LR 457 is yet another English Court of Appeal decision in which an issue arose as to whether the defence of automatism had been properly raised thereby entitling the appellant to an acquittal. The facts of that case are gruesome and bear no similarity to the instant case. Suffice it to say that the appellant, who was a family friend and in his late forties, was convicted of attempted murder and attempted rape of his friends' four year old daughter. In his defence, he stated that he had suffered blackouts in the past, was suffering from severe amnesia and could not

recall what had happened once he and the little girl entered a plot of land where the incident occurred. There was suggestion that he was diabetic, and so his counsel raised the possibility of him having a hypoglycaemic attack based on his consumption of alcohol on the night of the incident.

[78] The court, accepted the dicta in **R v Stripp**, "that the defence of automatism is one which can easily be put forward but may be a difficult one to pursue". In assessing whether a proper foundation had been laid for the defence of automatism, the court examined the evidence of a consultant physician that testified on behalf of the defence and found in the negative. The physician testified that there may have been no evidence of any hypoglycaemic condition; he did not find any evidence consistent with that condition ever having occurred; and he did not examine the appellant's blood sugar at the time. The court stated that despite their being no evidence to support the hypoglycaemic condition, the learned judge referred to it and gave adequate directions on it. Accordingly, since there was no factual basis for the defence of automatism, the appellant was not entitled to an acquittal based on that defence.

[79] The issue as to whether a proper foundation for the defence of automatism had been laid was also canvassed in **R v C** [2007] All ER (D) 91 (Sep). The defendant was observed driving his car erratically by several witnesses over a distance of some 1.5 miles between two villages. The car swerved several times towards oncoming vehicles before slowing to a crawl and then stopped completely. Suddenly, the car accelerated, swerved and mounted the pavement where it fatally collided into the deceased. A blood test was conducted on the respondent showing that his blood sugar was low and he

was given sugar to increase it. The respondent suffered from diabetes and had been questioned by the police as to whether he had had a hypoglycaemic attack while driving. He indicated that he was unaware of what had happened and had no advance warning of the attack.

[80] During the trial, the prosecution advanced evidence to show that the respondent had been advised to test his blood sugar before driving. He raised automatism by reason of an "external factor", namely, an imbalance of insulin caused by diabetes. The judge at the trial focused on whether the defendant had been advised to get tested before driving, and ruled that there was no case to answer. The prosecution appealed to the Court of Appeal which held that the learned judge had erred in ruling that there had been no case to be left before the jury, as the evidence had established the manner of the defendant's driving. The court also stated that if the defendant wished to advance the defence of automatism, he would have had to provide an evidential basis for asserting that he had been totally unable to control the car due to an unforeseen hypoglycaemic attack; that he could not have avoided this attack by advance testing; and there had been no advance warnings during the course of his journey. The prosecution's appeal was allowed and a retrial ordered.

[81] In **R v Bell** [1984] 3 All ER 842, the court listed the following hypothetical examples of involuntary conduct while driving to which no criminal liability may attach as follows:

(i) the driver being attacked by a swarm of bees or a malevolent passenger;

(ii) he was affected by a sudden, blinding pain;

(iii) he suddenly became unconscious; or

(iv) because his vehicle has suffered some failure, for example, through a tyre blow-out or the brakes failing.

The court, however, cautioned that for these defences to succeed the driver must be able to show that he was not in physical control of his actions.

[82] In the light of the principles emanating from these cases, it is necessary to first make a determination as to whether, in the instant case, a proper foundation had been laid for the defence of automatism. The applicant in her unsworn statement indicated that she had been driving from 4:30 pm when she left her office in Half-Way-Tree, and while travelling along Old Hope Road she recalls "seeing a bright red light, very bright, and [she did] not recall what happened after". There was no indication on her evidence that she had been afflicted with any "internal" or "external" factors that would have caused such total destruction of voluntary control that she could not be said to be driving her motor car at all. As was stated in **Bratty v A-G for Northern Ireland**, merely saying that there was a "blackout" (which is what the applicant's statement amounted to) was not sufficient. The applicant also did not claim that she had had any similar experience before or after the accident.

[83] Medical evidence was indeed adduced in support of the applicant's case, but as was the case in **Attorney General's Reference (No 2 of 1992)**, **R v Pullen** and **R v**

C, it appears that Dr Bruce's evidence did not establish a sufficient basis for the defence of automatism for the following reasons:

1. Dr Bruce could not say whether the applicant's syncopal attack resulted in a partial or complete loss of awareness.
2. He said that in the applicant's case, in circumstances of a first seizure having occurred, the protocol did not require use of a CT scan; and he therefore made his findings on a clinical diagnosis, without the benefit of the results of a CT scan.
3. He accepted that the applicant's injuries could have been caused by the accident and/or the syncopal attack.
4. He was not asked about nor did he speak to whether the "bright red light" that the applicant said she had seen is connected to or associated with a syncopal attack.
5. Dr Bruce had not examined the applicant on a consistent basis, nor was she his regular patient and so he could only speak to her having one syncopal attack.

6. The applicant spent about two weeks in Dr Bruce's care at UHWI, and never had a syncopal attack, nor was there evidence that she had suffered any such attack since leaving his care.

[84] Despite the absence of a proper foundation being laid for the defence of automatism, the learned trial judge (as was the case in **R v Pullen)**, no doubt being cautious as to whether that defence had been raised, directed the jury on it. In our view, the directions on the defence of automatism given by the learned trial judge in the instant case were thorough and accurate. Indeed, the use of the terms "internal" and "external" factors are legal constructs used to determine the cause of automatism. Having found that the defence of automatism arose, he instructed the jury, that "the defence of automatism requires total destruction of voluntary control of the accused caused by external factors". Since the applicant could not give an explanation for this "bright red light", and Dr Bruce was not asked about it, the learned trial judge was in fact being favourable to the applicant's defence when he instructed the jury that the applicant's claim that she had seen a "bright red light" could have been caused by an "external factor". The learned trial judge, by referring to "external" factors, was indicating to the jury that whether or not they believed that these factors were present was a matter for them to decide. In our view, the learned trial judge correctly gave no directions on "internal factors" relative to the defence of insanity, as that defence did not arise on the evidence.

[85] We have reproduced excerpts of his directions to the jury on the defence of automatism to illustrate this point. He directed the jury on the law relating to the offence of causing death by dangerous driving and the factors that would prove the elements of that offence. In assisting the jury in its consideration of the applicant's defence, at pages 27-30 of his summation, the learned trial judge said:

> "The defence has raised the issue and you need to consider, whether or not you find the defence of automatism applies. If you find the accused suffered a syncopal attack or fainting spell or seizure while she was driving, caused by a very bright red light from an external force and because of that attack, her state of mind was such that at the time of the car leaving the road and colliding with the deceased at the bus stop, **her ability to exercise voluntary control was totally destroyed**, she is not guilty of any offence.
>
> **The defence of automatism requires that there was a total destruction of voluntary control on the accused's part caused by an external factor.** So, if you find there were no bright red light or that the red light was caused by an internal factor, the accused would not be entitled to rely on [that] defence.
>
> Also bear in mind that impaired, reduced or partial control is not enough for the accused to be able to rely on this defence. The defence had raised this issue for you to consider, but the accused does not have to prove that this was her condition. It was for the prosecution -- it is for the prosecution to prove, if it can, so that you feel sure that it was not. The prosecution would succeed in proving that she was not suffering from automatism if you find you are sure that there was no bright external red light, or the prosecution's evidence establishes that she exercised presence of mind in steering the vehicle away from the wall, after it got onto the sidewalk.
>
> Therefore, to recap, the issue of the manner of driving, if you accept the prosecution's evidence as to how the accident occurred, you should consider whether or not you find the manner of the accused's driving was dangerous.

> If you find it was not dangerous, or you are not sure it was, then you have to find the accused not guilty. If you find that you are sure it was dangerous, then you should go on to consider whether the accused was at fault in some way. It would not matter if the fault was slight negligence or the accused was deliberately careless or momentarily inattentive or even doing her incompetent best. It would not matter if the fault was due to the slight or momentary lapse of concentration or watchfulness on her part. If you find the accused was at fault in some way, then providing you find all ingredients of the offence proven, it would be open to you to find the accused guilty. If on the other hand, you find the accused was or may have been suffering from automatism at the time of the accident, you would be obliged to find her not guilty." (Emphasis added)

[86] After summarising the case for the defence, the learned trial judge also gave the jury further directions on how to assess the applicant's defence. At pages 84-86 of his summation he told the jury the following:

> "Now, Madam Foreman and Members of the Jury, the defence has raised the issue and you need to consider whether or not you find the defence of Automatism applies. If you find the accused suffered a syncopal attack, a fainting spell or seizure while driving, caused by a very bright red light from an external source, and because of that attack, her state of mind was such that at the time the car was leaving the road and collided in the deceased at the bus stop, her ability to exercise voluntary control was totally destroyed, she would not be guilty of any offence. **The defence of Automatism requires that there was a total destruction of voluntary control on the accused's part, caused by an external factor**.
>
> So, if you find there was no very bright red light or that any such light was caused by an external factor, the accused would not be entitled to rely on the defence. Also, bear in mind that impaired, reduced or partial control is not enough for the accused to be able to rely on this defence.

> **Dr. Bruce was not asked about whether seeing a bright red light could cause a syncopal attack, or whether it was an internal or external factor, or was the cause or symptom of a syncopal attack. It is for you to determine what you find the position to be.**
>
> **The defence has raised this issue for you to consider, but the accused does not have to prove that this was her condition. It is for the prosecution to prove, if it can, so that you feel sure that it was not.**
>
> **The prosecution would succeed in proving that she was not suffering from Automatism, if you find you are sure that there was no red bright, external red light or the prosecution's evidence establishes that she exercised presence of mind in steering the vehicle from the wall after it got onto the sidewalk.**" (Emphasis added)

[87] In all these circumstances, in the light of the fact there is a real issue as to whether a proper foundation had been laid for the defence of automatism at all, and for that reason, simpliciter, the applicant's convictions could not be quashed. Additionally, in any event, since the defence of automatism was left to the jury, as the learned trial judge gave accurate and rather comprehensive directions to the jury in respect of that defence, ground 3 would also fail.

Incompetence of counsel

[88] In an affidavit sworn to on 25 February 2019, the applicant stated at paragraphs 2, 3 and 4 as follows:

> "2 I make this Affidavit in relation to the witness Joseph Harris who said at my trial that he parked his car on the sidewalk about 25 feet from the bus shelter, shortly before my car impacted the bus shelter.

> 3 I gave no instructions to my trial Attorney Mr. Garth Lyttle to challenge or discredit [Joseph Harris]. My instructions to [Mr Lyttle] were always that I saw a very bright red light and remember nothing of what happened after. I do not know whether Joseph Harris was truthful and accurate or not.
>
> 4. I heard Joseph Harris testify at the preliminary enquiry. I thought that he helped my case because he contradicted the conclusions of Sergeant Williams. I certainly did not want him discredited."

[89] Mr Lyttle responded to the contents of the applicant's affidavit in an email also dated 25 February 2019, wherein he stated that he took issue with paragraph 3 of the applicant's affidavit (as outlined above). In response to the applicant's allegation that she had given him no instructions to challenge or discredit Mr Harris, Mr Lyttle asked the following question: "[a]t a trial, what is defence counsel for?" He accepted that she had given him instructions with regard to seeing a "bright light" and remembering nothing else thereafter, but he stated that based on the stark differences between the testimony of Sergeant Williams and that of Mr Harris, it would have been physically impossible for the applicant's motor car to pass Mr Harris' motor car on the sidewalk. He stated further that the learned trial judge had failed to give proper directions on the mathematical evidence that had been elicited, and did not point out to the jury that on Mr Harris' evidence, a physical impediment (Mr Harris' motor car) had been present that would have prevented the accident from occurring.

[90] Lord Gifford, in his submissions on this ground, stated that Mr Lyttle's cross-examination of Mr Harris was not consistent with his instructions from the applicant. He

stated that Mr Lyttle's cross-examination of Mr Harris, especially his suggestion to Mr Harris that he "was not there the evening the accident occurred", had the effect of discrediting Mr Harris, and had served to push the jury, unfairly, towards the acceptance of Sergeant Williams' evidence, thereby increasing Sergeant Williams' credibility. This, he submitted, had rendered the trial unfair.

[91] In response to Lord Gifford's submission, the learned DPP stated that the cases in which "counsel's conduct can afford a basis for an appeal must be wholly exceptional" (see **R v Clinton** [1993] 1 WLR 1181). She also submitted that an allegation of incompetence of counsel can only succeed when the acts of incompetence alleged operated with undue prejudice to the fairness of the trial. Miss Llewellyn asserted that the suggestions made by Mr Lyttle to Mr Harris were not related to the applicant's defence, and so would not have operated to negate her defence. As a consequence, Mr Lyttle's conduct would not have caused undue prejudice to the fairness of the applicant's trial.

[92] We are in agreement with the learned DPP's submissions on this issue. This court in **Kenyatha Brown v R** [2018] JMCA Crim 24 and **Brenton Tulloch v R** [2019] JMCA Crim 45, accepted the principles in **Paul Lashley and another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ), from the Caribbean Court of Justice. In **Paul Lashley v Winston Singh**, the CCJ stated that in assessing the impact of what counsel did or did not do, regard must be had to whether "counsel's ineptitude... affected the outcome of the trial". The court went on to state that "[i]f counsel's management of the case results in a denial of due process, the conviction will be

quashed regardless of the guilt or innocence of the accused". Paragraph [12] of that judgment is instructive. It stated that:

> "**An appellate court, in adjudicating on an allegation of the incompetence of counsel which resulted in an unfair trial, has to bear in mind that the trial process is an adversarial one. Thus all counsel, including in this case the police prosecutor and retained counsel for the Appellants, are entitled to the utmost latitude in matters such as strategy, which issue he or she would contest, the evidence to be called, and the questions to be put in chief or in cross-examination subject to the rules of evidence.** The judge is an umpire, who takes no part in that forensic contest. Therefore, in an appeal such as the instant one where no error of the magistrate prior to sentencing is alleged, the trial does not become unfair simply because the Appellants or their counsel chose not to call evidence, or not to put the accused in the witness-box and to rely on their unsworn evidence." (Emphasis added)

[93] In **Kenyatha Brown v R**, this court accepted and applied the dicta in **R v Clinton** where the English Court of Appeal accepted that "[d]uring the course of any criminal trial counsel for the defence is called upon to make a number of tactical decisions ... [s]ome of these decisions turn out well, others less happily". However, "where it is shown that the decision was taken in defiance of or without proper instructions or when all promptings of reason and good sense pointed the other way", a determination must be made as to whether there is doubt that the appellant suffered some injustice by counsel's conduct.

[94] In the instant case, Mr Lyttle "took issue" with the applicant's allegation that she had not given him any instructions to challenge Mr Harris. Since Mr Lyttle has not

definitively denied the applicant's allegations, it is possible that his decision to cross-examine Mr Harris, in the way that he did, was taken "without proper instructions". However, in our view, it was Mr Lyttle's cross-examination of Mr Harris that illuminated the glaring inconsistencies in Mr Harris' evidence, and the discrepancy between Mr Harris' evidence and that of Sergeant Williams. Mr Lyttle, in his cross-examination of Mr Harris, raised three different possibilities:

(i) Mr Harris was not a credible witness as he spoke to matters that previous witnesses for the Crown did not speak about (such as the presence of a little girl about eight to 10 years old under the applicant's motor car); whether he was indeed a "mechanical engineer"; and whether Mr Harris' motor car was parked where he said it had been parked.

(ii) Mr Harris' motor car was parked where he said he was and the applicant swerved to avoid a collision with his motor car.

(iii) His car was parked out of range and just beyond where the applicant drove onto the sidewalk.

(iv) Mr Harris was not present at the scene at all.

[95] It seems that Mr Lyttle was indeed correct when he asked about the role of defence counsel at a trial. There is a risk that he might have been accused of being derelict in his duty to the applicant had he not highlighted the glaring inconsistencies in

Mr Harris' evidence, and the discrepancies between the testimony of Mr Harris and that of Sergeant Williams, as the "promptings of reason and good sense" would have pointed in that direction. This issue ultimately boils down to one of credibility, which is a matter entirely for the jury to determine with proper instructions from the learned trial judge. They were entitled to believe the testimony of Mr Harris and not that of Sergeant Williams, or accept or reject a part of either testimony, as they had been instructed to do by the learned trial judge. They obviously, at the end of the day, believed Sergeant Williams' testimony.

[96] Additionally, as was submitted by the learned DPP, Mr Lyttle, in his cross-examination of Mr Harris, had never alluded to the applicant's defence of automatism, and so could not have undermined the applicant's defence.

[97] We cannot therefore say, in those circumstances, that Mr Lyttle's cross-examination of Mr Harris demonstrated that he was "flagrantly incompetent" or that his conduct undermined the applicant's right to a fair trial or due process. Ground 4, therefore, cannot succeed.

[98] Lord Gifford had argued against the grant of a retrial should grounds 2, 3 and/or 4 succeed. However, given our findings on those grounds, we do not think it is necessary to explore that issue.

Sentence

[99] As indicated, the learned trial judge sentenced the applicant to one year's imprisonment at hard labour on each count to run concurrently and disqualified her from holding or obtaining a driver's licence for two years.

[100] Lord Gifford's complaint was with regard to the custodial element of the sentence that had been imposed. He submitted, in reliance on **Howard (Randolph) v R** (2004) 67 WIR 28, that the presence of strong mitigating factors in the applicant's favour made the instant case exceptional and rendered the imposition of a custodial sentence manifestly excessive. Miss Llewellyn stated that the learned trial judge applied the correct methodology in arriving at the sentences he had imposed. She submitted, that having applied those methodologies, the learned trial judge found that a custodial sentence would have been appropriate. She indicated that the sentence of one year's imprisonment was "on the low end of the scale", when the maximum sentence that can be imposed is five years' imprisonment at hard labour. In those circumstances, and having regard to those factors, she stated that the custodial sentence imposed was not manifestly excessive.

[101] In order to assess whether the custodial sentences imposed on the applicant were indeed manifestly excessive, it is important to first determine whether the learned trial judge applied the correct methodology in arriving at the sentence he had imposed. The principles applicable to this assessment have been stated and applied in a number of cases before this court. Indeed, in **Daniel Roulston v R** [2018] JMCA Crim 20, McDonald-Bishop JA summarised the appropriate sentencing methodology as follows:

"a. identify the sentence range;

b. identify the appropriate starting point within the range;

c. consider any relevant aggravating factors;

d. consider any relevant mitigating features (including personal mitigation);

e. consider, where appropriate, any reduction for a guilty plea;

f. decide on the appropriate sentence (giving reasons); and

g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

Although the methodology outlined on **Daniel Roulston v R** was not formalised at the time of the sentencing hearing in this case, the principles stated therein are based on well-known and accepted sentencing principles, and are therefore applicable to the instant case.

[102] Perusal of the learned trial judge's summation indicates that he had applied the correct methodology in sentencing the applicant. The learned trial judge described the accident as tragic. He recited the facts in the case, having regard to the case for the prosecution and the defence. He stated that the jury, by their unanimous verdict, rejected the applicant's defence and accepted that the applicant's manner of driving disclosed that she had presence of mind while driving, and was therefore responsible for the accident. The learned trial judge indicated that sentencing is a "balancing act bearing in mind the purpose and the aims of sentencing: [r]ehabilitation; deterrence; punishment and where necessary, the protection of society". He accepted that the court

had to analyse the various aggravating and mitigating features in the instant case, and he had regard to the aggravating and mitigating features as outlined in **Howard v R**.

[103] In terms of the mitigating features, the learned trial judge stated that the applicant's antecedent and social enquiry reports were "very positive". He was impressed with the fact that at the age of 38 years old, her previous record was unblemished; she was well-educated and gainfully employed; she participated significantly in charity work; and she was highly regarded in society. He also referenced the fact that compensation was made to the families of the deceased women and to those who were injured totalling about $8,000,000.00, derived from the applicant's own resources and that of her insurers. He also stated that the fact that she had issued letters of apology to the families of the deceased was a positive feature.

[104] Consideration was also given to the fact that the applicant was a mother, with a young child and her mother, who both resided with her and depended on her for support. He even acknowledged that the applicant may have suffered some mental anguish as a result of the accident. He referenced the evidence from the applicant's character witnesses, Ms Tanya Pringle, senior manager for corporate communications at the Jamaica National Building Society (as it then was) and that of Mrs Laurette Adams-Thomas, general manager of the Golden Age Home, who testified to the applicant's good character and excellent charitable work. He stated that he had considered "all the points raised by [Lord Gifford] in his plea in mitigation including the points he stressed in relation to the particular circumstances and the nature of the offence".

[105] However, the learned trial judge stated that there were "significant aggravating factors" as follows: two persons were killed who were standing under a bus stop on the sidewalk; other persons were injured as result of the accident; the negative impact of the accident on the victims' families; and the prevalence of the offence of causing death by dangerous driving in Jamaica. The learned trial judge noted the applicant's failure to take personal responsibility for the accident, and stated that "things would have been different had the applicant decided to plead guilty based on the facts in this case". He stated that the jury's verdict was indicative of a clear rejection of the applicant's defence (including the testimony of Dr Bruce) that she had a seizure at the time the accident occurred, and moreover, there was no evidence that the applicant had suffered a seizure before the accident or after.

[106] The jury, he said, seemed to have accepted Sergeant Williams' "strong evidence" that there was presence of mind demonstrated in the manner of driving which led her to veer away from the perimeter wall. As a consequence, he listed as further aggravating features, the fact that the applicant's motor car was driven along the sidewalk in excess of 70 feet, and at the time it collided into the bus stop, it was travelling well in excess of 50 kilometres per hour. Although the learned trial judge accepted Lord Gifford's argument that it remains unclear what caused the applicant to manoeuvre her motor car in a manner which caused her not to apply the brake, he nonetheless stated that the jury's verdict demonstrated that the applicant had the presence of mind to manoeuvre the motor car away from the perimeter wall.

[107] In considering whether to impose a custodial sentence and the length of sentence to impose the learned trial judge said the following:

> "The maximum penalty for Causing Death by Dangerous Driving is five years imprisonment at hard labour. I have considered your antecedent and listened very carefully to your character witnesses and to the detailed plea in mitigation. I have very carefully considered all the circumstances of this case, weighing the aggravating and mitigating factors. I have specifically perused the Social Enquiry Report, which was very helpful in certain respects. However, the recommendations made in the Social Enquiry Report and the request of counsel in his plea, after careful consideration, I am unable to accept, in all the circumstances of this case.
>
> I am of the view that a custodial sentence is what is appropriate. I have received guidance from the case of [**R v Warren (Rhone)** (2000) 59 WIR 360]. That was a case in which a defendant hit down two women, one of whom died. The defence of duress was rejected by the jury and he was convicted and sentenced to five years' imprisonment at hard labour which was reduced on appeal, to three years' imprisonment at hard labour.
>
> Two women were killed in this case, while one was killed in [**R v Warren**]. The significant mitigating factors in this case are, however, such that the sentence would be substantially less than that in [**R v Warren**] and at the lower end of the scale."

[108] The learned trial judge also gave consideration to the issue of disqualification, having considered the authority of **Whittal v Kirby** [1947] KB 194 relied on by Lord Gifford, but indicated that he had seen no "special reasons in [the instant] case that will mitigate against the period of disqualification".

[109] Thereafter, sentences of one year's imprisonment at hard labour were imposed on each count to run concurrently, and the applicant was also disqualified from holding or obtaining a driver's licence for a period of two years.

[110] Although we accept that the learned trial judge had applied the proper sentencing methodology, Lord Gifford invited the court to consider whether, in the light of the many mitigating features in the instant case, the custodial sentence imposed was manifestly excessive. Before embarking upon this consideration, it is important for us to consider that in **Tyrone Gillard v R** [2019] JMCA Crim 42, the court indicated that it was guided by the dictum of Hilbery J in the case of **R v Kenneth John Ball** (1951) 35 Cr App Rep 164, at page 165, where he said:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then the Court will intervene."

[111] In **Howard v R**, upon which Lord Gifford relied, the Court of Appeal of Barbados issued guidelines on sentencing in cases of causing death by dangerous or reckless driving. The court accepted that those cases normally attracted immediate custodial sentences, but indicated that "in exceptional circumstances, where the facts are not of a kind to attract imprisonment, for example, where there are no aggravating factors but

strong mitigating factors", the imposition of a suspended sentence along with a fine would have been appropriate. Although the court declined to list what it had deemed as exceptional circumstances, it envisaged a situation where imprisonment would exacerbate the tragedy or circumstances where some other form of punishment would be appropriate (for example, death of a spouse or family member). Interestingly, those guidelines also provide for the imposition of a minimal custodial sentence even where there were no aggravating factors but strong mitigating ones.

[112] As with the sentencing methodology referred to in **Daniel Roulston v R**, the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, issued in December 2017, had not yet been issued at the time the applicant was sentenced. However, the principles stated therein represent a summary of sentences imposed for the offence prior to the applicant being sentenced and so are applicable to the instant case as well. As indicated, the maximum sentence for the offence of causing death by dangerous driving is five years. Sentences imposed for that offence after a trial ranged from imprisonment for three years to a fine.

[113] In **R v Eric Shaw** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 142/1973, judgment delivered 29 November 1974, the appellant drove a heavily laden trailer very fast around a corner onto a narrow bridge, causing his truck to collide with the wheel of another truck going in the opposite direction, and ultimately overturning on a car killing its two occupants. This court upheld his conviction for two counts of causing death by dangerous driving. However, his sentences of three years' imprisonment at hard labour, as well as his disqualification

from holding or obtaining a driver's licence for three years. were set aside. Substituted therefor were sentences of 12 months' imprisonment at hard labour and the period of disqualification from holding or obtaining a driver's licence was also reduced to two years and six months, set to commence after the expiration of his custodial sentence.

[114] Only one person was killed on the facts in **R v Uroy Anderson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 212/1987, judgment delivered 26 May 1989, as a result of a truck driver turning across a dual carriageway into the pathway of the deceased's oncoming vehicle. His conviction and sentence to a fine of $800.00 or six months' imprisonment were upheld on appeal.

[115] **R v Rayon Williston** (1991) 28 JLR 141 involved the death of one person due to speeding and improper overtaking. The appellant claimed that the blowout of a tyre had caused his car to lose control. He was convicted and sentenced to two years' imprisonment. On appeal, on account of the learned judge's error in sentencing, his sentence was varied to two years' imprisonment at hard labour suspended for three years, and the period of disqualification from holding or obtaining a driver's licence for five years was affirmed.

[116] In **R v Warren**, considered by the learned trial judge, the appellant's vehicle collided into two ladies who were walking on the road, killing one of them. He claimed that at the time of the accident he had been under duress as he was being chased by six armed men travelling in a vehicle behind him. He was initially sentenced to five years' imprisonment at hard labour, which was reduced on appeal to three years, but

the period of his disqualification from holding or obtaining a driver's licence remained at two years.

[117] On the facts in **Lloyd Brown v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 119/2004, judgment delivered 12 June 2008, four persons died as a result of a Mack truck driving into the lane with oncoming traffic and colliding into a pickup and then a tractor trailer. The appellant's defence was that while driving he saw a sudden flash of light in front of him in the opposite direction and then heard an explosion. The appellant was convicted on four counts of manslaughter and sentenced to concurrent terms of six years on each count. However, as the learned judge failed to have regard to the principles outlined in the Privy Council case of **Uriah Brown v R** [2005] UKPC 18, the appellant's convictions for manslaughter were set aside, convictions for causing death by dangerous driving were substituted therefor and the appellant was fined $200,000.00 or six months' imprisonment at hard labour on each count, and he was disqualified from holding or obtaining a driver's licence for 18 months.

[118] It is therefore clear on these authorities that in Jamaica a custodial sentence for the offence of causing death by dangerous driving is reserved for the most egregious of offences which include the loss of more than one life. **Lloyd Brown v R** therefore seems to be an outlier among all the cases listed as that case involved the **loss of four lives** and yet only a fine was imposed. In the instant case, the learned trial judge clearly accepted that this case could be described as one with the "most egregious circumstances", as two persons had died and several more were injured. It would be

difficult to find a basis upon which to say that he had erred in that view, nor can we say that, in all the circumstances, the sentences he imposed were manifestly excessive. We therefore find no merit in ground 5.

Delay

[119] Lord Gifford stated that in the instant case there is an inordinate delay of eight years between the time of the commission of the offence and the appeal. He argued that it would now be oppressive to uphold the custodial sentence having regard to dicta in **Melanie Tapper and another v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 28/2007, judgment delivered 27 February 2009. Although the learned DPP accepted the dicta in **Melanie Tapper v R** and counsel's submission that the delay of eight years was inordinate, she submitted that that period of delay did not significantly prejudice the applicant as throughout that time she has been on bail, nor did it prejudice her defence.

[120] In **Alfred Flowers v R** [2000] UKPC 41 the Privy Council stated that in considering whether there has been a breach of the constitutional right to a fair hearing within a reasonable time, regard should be had to four factors: "the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant". In considering the prejudice to the accused, regard should be had to whether there was oppressive pre-trial incarceration; the anxiety and concern of the accused; and the extent to which delay had impaired his defence.

[121] The delay in **Melanie Tapper v R** occurred on account of the late receipt of the notes of evidence by the Court of Appeal. Although the sentences were imposed on the appellant on 29 May 2003, the notes of evidence were not received by the court until 9 August 2007, over four years later. This court stated that the constitutional right to a fair hearing within a reasonable time was guaranteed by section 20(1) of the Constitution (as it was then), and applies to both pre-trial and post-trial delays. Consequently, a delay in those circumstances, without more, constitutes a breach of that right. In order to remedy that breach, the appellant's sentence of 18 months' imprisonment at hard labour was reduced to 12 months' imprisonment at hard labour on account of the delay. Additionally, that sentence was suspended for 12 months on the erroneous assumption that the appellant had made restitution to the complainant (see **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26).

[122] The appellant's appeal to the Privy Council was ultimately dismissed. The appellant's counsel argued before the Board that this court had erred in not considering the issue of pre-trial delay. However, that argument failed as the Board indicated that no grounds had been advanced nor were arguments made before the Court of Appeal on pre-trial delay, and there was no "obligation on the court, of its own motion, to extend the argument beyond that advanced by the experienced advocates representing the Appellant".

[123] The Privy Council accepted that if a criminal case is not heard within a reasonable time, that will of itself constitute a constitutional breach whether or not the defendant has been prejudiced by the delay. In deciding upon a remedy for this breach,

the Board cited with approval dicta from **Attorney General's Reference (No 2 of 2001)** [2003] UKHL 68 which indicated that the hearing should not be stayed or the conviction quashed on account of delay alone, unless the hearing of the trial and the conviction obtained was substantially prejudiced by the delay. **Attorney General's Reference (No 2 of 2001)** also states that appropriate remedies for that breach may be in the form of a public acknowledgement; a reduction in the sentence imposed; or payment of compensation to the defendant.

[124] In **Rummun v State of Mauritius** [2013] UKPC 6, the Board stated that there are three matters which ought to be considered in deciding whether delay constitutes a breach of the right to a fair trial within a reasonable time: "i) the complexity of the case; (ii) the conduct of the Appellant; and (iii) the conduct of the administrative and judicial authorities". Once a breach of the constitutional right has been established the Board also stated that these factors are also relevant as to whether there should be any effect on the sentence. Although a breach of the constitutional right may always be a factor in deciding how to dispose of a case, in some instances it may not be a factor of great weight, and in those circumstances, due to other countervailing factors such as the gravity of the offence, may not be accorded any weight at all. The Privy Council also stated in **Celine v State of Mauritius** [2012] UKPC 32 that if an appellant seeks to challenge his sentence on account of delay, his attitude towards that delay must be closely examined. Additionally, in **Taito v R** [2002] UKPC 15, a Privy Council decision from New Zealand, it was said that delay for which the State is not responsible, cannot be prayed in aid by an appellant.

[125] On the issue as to whether a breach of a constitutional right has been established, we should note, however, since the decision in **Melanie Tapper v R** in the Court of Appeal, and the Privy Council decision which upheld it, the Constitution of Jamaica (the Constitution) was amended (on 7 April 2011) to provide for a Charter of Fundamental Rights and Freedoms (the Charter). Section 16(1) of the Charter also guarantees any person charged with a criminal offence the right to "a fair hearing within a reasonable time by an independent impartial court established by law". However, section 13(2) of the Charter states that "Parliament shall pass no law and no organ of the state shall take any action which abrogates, abridges or infringes those rights". It states further that the rights and freedoms set out in the Charter are guaranteed "save only as may be demonstrably justified in a free and democratic society".

[126] This court in **Jamaica Bar Association v The Attorney General and Another** [2020] JMCA Civ 37 has adopted the two-stage approach in determining constitutionality which is as stated in **R v Oakes** [1986] 1 SCR 103, from the Supreme Court of Canada. That approach is premised on the basis that: (i) the party asserting the breach should prove the abrogation, abridgment or infringement of the right under the Charter, and (ii) the state has the burden to justify the constitutionality of that breach (see section 13(2)). In the light of the Charter, therefore, it is now clear that a delay without more cannot sufficiently ground a breach of a constitutional right to a fair hearing within a reasonable time. There must be proof of an abrogation, abridgment or infringement of the right, and the State must be given an opportunity to prove that the

limitation of the right is demonstrably justifiable and the extent to which that limitation is demonstrably justifiable.

[127] The necessity for some reasons for the delay was also emphasised in this court by Morrison P in **Lincoln Hall v R** [2018] JMCA Crim 17. Although Morrison P acknowledged that a period of over 11 years delay between the appellant's detention and his trial date was inordinate, he indicated that there was nothing on the record indicating the reasons for the delay, and so the court declined to make an assessment on the effect of that delay on the appellant's sentence.

[128] However, in **Techla Simpson v R** [2019] JMCA Crim 37, where there was an eight year pre-trial delay, reasons were proffered for that delay and so the court was able to make an assessment as to whether it impacted on the appellant's right to a fair trial. This court found that the eight year pre-trial delay was inordinate and in breach of the appellant's constitutional right. Based on the reasons advanced, the court indicated that the reasons for delay were not based on any deliberate attempt by the state to delay the trial. The court also noted that the appellant had not asserted a breach of his constitutional right in the court below. Additionally, the court found that the period of delay did not prejudice the fairness of the appellant's trial as he was not subjected to oppressive pre-trial incarceration, nor was his defence at trial prejudiced on account of delay. Consequently, the remedy afforded to him on account of a breach of his constitutional right was a reduction by two years of the period within which he was eligible for parole from 40 to 38 years' imprisonment at hard labour.

[129] In the instant case, the pre-trial delay in excess of four years, and the post-conviction delay of approximately four years was indeed inordinate. However, no reasons have been advanced for this delay in order to facilitate an assessment of whether that delay had breached the appellant's right to a fair hearing within a reasonable time. There is also no indication of the applicant's attitude towards delay in the court below and her assertion of any breach of her constitutional right. Although inevitably there is some anxiety and concern on the applicant since she has had this matter hanging over her head for eight years, the applicant has always been on bail and so has never been subjected to any oppressive pre-trial incarceration. In any event, the case itself is not a complex one, and in the light of the applicant's defence that she saw "a bright red light, very bright, and [she did] not recall what happened after", and the fact that there was no submission that there had been any difficulty in obtaining Dr Bruce's evidence, on the evidence, and in the circumstances of this case, there would have been no substantial prejudice to the fairness of the appellant's trial. Ground 6 would therefore fail.

Disposition

[130] In the light of the foregoing, we make the following orders:

1. The application for leave to appeal against the convictions and sentences is refused.
2. The sentences are to be reckoned as having commenced on 6 November 2020.