The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 10 of 2018

B E T W E E N:

THE QUEEN

Appellant

- v -

ANDREW LAKE

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Cindy Clarke, Office of the Director for Public Prosecutions, for the Appellant;
Jerome Lynch QC, Trott & Duncan Ltd and Kim White, Cox Hallet & Wilkinson Ltd, for the Respondent

Date of Hearing: **16 November 2018**
Date of Judgment: **21 November 2018**

J U D G M E N T

When plea of guilty a nullity – failure to leave alternative offence to jury – effect – whether power to substitute conviction – power under section 23 of the Court of Appeal Act 1964.

BAKER, P

Introduction

1. Following a collision between two boats on the evening of 1 June 2017, Mary McKee tragically died and two others, her husband Arthur McKee and Charlie Watson, suffered serious injuries.

2. Criminal Proceedings were brought against Andrew Lake ("the Respondent"), the driver of one of the boats. He was charged with:

- Count 1, Manslaughter, contrary to section 293 of the Criminal Code 1907 ("the Code");
- Count 2, Causing injury by dangerous driving of a powercraft, contrary to section 276B(1) of the Code; and
- Count 2, Causing injury by dangerous driving of a powercraft, contrary to section 276B(1) of the Code.

3. The Respondent was naturally concerned at the risk of an immediate sentence of imprisonment. This would have been inevitable in the event of conviction for manslaughter and the other offences carried a considerable level of culpability.

The Goodyear Direction

4. He sought a *Goodyear [2005] EWCA Crim 888* direction from the judge, Simmons J. That is an indication as to the maximum sentence the judge would pass if he pleaded guilty to Counts 2 and 3 and the lesser offence inherent in Count 1 of causing death by reckless driving of a powercraft under section 276A of the Code.

5. If a judge gives a *Goodyear* direction, he or she is bound by it and cannot pass a greater sentence than that indicated. We are surprised that the judge gave a *Goodyear* direction in the present case. The prosecution had not said it would offer no evidence on the manslaughter charge and accept the pleas proposed, and in the event the prosecution proceeded with the manslaughter charge. In a case of this nature, the appropriate sentence is very much dependent on the level of the defendant's culpability and this is something of which the judge is likely to have a much clearer picture having heard evidence during a trial. The Crown had a *prima facie* case of manslaughter on the basis of drink and speed.

6. The judge's direction was that if the Respondent pleaded guilty as indicated, the maximum sentence would be 1 year's imprisonment suspended for 2 years with attendant community based supervision.

7. We note that the maximum sentence for reckless driving of a boat is substantially less than the maximum sentence for a similar offence with a vehicle on land. We think that is something that may require attention of the legislature.

8. Following that direction the Respondent pleaded guilty to Counts 2 and 3 and the lesser offence inherent in Count 1 contrary to section 276A of the Code. This was not, understandably, accepted by the Crown who proceeded with the charge of manslaughter.

9. The Respondent was acquitted by the jury of manslaughter and the judge sentenced him as follows:

- 8 months imprisonment suspended for 2 years in respect of the lesser offence inherent in count 1 contrary to section 276A of the Code
- 5 months imprisonment suspended for 2 years and 100 hours community service in respect of count 2 contrary to section 276B of the Code; and
- 5 months imprisonment suspended for 2 years in respect of count 2 contrary to section 276B of the Code. The sentences were to run concurrently.

The Appeal

10. The prosecution initially appealed against this sentence as manifestly inadequate. They have, however, not proceeded with that appeal. Nevertheless, the Crown sought leave to appeal out of time in respect of another matter and this Court granted leave.

11. The matter arises in this way. The case of *R v Hazeltine [1967] 2 QB 857* makes clear that the effect of the Crown having proceeded with the manslaughter charge

on Count 1 was to render the plea of guilty to the lesser offence under section 276A of the Code a nullity. There were two courses open. Either a separate count could have been added to the indictment under section 276A of the Code, and the Respondent plead guilty to that (along with his pleas to Counts 2 and 3); or the jury could have been directed that in the event that they found him not guilty of manslaughter, they could nevertheless convict him of causing death by reckless driving of a powercraft. Neither course was in the event taken.

12. There was, during the trial, an issue about whether the jury could hear about the Respondent's previous plea to reckless driving of the powercraft. The judge ruled that they could. Indeed, the Respondent's defence was that, whilst he admitted guilt of the lesser offence, his culpability was not such as to amount to guilt on the more serious offence of manslaughter.

13. When the judge came to sum the case up, she did not, as she should have, advise the jury that in the event that they were not satisfied manslaughter was proved, they could convict the Respondent of causing death by reckless driving of a power boat, contrary to section 276A of the Code. Indeed they would have had little option but to do so as the Respondent admitted it.

14. The reason the judge did not do so is that she was persuaded not to by Mr Lynch, for the Respondent – apparently on the basis that it was unnecessary because he had already pleaded guilty. Unfortunately, the judge was persuaded to make a decision that was wrong in law. In *R v Coutts [2006] UKHL 39*, Lord Bingham explained why it was necessary to leave the possibility of convicting of alternative offences to the jury. He said this at paragraph 12:

> *"[12] …The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-*

convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge (Von Starck v The Queen [2000] 1 WLR 1270, 1275; Hunter and Moodie v The Queen [2003] UKPC 69, para 27).

[15] The second principle is closely allied with the first (and is not, as counsel for the appellant insisted, engaged on the facts of this case). It is that ordinarily, and subject to limited exceptions, a trial judge should leave to the jury the possibility of convicting of lesser-included offences, that is, lesser offences within section 6(3) comprising some but not all the ingredients of the offence charged.

[23] The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice.

But the interests of society should not depend on such a contingency.

15. As Salmon L.J. pointed out in *Hazeltine* at p.862, there cannot be more than one effective plea to any count in respect of which an accused is put in charge of the jury. On Count 1, the jury could have convicted the Respondent of manslaughter or of reckless driving of a power boat but they were never given the second option as they should have been. The Respondent was acquitted.

16. The Crown submit that the failure to leave the alternative verdict to the jury was an error of law. It is plain in our judgment that it was. They seek to exercise their right of appeal under section 17(2) of the Court of Appeal Act 1964 ("the Act"), which provides:

> *"(2) Where—*
>
> *(a) an accused person tried on indictment is discharged or acquitted or is convicted of an offence other than the one with which he was charged…*
>
> *the Director of Public Prosecutions or the informant, as the case may be, may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone."*

17. The Respondent was tried on indictment. He was acquitted of Count 1 (which contained the inherent alternative offence that was never left to the jury). The judge made an error of law which triggers the Crown's right of appeal.

18. Section 23 of the Act deals with determination of appeals under section 17(2). It provides that the Court of Appeal shall allow the appeal if it appears that the acquittal or discharge should be set aside on a ground of a wrong decision of law. The way in which we analyse its position is as follows. The Respondent's plea of guilty to the alternative offence was a nullity. See *Hazeltine.* The Respondent's acquittal of manslaughter on Count 1 necessarily implicitly

involved acquittal of the lesser offence within it of causing the death of Mrs. McKee by reckless driving, a decision brought about by the error of law in not leaving that offence to the jury. Paragraph 12.23(b) of Blackstone's Criminal Practice (2017) provides:

> *"A man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted. This is the corollary of the power of a jury to return a verdict of not guilty as charged but guilty of a lesser offence. The reasoning is that, where the jury on a certain count could have convicted of a lesser offence but failed to do so, they have impliedly acquitted him both of the offence charged and of the lesser offence. This appears to be the case whether or not the lesser alternative was actually left to the jury. Consequently, their verdict can be relied on to bar a later indictment for either or both offences."*

The Court's Power

19. Our powers are, in an appropriate case, and if the interests of justice so require, to set aside the acquittal and remit the case to the Supreme Court or make such other order as we consider just. There is, in our judgment, no doubt that this is an appropriate case and it is in the interest of justice to set aside the acquittal.

20. The Respondent has, at all times, admitted causing the death of Mary McKee by his reckless driving of the power boat. He continues to accept that. It must be in the interests of justice that that should be reflected in the formal conviction that he has always been prepared to accept. It is likewise in the interest of the victim's family, that there should be formal public recognition that he killed Mary McKee by his recklessness.

21. Given that the threshold of public interest is passed, there are two courses open to the Court; 1) to remit the case to the Supreme Court for the Respondent to be retired; or 2) to make such order as we consider just. Sending the case back to

the Supreme Court would cause unnecessary cost and delay and is to be avoided if there is a more practicable solution.

22. Section 23, which is the source of the Court's power for dealing with appeals under section 17(2) of the Act, gives the Court a very wide residuary power to make such order as it considers just.

23. Mr Lynch draws our attention to section 22(2), but that subsection is dealing with a different situation, namely where the jury has convicted an appellant of an offence but must, on the facts proved, have been satisfied of some other offence, then the Court may substitute a conviction for the lesser offence. For example, had the Respondent been convicted of manslaughter, this Court could in appropriate circumstances substituted a verdict of causing death by reckless driving. He submits, rightly, that the power is only triggered when there has been a conviction. But, section 22 is not dealing with appeals by the Crown under section 17(2). Here we have to look to section 23(2) where the Court's power is much wider.

24. The Respondent has been acquitted of an offence of which he would inevitably have been convicted had the matter been left to the jury as it should have been. The Respondent admitted his guilt from the outset and maintains that admission. The only reason why there is no conviction against him, is that his plea became a nullity when the Crown did not accept it and the judge did not leave the alternative offence to the jury. Had she done so, a conviction would have been inevitable.

Conclusion

25. In these unusual circumstances, we are satisfied that we have power to substitute a verdict of guilty under section 276A of the Code in place of the acquittal. The sentence passed by the judge will remain undisturbed, namely 8

months imprisonment suspended for 2 years, which runs from the date that sentence was passed.

26. We accept Ms Clarke's submission that we have power under section 23(2) of the Act to make this order and reject that of Mr Lynch, that such an order would create a dangerous precedent. The judge made an error of law. The circumstances are most unusual and we would hope unique. It is common ground that the order we are making meets the justice of the case. In our view, it is the practical solution to remedy what would otherwise be an injustice. As we have power to do so, we now make the order.

Baker P

Kay JA

Bell JA