Neutral Citation No. [2011] NICA 3 | *Ref:* **MOR8103**

Judgment: approved by the Court for handing down | *Delivered:* **24/02/11**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MICHAEL GERALD CROOME

Defendant/Appellant

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against conviction for causing death by dangerous driving, leave having been granted by Weir J. After the hearing on 24 January 2011 we allowed the appeal and ordered a retrial on the basis that there was an irregularity at the trial by reason of the failure to leave to the jury the alternative verdict of causing death by careless driving. We indicated that we would give our reasons at a later date and we do so now. This judgment is intended to give guidance on the duty of the court to leave an alternative verdict to the jury. Mr Pownall QC and Mr Turkington appeared for the appellant and Mr Weir QC and Mr Connor for the Crown. We are grateful to counsel for their helpful oral and written submissions.

The issues

[2] The appellant, while driving to Belfast International Airport to catch a flight, attempted to overtake a group of cyclists taking part in an organised and marshalled cycle race. During the manoeuvre a dog ran onto the road causing one of the cyclists to swerve and the applicant's car hit him. The cyclist died almost instantly. The appellant submitted that in light of discrepancies in the prosecution case the conviction was on that account alone unsafe. He further contended that the trial judge erred in admitting bad character evidence of the applicant's previous driving offences and that the direction on causation linking the dangerous driving to the death was confusing and unclear. Finally he submitted that the trial judge erred in not

leaving an alternative of causing death by careless driving to the jury. Although other matters were canvassed in the notice of appeal none of them were pursued at the hearing.

The evidence

[3] The stretch of Belfast Road between the Ballyhill Road junction and Nutts Corner roundabout is 1 ¾ miles long. At approximately 7:45pm on Tuesday 12 August 2008 a group of six cyclists involved in an organised road race were cycling along this stretch of road in the direction of the Nutts Corner roundabout at an approximate speed of 30mph. The road was dry and in good condition and the weather was clear. The first four cyclists were riding in a straight line in tight racing formation, about two feet out from the shallow kerb separating the roadway from the hard shoulder. The deceased was the fifth cyclist with a Mr Gray in sixth place. Mr. Gray was cycling a couple of feet out from the kerb. The deceased was to his right and riding a matter of inches further out from the kerb line. The front wheel of Mr Gray's bicycle overlapped a few inches inside the rear wheel of the deceased. As they cycled past the forecourt of a petrol station on their left hand side, situated 1.4 miles along the stretch of road, a dog ran out onto the road between the third and fourth cyclists. The deceased and Mr Gray braked before making evasive manoeuvres. Mr Gray swerved towards the kerb whereas the deceased swerved towards the centre of the road. However, in doing so the deceased was struck by the appellant's overtaking car. Whilst the exact point of impact could not be ascertained, debris on the road indicated that it occurred some 68.5m to 72m from where the deceased's body came to rest. The width of the carriageway was 27 feet in total.

[4] At the trial the prosecution case was that the appellant was driving too fast while overtaking the cyclist and that he was in a hurry to reach the airport where he had to leave his car with the parking firm and then check in by 8:15pm for his flight at 8:55pm. The prosecution also contended that the overtaking position which he adopted was too close to the cyclists. It was their case that the combination of excessive speed and close proximity to the cyclists left him with no opportunity, time or space to cope with the emergency created by the dog. The appellant's case was that his speed and positioning of the car were reasonable and proper and that the speed at which the deceased swerved meant that he had no reasonable chance of avoiding an impact.

[5] A Ford Focus motor vehicle joined the Belfast Road at its junction with Ballyhill Road shortly before the collision. The driver of the vehicle said that he saw a car and van drive past towards Nutts Corner before he pulled onto the Belfast Road. He said that he followed the vehicles down the road and saw them overtake the cyclists. His passenger described how he looked left and right at the junction with Belfast Road but did not see any vehicles in

front of their car driving towards Nutts Corner. This was the first of the discrepancies upon which the appellant relied to demonstrate the unreliability of the prosecution case.

[6] The driver and passenger both said that the appellant's vehicle overtook them at speed as a vehicle was coming in the opposite direction. The driver claimed that the appellant's vehicle was so close that the driver's side wing mirror of his vehicle was almost touching the passenger side wing mirror of the appellant's car. He also claimed that the appellant's car was straddling the centre of the road. Since the driver said that he had pulled in towards the kerb it was suggested that there must have been at least 3 feet between the vehicles if the appellant's car was straddling the centre of the road. It was common case that no oncoming vehicle had reported being inconvenienced by the appellant's driving.

[7] The driver said that he had been travelling between 50 and 60 mph prior to being overtaken by the appellant's vehicle but that he slowed down at the time of the overtaking. He gave varying estimates as to the extent to which his speed had slowed. His passenger, on the other hand, claimed that the speedometer was at a steady 60 mph throughout.

[8] The driver recollected that the appellant's car returned to the nearside lane after the overtaking manoeuvre. The passenger stated that it remained in the centre of the road approaching the cyclists. A race marshal who was positioned in a layby which the vehicles had to pass said that he would have noticed a car travelling towards the cyclists straddling the road or being driven at speed but had not noticed any such vehicle. Mr Gray who was at the back of the pack of cyclists claimed that there must have been other vehicles immediately behind him but he was clearly inaccurate.

[9] The driver said that he was about 100 yards behind the appellant's vehicle when the collision occurred. He said that the appellant's car was pacing the other two vehicles to which he had referred. He said that none of the three vehicles was being driven in a manner which caused him concern. His concern was how close the appellant's vehicle was to the back of the cyclists. He described how the dog ran out and the cyclists swerved. The appellant's vehicle also moved out but hit the rear cyclist. The driver said that the appellant's vehicle did not cross over the centre line of the lane that he was in. The passenger, however, maintained that the appellant's vehicle was in the centre of the road throughout and struck the cyclist when it was in that position.

[10] Mr Gray said that he saw the deceased's bicycle veer to his right. He could not say if he strayed as far as the central dividing lines and could not be sure that he remained within the nearside lane. Mr Greer, who was at the

front of the pack of cyclists, said that the appellant's vehicle was astride the central line when he saw it going past.

[11] Lindsay McCormick, Forensic Scientist, gave evidence that the rear of the deceased's bicycle contacted with the front nearside corner of the appellant's car before it travelled along the nearside of the car. This damage together with the absence of damage to the central front region of the bonnet caused Ms McCormick to take the view that the bicycle was substantially aligned with the carriageway at the time of impact although "it is possible that there was a slight angle with the front of the bicycle angled towards the offside of the carriageway". Also, she "could not rule out the possibility that the cyclist deviated to his right into the path of the Peugeot car". She accepted that it was probable that the deceased swerved in front of the appellant's car.

[12] It was impossible to identify with precision the point of impact. It occurred between 68.5m and 72 m from where the body was found. Ms McCormick concluded that if the accident occurred 72 metres from the body, the speed at impact was between 73 mph as the upper limit and 57.5 mph as an absolute minimum. If the collision occurred 68.5 metres from where the body came to rest the figure would be between 61 to 71 mph with 56 mph as an absolute minimum.

Consideration

[13] Mr Pownall accepted that when an unexpected and fast moving event occurs there will inevitably be differences in recollection which can give rise to inconsistencies and discrepancies in the prosecution case. All of the matters to which he referred were properly brought to the attention of the jury by the learned trial judge. The evidence of inconsistency has to be examined in the context of all of the evidence in the case. Both the driver and passenger of the Ford Focus vehicle gave evidence that the appellant's vehicle was travelling at speed and was too close to their vehicle when it overtook them. After passing their car the appellant's vehicle established a gap of 100 yards between them. The driver made a clear case that the appellant's vehicle was too close to the cyclist. The passenger made a case of speed but also put the appellant's vehicle too close by reference to its position in relation to the Ford Focus when it was overtaken. Mr Gray's evidence about the position the deceased may have reached on the road after swerving was potentially a matter of speculation.

[14] The principles to be applied by the court on this ground have been set out by this court in R v Pollock [2004] NICA 34 at paragraph 32.

1. "The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.

2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
3. The court should eschew speculation as to what may have influenced the jury to its verdict.
4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

The inconsistencies and discrepancies relied upon by the appellant appear to us to be typical of those that one might expect in a situation of this kind. They were drawn to the attention of the jury and it was for the members of the jury to assess the reliability of the witnesses. We would not have allowed the appeal on this ground alone.

[15] We can dispose relatively briefly with 2 further grounds of appeal. The appellant submitted that his 4 convictions for speeding were incorrectly admitted. In this case speed was part of the case being made against the appellant, especially by the passenger of the Ford Focus, and he was denying it. The convictions were evidence of a propensity to speed and were, therefore, clearly relevant to an important matter in issue between the prosecution and the defence. The discretion to exclude such admissible material would only be reviewed on irrationality grounds but in any event we consider that the learned trial judge was well within the area of discretion open to him to admit this evidence (see R v Tirnaveaneu [2007] EWCA Crim 1239).

[16] In his directions the learned trial judge identified 4 matters which had to be proved to establish guilt.

> 1) That the defendant was driving;
> 2) That the deceased died as a result of the injuries sustained;
> 3) The way the defendant drove his car fell far below the standard that would be expected of a competent and careful driver, and
> 4) It would be obvious to a competent and careful driver that it would be dangerous to drive in the way that he did.

The appellant submitted that the direction failed to direct the jury that the dangerous driving had to be a cause of the death and this was all the more important in a case where a sudden and unexpected event (the dog) had intervened and contributed to the death. It is accepted the learned trial judge's direction did expressly tell the jury on 2 occasions that the issue for them was whether the prosecution had proved beyond reasonable doubt that the appellant was guilty of dangerous driving causing the death of the

deceased. The learned trial judge specifically referred to the emergency situation created by the dog before reminding the jury that their duty was to determine whether or not the prosecution had satisfied them that the appellant was guilty of dangerous driving causing the death of the deceased. We consider that the direction was clear on the issue of causation and was not impaired by the encouragement by the learned trial judge to leave other aspects of blame or responsibility relating to the control of the dog out of account.

Alternative verdict

[17] The trial lasted 2 weeks. On the third day, after the driver of the following vehicle had given evidence, the jury sent a note to the judge asking at which point careless driving became dangerous driving. The judge told the jury that they would be given proper directions on all relevant aspects of the law at the end of the trial but that they should concentrate on the facts for the time being. That was the proper course to adopt at that stage of the trial. At the end of the evidence both counsel addressed the learned trial judge on whether the jury should be directed that they could bring in an alternative verdict of causing death by careless driving. By virtue of Article 26 of the Road Traffic Offenders (Northern Ireland) Order 1996 such an alternative verdict was permissible.

[18] Counsel for the Crown argued that the court was obliged to leave such an alternative in a case such as this. The Crown case was that the driving of the appellant fell far below the standard expected of a competent and careful driver and that it would have been obvious to a competent and careful driver that it would have been dangerous to drive in that way. The jury should not, however, be left with the stark alternative of dangerous driving causing death or acquittal. If they were not satisfied that the prosecution had established dangerous driving they should consider whether a case of careless driving causing death had been proved beyond reasonable doubt. In his submission senior counsel for the appellant indicated that his strategy in the conduct of the defence and the cross-examination was geared solely to the dangerous driving charge and he submitted that there were other matters that would have been pertinent to the careless driving issue. In light of the indication that the appellant might be prejudiced the learned trial judge did not leave the alternative verdict to the jury.

[19] The leading authority on the duty of the court to leave alternative verdicts is R v Coutts [2006] 1 WLR 2154. That was a case in which the appellant was charged with murder. His defence was that the death was a tragic accident. The trial judge did not leave the alternative of manslaughter and the appellant was convicted. The House of Lords allowed the appeal. Lord Bingham, with whom the other Law Lords agreed, set out the relevant principles.

> "**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.
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> **24** It is of course fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial. This might be so if it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged."

[20] Although senior counsel for the appellant at the trial indicated to the learned trial judge that there were matters pertinent to the careless driving issue which he had not explored neither counsel in this appeal were able to identify any such matter. It does not appear that there was any exploration with senior counsel as to the nature of any unfairness to the appellant. In his concurring opinion in Coutts Lord Hutton referred with approval to the passage in Lord Clyde's speech in Von Stark v Queen [2000] 1 WLR 1270 which set out the nature of the obligation on the court.

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to

> present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them."

[21] In our view this was a clear case in which the jury had identified the alternative themselves by the third day of the trial. There was a strong public interest in ensuring that the jury were put in a position to consider all proper alternatives and nothing was put before this court to indicate any possible unfairness to the appellant in doing so. It is regrettable that the learned trial judge was led into error because he accepted at face value a submission by senior counsel from the Bar.

[22] In Coutts the House of Lords also considered the consequences where an alternative verdict had not been left to the jury. There had been a line of cases which suggested that if there was no other criticism of the conviction the failure to leave an alternative lesser count did not make the conviction unsafe. The House of Lords preferred an alternative line of cases the reasoning of which is encapsulated in the following passage from the judgment of Callinan J in Gilbert v The Queen (201) CLR 414.

> "101. The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice."

[23] We consider that the failure to place the alternative verdict before the jury constituted an irregularity which made the conviction unsafe and we, therefore, quash the conviction and order a retrial.