

IN THE SUPREME COURT }
OF WESTERN AUSTRALIA }

Heard: 17th February 1976; 15th,
16th & 17th March 1976.

Delivered: 7th April, 1976.

THE FULL COURT

COURT OF CRIMINAL APPEAL

CORAM: JACKSON C.J., LAVAN J.

C.C.A. Nos. 75 and 78 of 1975

B E T W E E N:

ALLAN MALCOLM SMITH

Appellant

-and-

THE QUEEN

Respondent

JUDGMENT

JACKSON C.J.

In this matter I am of the opinion that the appeal against conviction should be dismissed and the appeal by leave against sentence should also be dismissed, and I publish my reasons.

LAVAN J.

I agree with the Chief Justice that the appeal should be dismissed and with his reasons for reaching that conclusion. I have also been asked by Wickham J., who is absent on circuit, to say that he also agrees with his Honour's conclusion and with his reasons.

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B E T W E E N: the circumstances, dangerous to the public

ALLAN MALCOLM SMITH Appellant

-and-

THE QUEEN

Respondent

Mr. E. M. Heenan, Jnr. (instructed by E. M. Heenan & Co.) appeared for the appellant/applicant.

Mr. K. H. Parker and Mr. H. McLernon (instructed by the State Crown Solicitor) appeared for the respondent.

Authorities cited - by the trial judge. He also appears, by

R. v. McBride (1962) 2 Q.B. 167; (1961) 3 A.E.R. 16 convenient to
Nickisson v. R. (1963) W.A.R. 114

R. v. Thorpe (1972) 1 A.E.R. 929

R. v. Pearce (1973) W.A.R. 98

Andrews v. D.P.P. (1937) A.C. 576; (1937) 2 A.E.R. 556

Evgeniou v. The Queen (1964) 37 A.L.J.R. 508

Butler v. Gray (1944) 46 W.A.L.R. 191

Wedderburn v. Mann (1963) W.A.R. 151

R. v. Evans (1962) 3 A.E.R. 1086

R. v. Wilson (1965) 1 Q.W.N. 42

R. v. Scammell (1967) 3 A.E.R. 97

R. v. Coventry (1938) S.A.S.R. 79

McBride v. The Queen (1966) 115 C.L.R. 44

R. v. Hinz, 1972 Q.R. 272

R. v. Thomson (1975) 11 S.A.S.R. 217

R. v. Skelton (1947) Qd. W.N. 17

R. v. Bartlett (1966) Q.W.N. 34

Daunt v. The Queen (1956) Q.W.N. 44

R. v. Guilfoyle (1973) 2 A.E.R. 844

R. v. Dutton (1972) The Times - 1st February 1972

R. v. Storey (1973) Crim.L.Rev. 189

R. v. Doyle (1971) W.A.R. 110

R. v. Barnsley (1972) 2 N.S.W.L.R. 220

R. v. Hennigan (1971) 55 Cr.App.R. 262

R. v. Coventry 59 C.L.R. 633

R. v. Evans (1963) 1 Q.B. 412

R. v. Gosney (1971) 2 Q.B. 674

Geraldton Fisheries Co-operative Ltd. v. Munro (1963) W.A.R. 129

Tyler v. Peterson (1969) Tas. S.R. 193

tax cars in which car club members were travelling, all of their cars

to Sheriff's House. According to the report of the trial judge, the

Crab, "the accident happened in that the car had a collision

between the hills. The distance from the car to the hill was

yards (appellant's examination-in-chief, p. 11). The

Renault had travelled down the slope, and the car was

C.C.A. Nos. 75 & 78 of 1975

JACKSON C.J.

In December 1975, the appellant was tried by a jury in the District Court at Perth on an indictment charging that on 24th August 1975, at Gidgiegannup, he "drove a motor vehicle, namely, a Landrover utility, registered number SW 5244, in a manner that was, having regard to all the circumstances, dangerous to the public or to any person whereby death was caused to one Clive Linton Thorp". The offence charged was in contravention of s. 59 sub-s. (1) of the Road Traffic Act. He was convicted and sentenced to 12 months imprisonment with a minimum term before parole of 3 months, and was disqualified from holding a driver's licence for 3 years. He appeals against his conviction upon several grounds involving questions of law relating to the admission or exclusion of evidence and to alleged misdirection of the jury by the trial judge. He also appeals, by leave, against the sentence imposed on him. It is convenient to refer to the facts of the case before stating in full the grounds of appeal.

The charge against the appellant arose out of a motor vehicle accident which occurred on Bailup Road, Gidgiegannup, at about 8.15 p.m. on Sunday, 24th August 1975. It was a head-on collision between two vehicles travelling in opposite directions, one being a Landrover utility driven by the appellant, the other a Renault car driven by Mr. Thorp. The appellant was alone in his vehicle, but Mr. Thorp had his wife with him, and she also was killed in the accident. The appellant is a farmer, 53 years old. He was on his way home from the Wundowie Golf Club, where he had spent the day, and had driven some 5 to 6 miles when the accident occurred. Mr. and Mrs. Thorp were driving to their home at Wooroloo, having attended a car club meeting near Toodyay during the day. Their car was the first of a group of six cars in which car club members were travelling, all on their way to Thorp's home. According to the report of the trial judge to this Court, "the accident happened in what is more or less a valley between two hills. The distance from crest to crest is about 400 yards (appellant's examination-in-chief, transcript p. 193). The Renault had travelled down one slope, a medium downgrade, and was

about to travel up the other slope when the collision occurred. By then the Landrover was near the foot of the other slope, a medium to steep downgrade, and had just passed through a bend in the road. It was a left hand bend for the Landrover. The roadway has a 12 ft. wide bitumen surface and a $3\frac{1}{2}$ ft. wide gravel verge on each side of the bitumen. There is a culvert at or about the place where the collision occurred".

The case for the Crown was that as the vehicles approached each other, the Landrover moved or veered across the bitumen to its incorrect side of the road and collided right front to right front with the Renault despite the fact that Thorp had moved the left hand wheels of his car onto the gravel verge for some distance before the collision, and by that time had got as far off the bitumen as he could get. There was evidence to support this from the drivers of the two cars immediately behind the Renault and from the tyre marks observed at the scene afterwards and shown on a plan prepared by the police. The appellant did not deny that the collision occurred as described by the prosecution witnesses. His evidence was that he was driving at a moderate speed and as he came to the bend in the road he kept clear of the left hand edge of the bitumen because it was corrugated; then he saw three sets of headlights of oncoming vehicles, which dazzled him so that he lost his vision and could not see the edge of the road and did not know the position of his car on the roadway when the collision occurred. He sustained relatively minor injuries.

Evidence was given regarding the consumption of liquor during the day by the appellant and by Thorp. The appellant had played a round of golf in the morning, finishing about 12.15 p.m. Then he drank some beer, six or more 7 oz. glasses, and had a barbecue lunch. During the afternoon he worked for about 3 hours, until between 5.0 and 5.30 p.m., on the roof of the barbecue area. Between then and 8.0 p.m., when he left for home, he drank more beer, had a barbecue tea, and between 7.30 and 8.0 p.m. he helped two other men clean up the bar, during which time they drank a jug of beer between them. A police constable said that when taking a statement from the appellant after the accident his "breath smelled of liquor and his speech appeared slow and thick".

There was less evidence about Thorp's drinking. After the car club meeting, they went with other members to a barbecue at a Toodyay hotel, arriving some time after 5.0 p.m. and leaving after 7.30 p.m. During this time Thorp drank some beer. Counsel for the appellant sought to introduce evidence that post-mortem tests showed a percentage of alcohol in Thorp's blood and urine as 0.076 and 0.094 respectively. This was excluded by the learned trial judge.

Of the seven grounds of appeal, four relate to the admission of evidence of drink taken by the appellant and the trial judge's directions on that subject. They are as follows -

1. The learned trial judge erred in law in admitting evidence to the effect that the appellant had consumed liquor during the day and before the accident in which the deceased died notwithstanding that such evidence

(a) did not show that the amount of liquor taken by the appellant was such as would adversely affect him or any driver.

(b) Did not show that the appellant was adversely affected by any liquor that he had consumed.

2. The learned trial judge erred in the exercise of his discretion by admitting evidence to the effect that the appellant had consumed liquor during the day and before the said accident whereas the trial judge should have exercised his discretion to exclude such evidence on the ground that its prejudicial effect outweighed any probative value.

6. The learned trial judge further misdirected the jury in summing up by directing, in substance and effect, that it was open for the jury to conclude that as a result of the consumption of liquor the appellant's faculties may not have been as sharp as and that his judgment and skill might have fallen below that of a competent and experienced driver.

7. The learned trial judge further misdirected the jury in summing up by failing to direct that the consumption of liquor by the appellant was only relevant, if at all, in deciding whether it was dangerous for the appellant to drive after having consumed such liquor.

As to the first two grounds, counsel relied on R. v. McBride, (1962) 2 Q.B. 167, where it was held by the Court of Criminal Appeal that on a charge of dangerous driving, the fact that the driver is adversely affected by liquor is a relevant circumstance, and accordingly that evidence is admissible if it tends to show that the amount of drink taken would adversely affect a driver or in fact adversely affected the defendant; but there is a discretion in the court to exclude such evidence if its prejudicial effect outweighed its probative value. That decision was applied by the Court of Appeal in R. v. Thorpe, (1972) 1 W.L.R. 343, where it was said that

with modern methods of testing the quantity of alcohol in a person's blood, it would be within the principle of McBride's case to admit evidence of a percentage of alcohol in the blood of 0.08 or more, which is the prescribed limit in England, as it is here, beyond which it is an offence to drive a vehicle. The decision in McBride's case was adopted and applied in this State in 1962 - see Nickisson v. R., 1963 W.A.R. 114. Section 59(1) of the Act imposes liability when the death of another person is caused by driving a vehicle in a particularly dangerous manner, having regard to all the circumstances. McBride's case is authority for holding that it is a circumstance relevant to his manner of driving that the driver is adversely affected by liquor. Furthermore, it may in many cases supply an explanation, for the jury to consider, why the vehicle was driven in the manner shown by the evidence. Thus in the present case, the appellant's explanation for the accident, shown by other evidence to have occurred on his wrong side of the road, was that he was dazzled by the approaching headlights. But if there were other circumstances which might explain this movement of his vehicle, the jury was entitled to know them. Thus if he had been driving for a long time and was very tired, or if the vehicle's steering mechanism was, or suddenly became defective, evidence of such matters would clearly be admissible. In the same manner, it was relevant to know how he had spent the day and whether he was likely to be affected in his control of his vehicle either by the beer he had drunk or by tiredness following a day of golf and manual work, or a combination of both. It was contended for the appellant that the evidence fell short of showing that he was adversely affected by liquor, and should therefore have been excluded. It is true that there was no evidence before the jury of the result of any test of the percentage of alcohol in his blood. But it was shown that he was drinking fairly steadily for about 2½ hours before he left the golf club, and the evidence of his appearance after the accident was consistent with his having been, in some degree, affected by drink. It was for the jury to consider the weight and value of this evidence, but in my opinion it was quite sufficient to satisfy the test laid down in McBride's case that it tended to show that the appellant was affected.

Accordingly, I am of opinion that his Honour was correct in admitting this evidence for the jury's consideration. By the sixth ground of appeal, it is claimed that there was a misdirection of the jury in relation to the evidence of drink. The trial judge dealt with the whole question quite fully and, if I may say so, with clarity and precision. He commenced (transcript p. 266) by stating the basis for the admission of such evidence. He then outlined the evidence as to how the appellant spent the day, as part of the background to the events leading up to the accident. His summary of this evidence was a very fair one. He made the comment (p. 269) - "You might think that at the time of the accident he was not as sharp as he was in the morning, that to some extent his sense of perception, perhaps the edge of his reflexes or perhaps some of the skill that normally he would have had in driving had been taken away". This is the passage to which exception is taken. His Honour proceeded - "All of that might go some of the way to explaining how his vehicle came to be on the wrong side of the road if in fact you find on the evidence that that is where it was at the relevant time". He then warned the jury that they were not trying the appellant on a charge of driving under the influence of liquor.

Read in its context, I can find no fault with the comment made by the trial judge about which the appellant complains. It does no more than point to a possible inference which the jury might draw from the evidence. It cannot in any way be regarded as a misdirection.

The seventh ground of appeal asserts that the only relevance of evidence as to drink taken by the appellant was whether it tended to show that it was dangerous for him to drive at all. This appears to be founded on a direction given to a jury by Burt J. in R. v. Doyle, 1971 W.A.R. 110. But that was a case of criminal negligence, where it was, in effect, put to the jury that they might conclude that it was one aspect of negligence for an accused person to drive while drunk. This can have no application to the present case in which the appellant's manner of driving was the essential matter under consideration. To have given the direction which the appellant says his Honour failed to give would in my view have itself involved a misdirection. If it were not so, then a person who drove a vehicle

while under the influence of liquor would by reason of that alone be liable to be convicted of dangerous driving. I do not consider that this is a conclusion which s. 59(1) requires or permits. The trial judge therefore did not err in not giving the direction sought.

By the third ground of appeal, the appellant claims that the trial judge erred in law in not admitting the evidence offered regarding the results of the post-mortem tests of alcohol in Thorp's blood. It was argued that where a collision occurs between two vehicles, it is relevant to consider how each vehicle was being driven and hence to know to what extent, if at all, each driver was affected by liquor. I agree that this may frequently be true, but it really depends on the circumstances. Where there is evidence to suggest that not only the driver charged but also the other driver was blameworthy, then the effect of liquor on each may often be relevant. But here, there was nothing to suggest any fault in Thorp's driving; the evidence as to the course taken by his car was not contradicted, and this showed his car to have been on the correct side of the road at all times just prior to the accident, and steadily drawing off the bitumen onto the gravel. In those circumstances, it is quite immaterial, on the issue of dangerous driving by the appellant, whether or not Thorp had been drinking, and what percentage of alcohol was in his blood at his death. Accordingly, such evidence was properly excluded.

The fourth ground of appeal reads: "The learned trial judge misdirected the jury in summing up as to the criteria of dangerous driving to be applied and failed to direct the jury to the effect that for the appellant to be guilty of the offence charged the appellant would have had to have been driving in a manner which was criminally negligent at least". Counsel for the appellant contended that to support a conviction for dangerous driving causing death there must be shown to have been criminal negligence on the part of the accused. He claimed that this contention was supported by the language of the section which establishes the offence not only in itself but also when considered within the framework of the legislation in which it occurs, and also by the decisions in a number of cases, the chief ones being Andrews v. D.P.P., (1937) A.C. 576,

R. v. Coventry, (1938) S.A.S.R. 79, Callaghan v. The Queen, 87 C.L.R. 115, Evgeniou v. The Queen, 37 A.L.J.R. 508 and McBride v. The Queen, 115 C.L.R. 44. ago of sub-s. (1) of s. 5 is in marked contrast to

The Road Traffic Act, No. 59 of 1974, was an act to consolidate and amend the law relating to road traffic. It repealed the Traffic Act 1919-1974. A companion statute No. 58 of 1974 made provision for ancillary or consequential amendments to various statutes including the Criminal Code. The Road Traffic Act re-enacted, in ss. 60, 61 and 62, the offences commonly known as reckless driving, dangerous driving and careless driving which were formerly contained in ss. 31, 31A and 31B of the Traffic Act. The offence of dangerous driving under s. 61 of the new Act is in these terms - "Every person who drives a motor vehicle in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person commits an offence". But the new Act also made provision for an offence of dangerous driving causing death or grievous bodily harm, which had not found a place in the Traffic Act. That provision is in s. 59(1) and reads - "A person who causes the death of or grievous bodily harm to another person by driving a motor vehicle in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person commits an indictable offence which may, at the election of the person charged, be dealt with summarily".

The Road Traffic Act and the Act No. 58 of 1974 left unchanged the provisions of the Criminal Code by which it is manslaughter to cause the death of another by driving a motor vehicle with criminal negligence. But the Act No. 58/1974 repealed s. 291A of the Code, which made it an offence to cause the death of a person by the negligent use or management of a motor vehicle. A conviction under s. 291A was an alternative verdict open to a jury upon the trial of a person charged with manslaughter - see s. 595 of the Code. This section has also been amended so that an offence under s. 59 of the Road Traffic Act is now an alternative conviction on a charge of manslaughter. In like manner, a new s. 595A has been added to the Code to permit a person charged on indictment with doing grievous

bodily harm to be convicted of an offence under s. 59 of the Road Traffic Act.

The language of sub-s. (1) of s. 59 is in marked contrast to that of s. 291A of the Code, which it replaced. It does not speak in terms of negligence, or the failure to use reasonable care. Rather it is aimed at a death or grievous bodily harm caused by the manner in which a vehicle is driven. The manner of driving must be such that, having regard to all the circumstances, it is dangerous to the public or to any person. Apart from the requirement that death or grievous bodily harm must be caused, the section is in terms identical with s. 61 relating to dangerous driving, which is to be contrasted with reckless driving under s. 60 which includes the element of wilfulness, and s. 62 which speaks of driving without due care and attention. Reading s. 59 alone, I cannot discern any ground for concluding that negligence is an ingredient of the offence which it creates; and when it is read with its companion sections 60 to 62 and in the light of the fact that it has been enacted in substitution for s. 291A which expressly dealt with negligent driving, I am led to a positive conclusion the other way, namely that the legislative intention was to exclude negligence as an element of an offence under s. 59.

An examination of the cases upon which counsel for the appellant relied, so far as they refer to this question, appear to me to support, rather than to deny, this conclusion. In the passage from Lord Atkin's speech in Andrews' case, at p. 584, his Lordship recognises, I believe, that many instances of dangerous driving will in fact involve driving with a high degree of negligence so that "if death were caused the offender would have committed manslaughter". But Lord Atkin then points out that the converse is not true, and that a man may be convicted of dangerous driving without being guilty of criminal negligence. In Coventry's case, the trial judge expressly directed the jury that as the accused was not charged with manslaughter but with causing death by driving in a manner dangerous to the public, it was not necessary to show that he had been driving with criminal negligence (see at p. 88 of the report) and the Court of Criminal Appeal did not criticise this direction. Upon the appeal

to the High Court in the same case, The King v. Coventry, 59 C.L.R. 633, the judgments emphasise that the question was not whether a person was indifferent to the consequences of his driving (which might be considered as recklessness) but whether the acts of the driver constituted a danger, real or potential, to the public, and that the standard was an objective one "impersonal and universal, fixed in relation to the safety of other users of the highway", citing McCrone v. Riding, (1938) 1 A.E.R. 157. The High Court added that casual behaviour and momentary lapses of attention, if they result in danger to the public, are not outside the prohibition of the provision. But such behaviour or lapses would not generally be held to involve criminal negligence.

The cases of Callaghan and Evgeniou (supra) establish that the same degree of criminal negligence is a necessary element of the offence under s. 291A of the Criminal Code (and its counterpart in New Guinea) as it is for manslaughter by negligence. The judgments do not support the appellant's present contention. In McBride v. The Queen, 115 C.L.R. 44, the High Court had under consideration s. 52A of the N.S.W. Crimes Act which in some respects is quite different from s. 59 of the Road Traffic Act; but it relates to a death occasioned by a motor vehicle driven in a manner dangerous to the public. At pp. 49-50 of the report, Barwick C.J. said:

"This imports a quality in the speed or manner of driving which either intrinsically in all circumstances, or because of the particular circumstances surrounding the driving, is in a real sense potentially dangerous to a human being or human beings who as a member or as members of the public may be upon or in the vicinity of the roadway on which the driving is taking place. Whilst the immediate result of the driving may afford evidence from which the quality of the driving may be inferred, it is not that result which gives it that quality. A person may drive at a speed or in a manner dangerous to the public without causing any actual injury: it is the potentiality in fact of danger to the public in the manner of driving, whether realized by the accused or not, which makes it dangerous to the public within the meaning of the section.

This concept is in sharp contrast to the concept of negligence. The concept with which the section deals requires some serious breach of the proper conduct of a vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others. This does not involve a mere breach of duty however grave, to a particular person, having significance only if damage is caused thereby".

The opinion of the learned Chief Justice is thus opposed to the present contentions of counsel for the appellant.

The decisions in England on the comparable and very similar statutory provisions of that country show that the courts there have held over many years that criminal negligence is not an element of the offence of dangerous driving, but that the test is an objective one, so that juries are invited to place themselves, in their minds' eye, at the scene of the accident, and to say whether the manner of driving was a dangerous piece of driving. In R. v. Evans, (1963) 1 Q.B. 412, Atkinson J. giving the judgment of the Court of Criminal Appeal said, at p. 418 - "It is quite clear from the reported cases that if a driver in fact adopts a manner of driving which the jury think was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best. Such considerations are highly relevant if it ever comes to sentence and equally relevant for any person who has to consider whether a prosecution is justified or not". But the offence is not an absolute one; there must be some fault on the part of the driver; accordingly if, for example, a sudden emergency arises either from a defect in the vehicle of which the driver was not aware, or from illness or accident to the driver, or from the act of another person, which results in the vehicle being driven with actual or potential danger to the public, then the driver may properly be held not to have been guilty of the offence of dangerous driving. - See R. v. Spurge, (1961) 2 Q.B. 205, R. v. Gosney, (1971) 2 Q.B. 674. These decisions should, in my view, be adopted and followed in this State, in the absence of any judgment binding on this court which precludes us from so doing.

In my opinion, the learned trial judge was correct in refusing to direct the jury that it was necessary, on the charge of dangerous driving causing death, for the prosecution to show that the appellant was driving in a manner that was criminally negligent. To have introduced the topic of criminal negligence would not only have been wrong but would also, I consider, have tended to confuse the jury as to the real issues involved. The evident legislative intent was, in my view, to frame a new provision as an alternative offence to manslaughter in motor vehicle cases, in lieu of the former s. 291A,

with different elements and different criteria. It follows that on a charge of manslaughter in motor vehicle cases, a trial judge will be bound to draw a clear distinction between that offence and the offence of dangerous driving causing death, the former depending upon proof of criminal negligence, the latter depending upon proof of a manner of driving which is in all the circumstances a real or a potential danger to the public. The final ground of appeal is as follows:-

"The learned trial judge further misdirected the jury in summing up in the following respects

(a) in failing adequately or at all to define what actions or conduct of the appellant was charged as the manner of driving in question.

(b) In failing adequately or at all to deal with the question whether that manner of driving in itself or was in its circumstances was dangerous to the public.

(c) Failing to direct the jury to consider whether the very deep impact which caused the death of the deceased occurred whilst the vehicle was being driven dangerously."

In his directions to the jury, the learned trial judge dealt first with the issues which the jury had to decide; then with the nature of the offence of dangerous driving, stressing that all the circumstances (to which he referred) had to be considered; then with the question whether or not there was fault on the appellant's part, or any circumstances relieving him from responsibility; next with the relevance of drink and the evidence relating to that topic. The jury had visited the scene of the collision and his Honour gave them directions as to the use they could make of what they saw. He then dealt, quite briefly as he said, with the facts. He summarised the case against the appellant in these words -

"In substance it is that the accused either drove his Landrover or allowed it to go to the incorrect side of the road in such a way that there was no road left for the Renault which Mr. Thorp was driving and that in effect what he did made a collision inevitable unless Mr. Thorp either drove off the roadway altogether or took the desperate measure of driving back to his incorrect side.

That, as I understand it, is really the set of circumstances inappor that is the manner of driving which the Crown puts to you. The appellant has not previously been convicted of any violation of the traffic laws. It is not disputed that he was a respectable farmer

and good character who had four years of war service with the R.A.F.

He then referred to the evidence for the prosecution and to that of the appellant. He invited the jury to decide where on the road the impact occurred, and if they found it was on the appellant's incorrect side of the road to decide how and why the vehicle got there, and whether the appellant was dazzled by the headlights so that he could not get further to his left. Finally, his Honour told the jury that it was for them to decide, on the facts as found, whether the appellant was driving in a dangerous manner as alleged.

It would appear that the submissions in support of this ground of appeal rely largely on certain observations by Barwick C.J. in McBride v. The Queen (supra) where his Honour stressed the need for the jury to be told what features of the driving were claimed by the Crown to be dangerous. But this part of his Honour's judgment was prefaced by the words - "If that manner of driving is not by its very description potentially dangerous to the public". A summing up must always be viewed against a background of the relevant facts of the case. Here the issues were very simple: did the appellant drive onto the wrong side of the road in the face of oncoming vehicles whose headlights were seen by him, and if so was this driving in a dangerous manner having regard to all the circumstances, including his evidence that he was dazzled and could not see where he was on the road. In my opinion, these issues were put very plainly to the jury by the trial judge and no further directions were called for as to the precise manner of driving which the Crown alleged to be dangerous. Nor was any direction required as to whether the collision occurred at the time when the vehicle was being driven dangerously, for on the facts this was not a matter in issue. In my opinion, there is no substance in the criticism levelled at the directions given.

The appeal against conviction should be dismissed.

The appeal against sentence was supported in argument by counsel for the appellant upon the grounds that a custodial sentence was inappropriate in the circumstances and was manifestly excessive. The appellant had not previously been convicted of any violation of the traffic laws. It was not disputed that he was a respectable farmer of good character who had four years of war service with the R.A.A.F.

It is clear that the trial judge gave careful consideration to the sentence which he imposed, as he remanded the appellant for one week for that expressed reason. In sentencing the appellant, his Honour said that the impact occurred well on the incorrect side of the road, so that the other driver had no real opportunity of avoiding the collision, that the area was well-known to the appellant and should not have caused him any difficulty, but that it was not a case merely of momentary inattention or misjudgment and that he was satisfied that the accident happened because the appellant's driving capacity was affected to some extent by liquor.

Section 59 provides that the maximum penalty for the offence for which the appellant was convicted is, upon a conviction on indictment, a fine of \$5000 or imprisonment for 4 years; and by s. 74 he may also be disqualified from holding or obtaining a driver's licence for such period as the court thinks fit. The maximum penalty for dangerous driving under s. 61 is, for a first offence, \$200, and for a subsequent offence \$400 or imprisonment for 3 months. It is thus apparent that the legislature has decreed a substantially heavier penalty when dangerous driving results in death or grievous bodily harm, even though one or other of these consequences will generally be fortuitous. It should, however, be accepted that the offence is to be regarded as less serious than manslaughter. Very few convictions for manslaughter in motor vehicle cases have occurred since s. 291A was added to the Criminal Code in 1945, a conviction under that section being preferred as a rule when death by grossly negligent driving has been proved. Sentences for that offence have of course varied very much according to circumstances, but in bad cases, particularly where the offender has been affected by liquor, a sentence of 18 months to 2 years imprisonment, with a suitable minimum term, has been quite common, though not inflexible.

This clearly was the view adopted by the trial judge. I am unable to find any sound reason why his observation should be held to have been wrongly exercised. I should only add that, for myself, I would have thought a sentence of the same period as the minimum term would have been preferable, as

the Counsel for the appellant went to a good deal of trouble to outline the circumstances of numerous recorded convictions for this class of offence and the sentences imposed both in Australia and in England. If one can discern a general trend, perhaps it could be said that where imprisonment is imposed, a sentence of between 3 and 9 months appears to be most common. The Court of Appeal in England in R. v. Guilfoyle, (1973) 2 All E.R. 844, recently considered the subject of the penalties to be imposed for this offence, and pointed out that cases of this kind fall into two broad categories; "first, those in which the accident has arisen through momentary inattention or misjudgment, and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness. A sub-division of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs"; and that offenders may have good or bad driving records; the Court then said, at p. 845 -

"In the judgment of this court an offender who has been convicted because of momentary inattention or misjudgment and who has a good driving record should normally be fined and disqualified from holding or obtaining a driving licence for the minimum statutory period or a period not greatly exceeding it, unless of course there are special reasons for not disqualifying. If his driving record is indifferent the period of disqualification should be longer, say two to four years, and if it is bad he should be put off the road for a long time. For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, a custodial sentence with a long period of disqualification may well be appropriate, and if this kind of driving is coupled with a bad driving record the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed."

I would, with respect, adopt and follow these views. It will be seen that this case falls into the second, or more serious class of offences, even though the offender has a good driving record. For the more serious category, as the Court of Appeal said, a custodial sentence may well be appropriate. This clearly was the view adopted by the trial judge. I am unable to find any sound reason why his discretion should be held to have been wrongly exercised. I should only add that, for myself, I would have thought a finite sentence of the same period as the minimum term would have been preferable, as

the appellant is a man of good character and is not likely to need or benefit from a period on parole. But there is no appeal on this point; and in any event it was essentially a matter for the discretion of the judge.

I would therefore also dismiss the appeal against sentence.

File

IN THE SUPREME COURT
OF WESTERN AUSTRALIA

C.C.A. No.75 & 78 of 1975

THE FULL COURT
COURT OF CRIMINAL APPEAL

CORAM: JACKSON C.J., LAVAN J.,
WICKHAM J.

A. M. SMITH

V.

THE QUEEN

REASONS FOR JUDGMENT

JACKSON C.J.

Judgment delivered on 7th April, 1976

(4)