IN THE COURT OF APPEAL OF BELIZE AD 2012

CRIMINAL APPEAL NO 4 OF 2011

BETWEEN:

ENRIQUE MONTEJO	**Appellant**
AND	
THE QUEEN	**Respondent**

BEFORE

The Hon Mr Justice Sosa	**-**	**President**
The Hon Mr Justice Morrison	**-**	**Justice of Appeal**
The Hon Mr Justice Mendes	**-**	**Justice of Appeal**

Miss Darlene Vernon for the appellant.
Mrs Cheryl-Lynn Vidal, Director of Public Prosecutions, for the Crown.

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20 March, 20 July 2012.

MORRISON JA

Preliminary

[1] On 3 February 2011, the appellant was convicted, after a trial before Hanomansingh J and a jury, of the offences of manslaughter by negligence, negligent grievous harm and negligent harm. On 15 February 2011, he was sentenced to a fine of $10,000.00 (in default 12 months' imprisonment) for manslaughter, a fine of $2,000.00 (in default six months' imprisonment) for negligent grievous harm and a fine of $1,000.00 (in default six months' imprisonment), and compensation in the sum of $3,000.00, for negligent harm.

[2] This is an application for leave to appeal, pursuant to section 23(1)(b) of the Court of Appeal Act, on grounds involving questions of mixed law and fact. At the outset of the hearing, the court indicated that it proposed to hear the application for leave to appeal and, if appropriate, treat the hearing of the application as the hearing of the appeal.

[3] The charge of manslaughter by negligence arose from the death, on 5 April 2006, of Raul Magana ('the deceased'), who was at the time a corporal of police, in a motor vehicle accident on the evening of that day. The accident involved vehicles driven by the applicant and the deceased respectively, at a point between miles 82 and 83 on the Northern Highway, Ranchito Village, in the Corozal District. The charges of negligent grievous harm and negligent harm related to injuries allegedly sustained in the same accident by Mayra Pena and Elena Pena, who were passengers in the vehicle driven by the deceased. The applicant was originally charged on a fourth count of negligent grievous harm in respect of Seleni Magana, who was also a passenger in the deceased's vehicle. However, at the close of the Crown's case, he was discharged on this count by the directed verdict of the jury, a successful submission of no-case having been made on his behalf.

The facts

[4] The prosecution relied on a total of 15 witnesses at the applicant's trial, but it is happily not necessary to deal with them all in the same detail. The crucial witnesses as to the causes of accident were Mrs Marleni Magana, the widow of the deceased, her mother, Mrs Elena Peňa, Ms Mayra Peňa (all of whom were passengers in the deceased's vehicle at the time of the accident), Mr Raymond Gilharry, who was a bystander at the time of the accident and Mr Roy Ek, a police constable, who visited the scene approximately half an hour after the accident. For convenience (and naturally, intending no disrespect), we will refer to the passengers in the deceased's vehicle as Marleni, Elena and Mayra.

[5] On the evening of 5 April 2006, the deceased and other members of his family were in the process of returning home to San Joaquin Village in Corozal District, from an all day visit to Chetumal. In all, there were seven passengers in the

deceased's motor vehicle, a Mitsubishi Mirage Sedan (Licence Plate No CZL-C-13268), which was being driven by him. Mayra occupied the front passenger seat beside the deceased, while Marleni and Elena sat on either side of the rear seat. Marleni's eight year old son, Julian, sat on her legs, her ten year old daughter, Seleni, sat in the middle of the rear seat and her six year old son, Christian, sat on Elena's legs.

[6] Marleni was the first to give evidence. At around 10:00 pm, as the family made their way home to San Joaquin, in front of a bar in Ranchito, Los Corazones Rotes, an accident occurred. The deceased was driving on the right side of the paved highway, headed north to south in the direction of Orange Walk, when, Marleni testified, she observed this:

> "…I saw a light, a strong light that was coming in the opposite direction. I saw my husband slowed down [sic]. He started to move off the road giving the space to the next driver that was coming. All of a sudden I saw the vehicle that was coming on our direction and I feel an impact. At that moment I saw that the two already crashed. I tried to remove the seatbelt. I couldn't because I stayed unconscious."

[7] Marleni regained consciousness at the hospital in Corozal. Her daughter Seleni had sustained injuries to her head and she herself had broken a leg and a rib and hurt her neck. She denied the suggestions put to her in cross-examination that she was not paying attention to the road at the material time because she was distracted by her children, and that what had happened in fact was that the deceased's vehicle had moved over into the lane to his left and that it was only when the deceased realised this that "he hurried and tried to get into his lane". She insisted that the deceased "was giving all the space to the next driver" and that he "was driving slow, 40 miles per hour" (which, she said, was the speed at which he had always told her "is the right way to drive").

[8] Elena's account was not much different. At Ranchito, on the way home to San Joaquin, she saw a vehicle coming in their direction, "in speed with the light very strong". At that moment, she said, the deceased slowed down his speed and moved

off the road, giving space to "the next person". Then, she continued, "I feel the vehicle crashed on me" [sic]. She was unable to say what happened after that, as she could only hear her grandchildren crying. She was helped into the back of a pickup and taken to the hospital in Corozal. In answer to the question whether she had received any injury, she referred to the left side of her hip, before saying, not without prompting from both Crown counsel and the judge, that her left hip was dislocated. She spent 12 days in hospital and received treatment from a doctor in Orange Walk, whose name she was not able to recall.

[9] Cross-examined, Elena denied, as Marleni had also done, that the deceased had been engaged in conversation with Mayra in the front seat of the vehicle before the accident and so had not been paying attention to the road, or that she and Marleni had been in conversation with the children in the back. However, she agreed that there were no dividing median lines in the road at that time and that at night, although the road was not dark, it appeared as if it was "just one stretch". She insisted that she was able to see ahead from where she sat in the back seat of the vehicle and that the deceased had in fact reduced his speed and pulled completely off the road immediately before the collision.

[10] Mayra also located the collision at a point on the road in Ranchito Village, in the vicinity of the Corazones Rotes bar. She first saw a bright light coming towards the deceased's vehicle and observed that his face "was a bit nervous". She then felt when the vehicle slowed down "and went out from the road, the shoulder of the road", after which she felt the impact of the oncoming vehicle. She also fell into unconsciousness, regaining consciousness at 1:00 am the following morning in the Orange Walk Regional Hospital where she was told that surgery had already been performed on her for a punctured left lung, a broken rib and an injured left arm.

[11] In cross-examination, she denied that the road between miles 82 and 83 was "dark and narrow", that there was a curve "right around that area of the road", that she was having a conversation with the deceased and that was she using her cell phone at that time. She agreed that there were seven persons travelling in the car at the time, but denied that the car was "crowded" as a result. She too disagreed that,

throughout the journey, Marleni and Elena were talking or that the deceased was not paying attention to the road because he was speaking to her and to others in the car.

[12] Towards the end of the cross-examination, a number of suggestions, all of which were denied, were then put to Mayra, including that "it's because [the deceased] was in the middle of the road that when he saw the vehicle coming he became nervous"; that [it was] because he was in the middle and nervous that he actually swerved to try to get to his side of the road"; that she "only became aware of what was happening when [the deceased] swerved the vehicle"; "that at no time did [the deceased's] vehicle move off to the shoulder of the road"; "that because you were unconscious…you can't really remember what happened that night when you gave the statement"; "that today you are only repeating what others told you happened"; and "that you want someone punished for [the deceased's] death and the injuries the family suffered".

[13] Mr Raymond Gilharry was a resident of College Road, Corozal. He told the court that on 5 April 2006, at about 9:00 pm, he was sitting in his stationary Toyota pickup (Licence Plate No CYC 20704) parked in Ranchito on the right hand side of the main highway going towards Corozal Town from the direction of Orange Walk. His vehicle was on the soft shoulder, two feet off the paved section of the road, facing Corozal Town and his park lights were illuminated. While sitting there, he heard a bang behind him and, when he looked, he saw something "like di come, one big dark think di come di spin", in the direction of his pickup. This thing, which turned out to be a car, then collided into the back of the pickup, directly behind the driver's side, whereupon Mr Gilharry jumped through the passenger side to come out of the vehicle. He heard someone shouting, "Help. Help. Help", and then saw that the car which had hit his pickup had overturned and "The four-wheel mi deh dah top". He and two or three other men then turned the car back onto its wheels. A man, who appeared to be unconscious, was seen in the car and was taken from it by one of the other men. He was put to lie on the ground, but he subsequently disappeared from the scene and Mr Gilharry could not say what had become of him.

[14] The car which hit Mr Gilharry's pickup, described by him as a "blue Geo car", was subsequently identified as a purple Chevy Metro LS1 car (Licence Plate No C

25855) and described by all the witnesses as a 'Geo'. The Crown's case was that this vehicle was owned and driven at the material time by the applicant and that this was the car which had collided with the deceased's Mitsubishi Mirage motor car that evening. Mr Gilharry confirmed under cross-examination that he did not know where either vehicle was, either before or at the time of the collision, which he had not in any event observed.

[16] Police Constable Roy Ek ('PC Ek') was at the time of the trial attached to the Crimes Investigation Branch, Corozal, but he had previously spent three years in the Traffic Department and had conducted many accident investigations. At about 9:20 pm on 5 April 2006, acting pursuant to a report of a traffic accident, he went to Ranchito Village, between miles 82 and 83 along the Northern Highway. There, on the right hand side of the road, facing in the direction of Orange Walk town from Corozal Town (that is, in a north to south direction), he saw a green Mitsubishi motor car, Licence Plate No CZL-C-13268. This vehicle was actually off the pavement on the western soft shoulder of the road, facing east, and there was a man, who PC Ek recognised as the deceased, trapped on the driver's side of the vehicle. On the opposite side of the road, that is, on the left hand side facing Orange Walk town, PC Ek observed a Chevy Metro motor car, with Licence Plate No Bz-C-25855. The driver of this vehicle was not located. In addition to these two vehicles, which both had extensive damage to their front sections, PC Ek also observed a third vehicle, Toyota pickup, Licence Plate No CY-C-20704), also on the left hand side of the road facing Orange Walk Town. This vehicle was off the pavement of the road on the soft shoulder and had damage to its left rear fender.

[17] From among the crowd of people on the scene, Mr Gilharry identified himself to PC Ek as the driver of the Toyota pickup. PC Ek then advised Mr Gilharry that he intended to prepare a sketch plan of the accident scene and he also enlisted the aid of Ms Muriel Ann Flowers, a Justice of the Peace who happened to be nearby, with a view to having both persons sign as witnesses to the sketch plan after he had prepared it. Using a plain sheet of white typing paper, PC Ek then prepared the plan and took detailed measurements, which he noted on the plan. These measurements were taken in the presence of Mr Gilharry and Ms Flowers, who in due course both

signed the plan after it was completed and signed by PC Ek and Mr Gilharry had expressed satisfaction with the measurements.

[18] This sketch plan was tendered and exhibited in evidence at the trial as exhibit 'R.E. (1)' (for ease of reference, a copy is attached to this judgment as Appendix 1). PC Ek then explained the details of the plan to the court as follows. The width of the paved section of the road was 23 feet 3 inches and the distance from the western edge of the paved section of the road to the rear of the Chevy Metro was 12 feet 5 inches. The width of the soft shoulder on the western side of the road was 9 feet 10 inches and the Mitsubishi was on that soft shoulder, at a distance of 6 feet 4 inches from the edge of the paved section of road. The distance from the Mitsubishi to the rear of the Chevy Metro was 62 feet 5 inches. There was a pile of debris 10 feet 5 inches from the western side of the paved section of the road and 12 feet 4 inches from the eastern side. The pile of debris was 19 feet 10 inches from the front of the Mitsubishi and a detached car bumper was also found on the soft shoulder on the western side of the road, 15 feet from the front of the Mitsubishi. The distance of the rear of the Chevy Metro to the pile of debris was 50 feet.

[19] In cross-examination, PC Ek said that the pile of debris was made up of broken glass, light reflectors, pieces of plastic bumpers, like "rubbers and stuff" and spilt oil. HIs view was that the pile of debris, which was concentrated on the western driveway of the road, that is, on the right side of the road going towards Orange Walk, at a point 10 feet 5 inches from the western soft shoulder, was the point of impact between the two vehicles, but he accepted that "the presence of debris on a road would not necessarily mean that that is the point of impact". There were, he said, no tire or skid marks in the road close to the scene of the accident, which occurred after a curve in the road. He agreed that there was a crowd of about 25 – 30, or more persons on the scene upon his arrival about half an hour after the accident and there were persons surrounding all three vehicles. He accepted that, in relation to the position of the Chevy Metro, his sketch plan depicted the position in which he saw it when he arrived on the scene and that, in the light of the previous evidence from Mr Gilharry that he and others had had to flip it back onto its wheels, the sketch plan might not be an accurate depiction of where that vehicle actually ended up after the collision.

[20] In re-examination, PC Ek stated that the debris on the western side of the road was scattered and that some of it was actually at the western edge of the road, extending 10 feet 5 inches into the roadway itself. In answer to questions from the judge, he also said that when he arrived at the scene there were people "walking all over the place", although he could not say whether those people had trampled on the debris.

[21] Ms Flowers, the Justice of the Peace, confirmed her role in the sketch plan exercise to be as it was described by PC Ek and also estimated the crowd at the accident scene to be "about 20, 30 people".

[22] Among the several other witnesses who testified for the prosecution, Dr Estrada Bran, the Medical Examiner for the Government of Belize, gave evidence of having conducted a post mortem examination on the body of the deceased on 7 April 2006. His findings were that the deceased had sustained multiple fractures to the upper and lower limbs, as well as chest injuries affecting the lungs, and that the cause of death was asphyxia by trauma. When asked to state the cause of death in layman's terms, he described it as "lack of oxygenation due to chest injuries affecting the respiratory system specifically to the lungs".

[23] Evidence was also given of the collection of blood samples from the appellant (at the Northern Regional Hospital in Orange Walk Town, sometime after 5:00 am on 6 April 2006) and the deceased's body (at the post mortem), and the delivery of the samples to the National Forensic Service, where they were tested for blood alcohol concentration by Mrs Diana Bol Noble, a Forensic Analyst attached to the service. Her evidence was that no alcohol was detected within the specimen taken from the deceased's body, while in relation to that taken from the applicant, the blood alcohol concentration was found to be 55 milligrams per 100 millilitres of blood. This latter finding fell "within the range of sobriety…so it does not have much influence on a person" (the evidence was that the legal limit is 80 milligrams of alcohol to 100 millilitres of blood). However, the jury seemed interested to discover how long alcohol remained in the system, eliciting from the analyst the answer that the average rate of dissipation is 19 milligrams per hour after the complete cessation of alcohol consumption.

[24] A number of photographs taken on the accident scene by a crime scene technician (Mr Jiro Sosa) at 9:45 pm on 5 April 2006 were also tendered and admitted as exhibits at the trial and these were shown and explained to the jury and made available to them during their deliberations.

[25] The evidence of the remaining prosecution witnesses can be summarised even more briefly. Mr Teofilo Rejon, then a member of the Belize Police Department working at Orange Walk Police Station, served Notice of Intended Prosecution on the appellant on 10 April 2006 at Northern Regional Hospital. Sergeant Raymond Berry, who as attached to the Corozal Police Station at the material time, was the investigating officer and the person who in due course arrested and charged the appellant with the offences for which he was tried. Dr. Jair Osorio, gave evidence as to his examination and treatment of Mayra at the Northern Regional Hospital in Orange Walk for multiple injuries to her lungs, the abdominal cavity and a fractured rib. Treatment of these injuries required abdominal surgery (a 'laparotomy'), as well as a procedure (a 'thoracotomy') to insert a tube into the lungs for the purpose of draining blood. Dr Osorio classified Mayra's injuries as "grievous harm. And lastly, Mr Roque Riverol gave evidence of having, on the very day of the accident, done an open transfer of the Chevy Metro and delivered the vehicle to the appellant, a matter of minutes before the accident took place.

[26] That was the case for the prosecution, at which point a no-case submission was made on behalf of the applicant. The result of this submission was, as already indicated, that the jury were directed to return a formal verdict of not guilty in respect of the charge against the applicant relating to Seleni Magana, but he was called upon to answer the remaining three charges. Reminded of his rights in this regard, the applicant elected to remain silent, whereupon, after addresses from counsel on both sides, the trial judge summed up the case to the jury.

The summing up and the verdict

[27] In a commendably economical summing up, of which no complaint is made on appeal, the learned trial judge directed the jury, in wholly unexceptionable terms, along standard lines. In particular, he alerted them to the distinction between direct

and circumstantial evidence, defining the latter and inviting the jury to examine it with care and to consider "whether the evidence upon which the Prosecution relies in proof of its case is reliable and whether it does prove guilt". He also urged them to be careful to distinguish conclusions based on "reliable circumstantial evidence and mere speculation". The judge also gave accurate directions on the ingredients of the offences of manslaughter by negligence (placing particular emphasis on the need for the defendant's conduct to depart from the acceptable standard of case by a "grave degree"), negligent grievous harm and negligent harm.

[28] The learned judge then summarised the facts of the case, again with great economy. Having dealt with the evidence of Marleni, Elena and Mayra, he pointed out to the jury that there was "no evidence of the manner of the driving before the accident, whether the Geo Metro car was driven at an excessive speed or any other evidence whatsoever in proof of the driving of the Geo Metro car". He went on to refer to the evidence that the deceased had slowed down the car and moved towards the shoulder of the road, which is when the impact was felt, as well as to the location of the debris in the road, and made the comment, as he was entitled to do, that that "to my mind means that [the deceased] must have had to have been in the eastern carriage way, when he saw the approaching vehicle, he tried to get into his correct lane but it was too late to avoid the accident". However, having said this, he again reiterated to the jury that they did not have to accept his decision and that it was a matter for them to consider. As regards the point of impact, the judge instructed the jury "not to accept the point of impact shown on the sketch by Constable Ek as the true point of impact…[that shows]…where Constable Ak thinks it would be".

[29] Finally, the judge told the jury plainly that, by choosing to remain silent, the applicant was exercising "his inherent and constitutional right to remain silent, as it is the Prosecution who brought him here." As he had done before, he reminded the jury of the presumption of innocence and that it was therefore for the prosecution to prove the guilt of the applicant to their satisfaction.

[30] After close to two hours of deliberation, the jury returned verdicts finding the applicant guilty on all three counts and in due course the judge passed sentence on him in the manner already indicated.

The grounds of appeal and counsel's submissions

[31] On 23 February 2011, the applicant through his counsel filed three grounds of appeal. These grounds were subsequently amended and the grounds of appeal, as amended, now read as follows:

> "GROUND I
>
> That the Learned Judged erred in law when he decided not to uphold the no-case submission when it was evidence that the evidence presented by the Prosecution was of such a tenuous nature that it was therefore unsafe for such a case to go to the jury.
>
> i. That the Learned Trial judge erred in Law when he failed to uphold the submission made in relation to the offense of Negligent Harm against Elena Pena in the absence of a medical form being tendered and in the absence of any evidence by the attending physician being proffered by the Prosecution to substantiate the offence,.
>
> GROUND II
>
> In light of the Crown's presentation of its case in light of the evidence, the verdict reached by the jury was inconsistent.
>
> GROUND III
>
> The verdict of the jury was unreasonable or cannot be supported having regard to the evidence."

[32] In skeleton arguments running into 32 paragraphs, as well as in her spirited oral argument, Miss Vernon for the applicant supported these grounds with detailed submissions, which we hope do no injustice by summarising as follows. In ground 1, the applicant's complaint is as to the "tenuous nature" of the case presented by the prosecution. Miss Vernon's primary submission on this ground was that the prosecution had not only failed to prove that the applicant had failed to a grave degree to observe the standard of proof reasonably to be expected of him, but had failed to show even negligence in any degree. She pointed out that, as had been submitted to the trial judge, no evidence had been given as to the speed at which the applicant had been driving, that he was driving on the wrong side of the road or that he was careless or lost control of his car. Further, that the evidence given by the three witnesses who were passengers in the deceased's car was completely discredited by PC Ek's evidence of the location of the debris on the western side of the road.

[33] As regards the second limb of ground 1, it was submitted that the prosecution had failed to adduce any admissible evidence to substantiate the charge of negligent harm in respect of Elena. In these circumstances, reliance on the evidence of Elena alone was insufficient to establish the classification of the injury in question.

[34] In support of these submissions, Miss Vernon relied on a number of cases, notably the oft cited decision of the English Court of Appeal in **R v Galbraith [1981] 1 WLR 1039**, to which we will make reference in due course. She also referred us to the decision of this court in **Cardinal Smith v R** (Criminal Appeal No 35 of 2005, judgment delivered 14 July 2006).

[35] Taking grounds 2 and 3 together, Miss Vernon highlighted those passages in the learned judge's summing up in which he brought to the jury's attention what could be described as weaknesses in the prosecution's case (see para. [28] above). She also referred us to the decisions of the Privy Council in **Aladesuru v R [1956] AC 49** and **Reid v R [1980] AC 343**.

[36] For the Crown, the learned Director submitted, on ground 1, that the evidence adduced by the prosecution could not be described as tenuous and there was

therefore no legal basis upon which the trial judge could have taken the case from the jury. She also referred to **Cardinal Smith** and submitted that there was evidence upon which, once it was accepted by them, the jury could properly convict. As regards grounds 2 and 3, the Director submitted that, on the evidence, the jury was entitled to accept the evidence of the three passengers in the deceased's vehicle and that of PC Ek and draw their own conclusions.

[37] However, the Director also – quite properly – drew the court's attention to section 128 of the Indictable Procedure Act, which makes the offence of causing death by careless conduct a statutory alternative to manslaughter by negligence. This also led to Miss Vernon in a brief reply referring us to section 31(2) of the Court of Appeal Act, whereby this court is empowered in certain circumstances to substitute a lesser offence.

[38] The grounds of appeal and the helpful submissions of counsel on both sides invite consideration of three issues; that is (i) ought the learned trial judge to have allowed the no case submission on the grounds put forward; (ii) was the verdict of the jury inconsistent or unreasonable; and (iii) should this court in any event substitute a verdict of guilty of a lesser offence in respect of the conviction of the appellant for manslaughter by negligence. Although the appeal was filed against conviction and sentence, no grounds have been filed or submissions advanced on the question of sentence and we therefore do not propose to say anything further about it in this judgment.

The first issue – the no case submission

[39] **R v Galbraith** has been constantly cited in this jurisdiction and referred to in judgments of this court as prescribing the correct approach by a trail judge to a no case submission (see, for example, **Cardinal Smith**, at para. 36). We cannot avoid reproducing Lord Lane CJ's now famous statement in the case:

> "How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the

case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution 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 upon 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. It follows that we think the second of the two schools of thought is to be preferred.

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[40] It is always helpful to recall that the court was concerned in **Galbraith** to resolve a controversy in English judicial circles as to the proper response of the trial judge to a submission of no case to answer. In **Galbraith** itself, Lord Lane CJ identified the two school of thoughts (at page 1040) as - "(1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence upon which a jury properly directed could properly convict". (A particularly lucid account of the development of this controversy may be found in the judgment of Lord Mustill in **Daley v R [1994] 1 AC 117, 123 – 126**).

[41] Viewed against this background, it is therefore clear that the objective of the solution which the court ultimately preferred was to limit the circumstances in which a case should be taken from the jury by the judge to "those cases where the necessary minimum evidence to establish the facts of the crime has not been called" (per Lord Widgery CJ in **R v Barker (Note) (1975) 65 Cr App R 287, 288**). To do otherwise, by allowing the judge "to weigh the evidence, decide who is telling the truth, and to

stop the case merely because he thinks the witness is lying…is to usurp the functions of the jury".

[42] The interplay – and the distinction – between the two limbs of the rule in **Galbraith** is neatly illustrated in **Cardinal Smith**. In that case, the appellant was charged with manslaughter by negligence arising out of a motor vehicle accident in which a pedal cyclist lost his life and, in the alternative, causing death by careless conduct (contrary to section 108(2) of the Criminal Code). The appellant was convicted on the first count and, on appeal, it was contended by counsel for the appellant, that the trial judge had erred in law in rejecting a submission that there was no case for the appellant to answer on either count.

[43] In response to this submission, it was held that, there was evidence upon which a jury properly directed could find the defendant guilty of careless conduct, the strength or weakness of the prosecution evidence depending on "whether a certain inference was drawn, a matter falling strictly within the province of the jury" (per Sosa JA, as he then was, at para 36). The trial judge had accordingly been correct to reject the no case submission on this count. However, as regards the charge of manslaughter by negligence, it was held that, while there was evidence of a careless, momentary lapse on the part of the defendant, there was insufficient evidence to establish the degree of departure from the accepted standard of care required on a charge of manslaughter by negligence and accordingly "[this] was not a case in which, as regards that charge, it could be said, to quote the Board in *Taibo (Ellis) v R* (1966) 48 WIR 74, at 83, 'there was material on which a jury could, without irrationality be satisfied of guilt'" (per Sosa JA at para 47). The trial judge had therefore erred in rejecting the no case submission on this count.

[44] Turning now, against this background, to the instant case, at the close of the case for the prosecution, there was unchallenged evidence of the following:

(i) At a point in the road in the vicinity of Corazones Bar, a strong/bright was observed coming from the opposite direction, whereupon the deceased "slowed down" and started to move off

the road giving space for the oncoming vehicle (Marleni, page 27, Elena, pages 57, 65 – 66 and Mayra, page 71);

(ii) the approaching vehicle was coming “in speed” (Elena, page 56);

(iii) the deceased was driving at 40 miles per hour (Marleni, page 36);

(iv) the deceased’s face “was a bit nervous” immediately after the light from the oncoming vehicle was seen (Mayra, page 71);

(v) within half an hour or so after the accident, a pile of debris, comprising broken glass, light reflectors, pieces of plastic bumpers, such as rubbers and oil, was observed, extending from the western edge of the road to a distance of 10 feet 5 inches into the road (PC Ek, pages 145 and 162);

(vi) both the deceased’s vehicle and the vehicle driven by the appellant sustained extensive damage to their front sections (PC Ek, page 85);

(vii) there were no skid marks at the scene of the accident (PC Ek, pages 131-2);

(viii) after the accident, the deceased’s vehicle stood stationary (with the deceased trapped inside the vehicle) on the left shoulder on the western side of the road, with its front a distance of 6 feet 4 inches from the edge of the paved section of the road (PC Ek, pages 85, 107);

(ix) the width of the paved section of the road at the accident scene was 23 feet, 4 inches (PC Ek, page 104);

(x) the Chevy Motor collided with the rear of Mr Gilharry's vehicle, which was on the opposite (eastern) side of the road, parked on the soft shoulder (Mr Gilharry, page 49);

(xi) after the Chevy Metro collided with Mr Gilharry's vehicle, the Chevy Metro was observed with its four wheels in the air and was turned back over onto its four wheels by Mr Gilharry and others (Mr Gilharry, pages 50 – 51);

(xii) Mr Gilharry's vehicle received damage to its left rear fender (PC Ek, page 86);

(xiii) approximately half an hour or so after the accident, the Chevy Metro was found to be a distance of 12 feet five inches from the eastern edge of the paved section of the road (PC Ek, page 104);

(xiv) the distance from the deceased's car to the rear section of the Chevy Metro, measured diagonally west to east across the road, was 62 feet, 5 inches (PC Ek, page 105);

(xv) the distance from the eastern side of the paved section of the road to the pile of debris was 12 feet 4 inches (PC Ek, page 106);

(xvi) the distance from the front section of the deceased's car to the debris was 19 feet 10 inches (PC Ek, 112);

(xvii) the distance from the rear section of the Chevy Metro to the debris, measured diagonally east to west across the road, was 50 feet (PC Ek, page 112); and

(xviii) the applicant had taken delivery of the Chevy Metro from its previous owner approximately 10 minutes before the accident occurred (Mr Riverol, 221).

[45] This evidence gave rise to a number of possibilities. One such, identified by the judge in his summing up (but obviously rejected by the jury), was that the deceased was, immediately before the collision with the oncoming car, on the wrong side of the road, tried to get into his correct lane, but was too late to avoid the collision. On that view of the facts, of course, the deceased would have been the author of his own misfortune. But, on another view of the facts, the deceased could well have equally been on his correct side of the road, seen the oncoming vehicle approaching on that side, started to move to his right to avoid the collision but found himself unable to do so in time. Assuming that the jury found, as they were plainly entitled to do, notwithstanding the judge's pointed caution, that the point of impact was, as PC Ek thought, at or in the close vicinity of the pile of debris, that view could find some support from the spread or distribution of the debris, from the western edge of the paved section of the road to a point 10 feet 5 inches into the western carriageway. On this view, the applicant would on the face of it have been driving on the incorrect side of the road and therefore negligently to a grave degree.

[46] The jury could also accept the evidence that the Chevy Metro was approaching, not only on the wrong side of the road, but, as Elena put it, "in speed", a conclusion that might find some support from whatever view they took of the clear implication of great speed that might be derived, again assuming a point of impact somewhere in the vicinity of the pile of debris, from the distance diagonally across the road that the Chevy Metro travelled after the collision, "spinning", as Mr Gilharry put it, in the direction of the stationary Toyota pickup on the eastern soft shoulder, colliding into it and eventually overturning. The jury could also have formed a view as to the force of the impact, and hence the speed at which the Chevy Metro was travelling at the time of the collision, from the severity of the impact, which caused extensive damage to the front sections of both vehicles, the apparently instantaneous death of the deceased and injuries to Mayra, the front seat passenger in that vehicle, of the utmost severity.

[47] And there were no doubt yet other possibilities. But which of them, or which combination of them, should be accepted was, as Sosa JA put it in **Cardinal Smith** (para 36), "a matter falling strictly within the province of the jury". The evidence adduced by the prosecution, taken at its highest, on even one view of the facts, was

capable of supporting the conclusion that the applicant was conducting the Chevy Metro in a manner that amounted to a failure, "to a grave degree", to observe the standard of care which he ought reasonably to observe in all the circumstances of this case (see section 10 of the Criminal Code).

[48] In **Cardinal Smith**, Sosa JA made reference to the Rules of the Road contained in Part VII of the Motor Vehicles and Road Traffic Regulations, regulation 114(1)(a) of which provides that each driver of a motor vehicle "shall at all times keep the vehicle on the right side of the road unless prevented by some sufficient cause". In our view, evidence that the applicant, with or without excessive speed, conducted his vehicle on the highway on his incorrect side of the road, was clearly sufficient to raise a prima facie inference of failure to a grave degree to observe the requisite standard of care.

[49] This conclusion is, in our view, unaffected by either **Crosdale v R (1995) 46 WIR 278** or **R v Shippy [1988] Crim LR 767**, upon both of which Miss Vernon placed great reliance. In **Crosdale**, the principal issue before the Privy Council was whether it was permissible for a submission of no case to answer to be made in the presence of the jury, as was at the time the prevailing and accepted practice in Jamaica. The Board held that, as a general rule, the judge should require the jury to withdraw during the hearing of a no case submission (irrespective of whether or not the defence so requests) and the jury should neither be present when the judge delivers the ruling on the submission, nor should they be informed of the reasons for the judge's decision. The Board was nevertheless prepared to assume, albeit with some scepticism, that, in exceptional circumstances, the defence might have legitimate reasons for requesting that the submission be heard in the presence of the jury. In such cases, the judge should hear argument in support of the request that the jury be allowed to remain during the no case submission in the absence of the jury and exercise his discretion on the point (see per Lord Steyn, pages 284 – 286).

[50] It is in the context of the general discussion on these points that Lord Steyn cited the passage from 'Trial by Jury' Lord Devlin's celebrated 55 year old Hamlyn Lecture (The Hamlyn Lectures, 1956, republished 1988), upon which Miss Vernon so

heavily relied. In order to establish the full context, it is necessary to quote Lord Steyn in full (page 285 – 286):

> "A judge and a jury have separate but complementary functions in a jury trial. The judge has a supervisory role. Thus the judge carries out a filtering process to decide what evidence is to be placed before the jury. Pertinent to the present appeal is another aspect of the judge's supervisory role: the judge may be required to consider whether the prosecution has produced sufficient evidence to justify putting the issue to the jury. Lord Devlin in Trial by Jury (The Hamlyn Lectures) (1956, republished in 1988) aptly illustrated the separate roles of the judge of jury. He said (at page 64):
>
> > ' … there is in truth a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine by using their judgment based on their experience. But they base their judgment on the assumption that the rope is what it seems to the eye to be and that it has no concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary, before he sends it out to see what it has no flaw; that is a job for an expert. It is the business of the judge as the expert who has a mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is … The trained mind is the better instrument for detecting flaws in reasoning; but if it can be made sure that the jury handles only solid argument and not sham, the pooled experience of twelve men is the better instrument for arriving at a just verdict. Thus logic and common sense are put together to make the verdict.'
>
> The important point is that the jury cannot assist the judge in his decision as to whether there is sufficient evidence for the judge to place the case before the jury. The part of the proceedings is conducted by the judge alone. And the jury has no interest in that part of the proceedings. There is also no sensible reason why the jury should witness that part of the proceedings. On the contrary, there are substantial reasons why in the interests of an effective and fair determination of the issue whether the defendant has a case to answer the jury should be asked to withdraw."

[51] To the extent that Lord Devlin's observation that it is the judge's role on a no case submission "to test the chain of evidence before he sends it to the jury", was intended to convey that the judge's role is to ensure that evidence which does not match up to the minimum required by law for the particular offence, then it is obviously unexceptionable. If, however, it was intended to convey something more than this, that is, that it is the judge's duty to weigh the evidence at the close of the prosecution's case and to make some kind of qualitative assessment of the credibility and consistency of that evidence before leaving it to the jury, then it is in our view, with unbounded respect, plainly out of line with the accepted modern approach, as sanctioned by the decision in **Galbraith**.

[52] The brief summary of **Shippey** which we were shown by Miss Vernon (taken from Archbold, 'Criminal Pleading, Evidence and Practice', 2001, para. 4-295), attributes to Turner J at first instance the observation that the **Galbraith** requirement to take the prosecution evidence at its highest did not mean "picking out all the plums and leaving the duff behind". What was necessary, Turner J said, was for the judge to make an assessment of the evidence as a whole, a proposition with which we could not possibly have any difficulty. Applying that approach, we remain of the clear view that in the instant case, the evidence at the close of the prosecution case, taken as a whole, amply justified the learned trial judge in leaving the case to the jury.

[53] The other aspect of this issue relates to the charge of negligent harm in respect of Elena. The applicant contends that the judge should have withdrawn the case from the jury, in the absence of a "medical form" or any evidence from the attending physician to substantiate her injuries.

[54] Elena's evidence was, it will be recalled, that after the accident she was taken to the hospital in Corozal in the back of a pickup. When asked whether anything had happened to her, her first response was "My left side of my hip", which she then amplified, in a manner of speaking, in the following exchange:

"THE COURT:	Your left hip, what happened to it?
Q:	What to your left hip?

A:	It moved from –
THE COURT:	It was displaced?
THE WITNESS:	Yes.
THE PROSECUTION:	Dislocated.
THE COURT:	Dislocated?
THE WITNESS:	Yes.
Q:	Anything else?
A:	Only that.”

Elena went on to say that she received treatment at hospital in Orange Walk, where she was hospitalised for 12 days and she was not challenged on any of this in cross-examination.

[55] Section 96 of the Criminal Code defines “Harm” as follows:

> “‘Harm’ means any bodily hurt, disease or disorder, whether permanent or temporary”;

[56] ‘Grievous harm’, on the other hand, is defined as –

> “any harm which amounts to a maim or dangerous harm as hereinafter defined, or which seriously or permanently injures health, or which is likely to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense”;

‘Dangerous harm’ means “harm endangering life”; while ‘maim’ means “the destruction or permanent disabling of any external or internal organ, member or sense”.

[57] On these definitions, while it may be difficult, but not impossible (since it is essentially a question of fact to be determined by the jury), to establish a case of ‘grievous harm’, ‘dangerous harm’ or ‘maim’ without medical evidence being

proffered in support, it appears to us that the complete lack of specificity in the definition of 'harm', simpliciter, suggests that it may more easily be established by lay evidence from the complainant, as in this case, of what had happened to her, her treatment and, if known, her prognosis. On Elena's evidence, we consider that there was sufficient in her indication that, as a result of the accident, something had happened to her left hip, apparently affecting her mobility, at least temporarily, and requiring hospitalisation for 12 days, to enable the jury to determine whether she had suffered 'harm', as defined, that is, any bodily harm or disorder, whether permanent or temporary.

[58] We would therefore hold that the appellant fails on the first issue.

The second issue – inconsistent or unreasonable verdict

[59] Exactly what the verdict of jury was said to be inconsistent with, did not appear in the argument, so it suffices to say that the complaint of inconsistency was not established. As regards the unreasonableness of the verdict, Miss Vernon relies on section 30(1) of the Court of Appeal Act, which empowers the court to allow an appeal, "if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence." As the Privy Council confirmed in **Aladesuru v R [1956] AC 49**, the words of the statute must be given their ordinary meaning and it is therefore inaccurate to treat this ground as synonymous with the complaint that the verdict of the jury is "against the weight of the evidence".

[60] We have already expressed the view that there was sufficient evidence, fit to be left to the jury, to support the charges of manslaughter by negligence and negligent harm in respect of Elena. In our view, a verdict of guilty on both counts, based on that same evidence, no additional evidence having been forthcoming in the case, cannot be said in those circumstances to have been unreasonable having regard to the evidence. The evidence supported an inference, which the jury must have found to be the fact, that the accident occurred at a point between the edge of the pavement on the western side of the road and a point 10 feet 5 inches into the western carriageway, in accordance with the evidence given by PC Ek and the

measurements taken by him, while the deceased was driving on the correct side of the road. Such a finding, in our judgment, fully supported the further inference that the applicant, as the driver of the oncoming vehicle that placed the deceased's vehicle in, as it turned out, mortal peril, was at the material time driving, probably at a speed which was inappropriate in the circumstances, on the incorrect side of the road and was therefore guilty of negligence to the degree required on a charge of manslaughter by negligence, that is to say, to a grave degree.

[61] Similarly in respect of the charge of negligent harm caused to Elena, we consider that her evidence of the injury suffered by her, though unsupported by medical evidence, sufficed to satisfy the definition of harm given in section 96 of the Criminal Code and that a verdict of guilty based on that evidence cannot be said to have been unreasonable having regard to the evidence.

The third issue – substitution of a verdict for a lesser offence

[62] The Director brought to our attention section 128(2) of the Indictable Procedure Act, which makes the following provision:

> "Where upon the trial of any person for manslaughter by negligence… the jury is satisfied that the accused person caused the death of the deceased by any careless conduct not amounting to negligence, it may acquit him of manslaughter by negligence and find him guilty of causing death by careless conduct under section 108(2) of the Code."

[63] In the instant case, this option was not given to the jury by the learned trial judge in his summing up. However, it seems to us that this is not a matter upon which the applicant could possibly complain (and, indeed, he has not), in the light of the way in which the case was at the end of the day left to the jury by the judge:

> "When you retire to deliberate your verdict, remember that the Prosecution has to prove to you beyond a reasonable doubt that firstly the accused was the driver of the car involved in the accident with the Mitsubishi car that night and that he drove negligently by failing to a

> grave degree to observe the standard of care which he ought reasonably to have observed in all the circumstances of the case. If to your mind the Prosecution has failed to prove the offences so that you feel sure, then you have to return a verdict of not guilty. If you have any doubts, then again you have to return a verdict of not guilty because then it means that the Prosecution has failed to make you feel sure of the guilt of the accused."

[64] The options given to the jury were therefore sharply drawn: if they could not be sure that the accused had acted negligently by failing to a grave degree to observe the standard of care which he ought reasonably to have observed in all the circumstances, then they should acquit. Had the jury not, in the light of this clear direction, been satisfied that the applicant was guilty of the offence with which he was charged, then it must be assumed, in our view, that they would have found him not guilty, as they were instructed to do in such a circumstance. It is therefore not clear to us, especially on the facts of this case, that an additional direction as to the availability of a lesser offence as an alternative solution would have been of any benefit to the applicant. The question whether, and in what circumstances, a direction in accordance with section 128(2) of the Indictable Procedure Act ought to be given in cases such as these is, of course, another matter, upon which we express no view, it not having been fully argued before us.

[65] The second aspect of this issue arises from section 31(2) of the Court of Appeal Act, of which Miss Vernon helpfully reminded us at the very end of the hearing. Section 31(2) provides as follows:

> "Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence and on the finding of the jury it appears to the court that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict returned by the jury a judgment of guilty of that other offence and pass such sentence in substitution for the sentence

> passed at the trial as may be warranted in law for the other offence, not being a sentence of greater severity."

[66] In **Cardinal Smith**, the court applied this provision in the circumstances already described. That is, it having been determined that the trial judge erred in not accepting the submission of no case in respect of the offence of manslaughter by negligence, for which the appellant was ultimately convicted, the court therefore substituted a judgment of guilty on the lesser offence of causing death by careless driving and sentenced the appellant accordingly.

[67] More recently, section 31(2) was considered by the court in **Danie Ku v R** (Criminal Appeal No 15 of 2010), in which judgment was delivered on 30 March 2012, that is, 10 days after the completion of the hearing in the instant case. In this case, the court declined to apply section 31(2) in circumstances where, the appellant having been found guilty of murder by the jury, the court was satisfied on appeal (on a concession by the Crown) that the trial judge's directions on provocation were deficient and had thus deprived the appellant of a fair trial. In determining what course of action the court should take in these circumstances, one of the options considered – but ultimately rejected – by the court was the substitution of a verdict of guilty of manslaughter for the verdict of guilty of murder returned by the jury. Speaking for the court, Mendes JA said this (at para 12):

> "In our view, a court would be justified in exercising its power under section 31(2) to substitute a verdict of manslaughter for the jury's verdict of murder on the basis of a faulty direction on provocation if satisfied that, if properly directed, a jury would inevitably have found that there was evidence which raised a reasonable doubt that the accused acted under provocation as defined in sections 119 and 120 [of the Criminal Code]."

[68] In the instant case, we have concluded in this judgment that the learned trial judge did not fall into error, either in respect of his ruling on the no case submission (as had happened in **Cardinal Smith**) or in respect of his directions to the jury (as in **Danie Ku**). Although we do not suggest that these are the only circumstances in

which section 31(2) can apply (the power to substitute a verdict is, after all, explicitly given “instead of allowing or dismissing the appeal”), we consider that it ought not to be applied in the instant case on the basis of any view of the facts different from that taken by the jury, on evidence which, by our determination, they were entitled to accept. This would, in effect, amount to this court second-guessing the jury on matters entirely within their purview.

Disposal of the application

[69] In the result, the application for leave to appeal is dismissed and the conviction and sentence in the court below are affirmed.

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SOSA P

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MORRISON JA

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MENDES JA