THE COURT OF APPEAL

Birmingham P.
Edwards J.
Kennedy J.

IN THE MATTER OF AN APPLICATION UNDER

S. 23 OF THE CRIMINAL PROCEDURE ACT, 2010

Record No: 54/2018

Between/

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

V

D. P.

Respondent

JUDGMENT of the Court delivered on the 28th of February, 2019 by Mr. Justice Edwards.

Introduction
1. On the 31st of January 2018, the respondent was arraigned and pleaded not guilty to one count of dangerous driving causing death, contrary to s. 53(1) of the Road Traffic Act, 1961 (the Act of 1961), as inserted by s. 4 of the Road Traffic (No. 2) Act 2011. On the 1st of February 2018, and at the close of the prosecution case, the trial judge acceded to an application for direction brought by the defence, and directed the jury to return a verdict of not-guilty in relation to the sole count on the indictment.

2. The applicant herein, namely the Director of Public Prosecutions, now seeks to appeal to this Court, with prejudice, pursuant to s. 23(3)(b) of the Criminal Procedure Act 2010, against the acquittal of the respondent by direction of the trial judge.

The jurisdiction to appeal with prejudice
3. Section 23 of the Criminal Procedure Act 2010, as amended by the Court of Appeal Act 2014, provides (to the extent relevant to the issues on this appeal) as follows:

> "(1) Where on or after the commencement of this section, a person is tried on indictment and acquitted of an offence, the Director, if he or she is the prosecuting authority in the trial, or the Attorney General as may be appropriate, may, subject to subsection (3) and section 24, appeal the acquittal in respect of the offence concerned on a question of law to to—
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> (i) the Court of Appeal, or
>
> (ii) in the case of a person who is tried on indictment in the Central Criminal Court, the Court of Appeal or the Supreme Court under Article 34.5.4° of the Constitution",
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> (2) [Not relevant]
>
> (3) An appeal referred to under this section shall lie only where—
>
> (a) [not relevant], or
>
> (b) a direction was given by a court during the course of a trial referred to in subsection (1), directing the jury in the trial to find the person not guilty where—
>
> (i) the direction was wrong in law, and
>
> (ii) the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned.
>
> (4) [Not relevant]
>
> (5) [Not relevant]
>
> (6) [Not relevant]
>
> (7) [Not relevant]

(9) [Not relevant]

(10) [Not relevant]

(11) On hearing an appeal referred to in subsection (1) the Court of Appeal may—

(a) quash the acquittal and order the person to be re-tried for the offence concerned if it is satisfied—
(i) that the requirements of subsection (3)(a)(i) or (b), as the case may be, are met, and

(ii) that, having regard to the matters referred to in subsection (12), it is, in all the circumstances, in the interests of justice to do so,

or

(b) if it is not so satisfied, affirm the acquittal.

(11A) [Not relevant]

(12) In determining whether to make an order under paragraph (a) of subsection (11) or (11A), the Court of Appeal or the Supreme Court, as the case may be, shall have regard to—

(a) whether or not it is likely that any re-trial could be conducted fairly,

(b) the amount of time that has passed since the act or omission that gave rise to the indictment,

(c) the interest of any victim of the offence concerned, and

(d) any other matter which it considers relevant to the appeal.

(13) (a) The Court of Appeal or the Supreme Court, as the case may be, may make an order for a re-trial under this section subject to such conditions and directions as it considers necessary or expedient (including conditions and directions in relation to the staying of the re-trial) to ensure the fairness of the re-trial.

(b) Subject to paragraph (a), where the Court of Appeal or the Supreme Court, as the case may be, makes an order for a re-trial under this section, the re-trial shall take place as soon as practicable.

(14) [Not relevant]"

4. The application in this case is brought on the basis that the direction to find the respondent not guilty was wrong in law, and in circumstances where the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the respondent's guilt in respect of the offence concerned.

The evidence at trial
5. The incident giving rise to the prosecution occurred on the N20 just outside the town of Charleville on the Limerick side of that town. It involved a collision between two vehicles that were travelling in opposite directions. One was a Mazda motor car driven by a Mr. C (the deceased) that was travelling from the Limerick direction towards Charleville; and the other was the respondent's vehicle, a Peugeot motor car, which was travelling from Charleville towards Limerick. At the time of the collision, there was another vehicle behind the deceased's vehicle, driven by a Mr. Oliver Casey, who witnessed what occurred.

6. At trial, the key eye-witness to the incident, the aforementioned Mr. Casey, gave evidence that, at approximately 12.30 p.m. on the 23rd of July 2014, he was driving *"on a straight stretch of road"* towards Charleville. The evidence at trial was that "*it was a lovely, dry warm day*" and that visibility was "*perfect*". Mr. Casey testified that "The road was actually quiet on the day, around that time of the day it was quiet, actually…..there was just the one car in front of me all the time, actually no car passed me out on that road that day."

7. Sergeant Kevin Bourke gave evidence that "*the road was straight at the location of the collision. There was a series of bends on the road approaching the scene from Charleville. The continuous white line on these bends finished approximately 90 metres south of the collision scene. The location of the collision was visible approximately 270 metres on the Charleville side, with a right grass margin on both sides of the road allowing for increased visibility.*" He further described the scene as follows: "*the road itself, it consisted of two lanes. Each lane measured 3.3 metres wide and the full available road width for road users was 6.8 metres [with a] [b]roken white line defining the centre.*" Sergeant Bourke further testified that the accident location was "*on the lead outside of Charleville, within the town speed limit*".

8. The deceased was driving approximately 400 yards in front of Mr. Casey. The respondent's vehicle, approaching on the other side of the road, was "*a good distance behind*" behind a lorry, both of them travelling in the Limerick direction and driving away from Charleville, i.e. in the opposite direction to that in which the deceased and Mr. Casey were travelling. Mr. Casey's evidence was that "*after the lorry had passed safely*", the respondent's vehicle "*veered across the road at an angle. It appeared to hit, like, [the deceased's car] maybe not dead on, but you know, at angle to dead on. And it just -- was, you know, just bang up in the air*"

9. The deceased's car was knocked off the road by the impact and ended up breaking through the ditch and coming to a rest facing upwards from a steep incline below the road. Mr. Casey stated that in his view the respondent was not overtaking, as the lorry that had been in front of him had gone down the road by the time the collision occurred. According to Mr. Casey the respondent's vehicle did not have its indicator on prior to the collision. The respondent was helped from his car by Mr. Casey who noticed a phone on the ground beside the car of the respondent which phone was later taken as evidence. However, it was established in the evidence of Garda Elaine O' Donovan at trial that the respondent did not receive or make any phone calls on his phone since 11.48 a.m. i.e. approximately 40 minutes before the accident.

10. Mr. Dennis Forde, a truck-driver who was driving from Charleville and who had come upon the scene just after the incident testified at trial that he "*saw a black Peugeot car, just spinning around the centre of the road and debris flying off it.*" He called 999 at approximately 12.31 p.m.

11. The deceased, who was 22 years of age at the time, was pronounced dead at the scene and identified by his father at the mortuary at University Hospital Limerick. The evidence of Dr Vourneen Healy at trial was that "*death was due to acute cardiorespiratory failure, this means that his heart and his lungs stopped working, and this was secondary to multiple head injuries sustained in a road traffic accident.*" Counsel for the defence at trial made a formal admission under section 22 of the Criminal Justice Act of 1984 that the deceased died as a result of the accident the subject matter of the present case.

12. The respondent's memorandum of interview was introduced into evidence by the prosecution. In it, he gave an account of driving his brother's car at the time of the collision. He had gotten up at 6 a.m. to drive from his home in Loughrea in Galway to the Hayfield Manor Hotel in Cork City for a job interview and he told Gardaí that he had gone to bed at about 10.30 p.m. the night before. He had arrived in Cork City at approximately 9:30 a.m., believing the interview to be at 9:50 a.m., whereas it was actually 10.50 a.m. He had two sandwiches, a bar and an orange juice before going in for interview at around 10.20 a.m. He stated that after the interview, he had telephoned his mother and his girlfriend but that he hadn't "*a clue what time*". The respondent stated he went to drive directly home after the interview.

13. The respondent stated that he did not recollect how the collision occurred and his last memory was "*a green sign saying 'Limerick' coming out of the city, and then the last thing I remember before the crash was seeing the Charleville Park Hotel on my left…. I remember vaguely being in the car and somebody saying something to me. Then I remember being in an ambulance and I think one of paramedics asked for permission to cut my trousers as there was blood coming out from my leg. I said, 'Yeah, do what you need to do.' After that, it's very vague. A blond garda, not sure on that, asked for breath sample. That is really all I can remember until the hospital.*"

14. He also stated that he was not on any medication at the time of the collision. Further, the respondent passed an alcohol breathalyser test in the aftermath of the incident, as Garda O' Donovan confirmed in the course of her evidence. The evidence also established that there were no defects in either vehicle prior to the incident.

15. Sergeant Bourke, who is a trained forensic collision investigator, gave expert evidence in that capacity and described the collision between the respondent and the deceased as being "*an almost head-on collision…what that would mean would be as opposed to two vehicles meeting nose to nose as such, they're offset one -- is that you have the drivers' sides of both vehicles coming in contact with each other.*" He also testified that he was "*satisfied that the [respondent's car] had turned into the path of [the deceased's car] that was coming in the opposite direction.*" There was other evidence adduced at the trial to the effect that there were no skid marks at the scene, indicating "*that no braking took place, that the driver, for whatever [reason] -- applied no brakes*", and also suggesting that neither vehicle lost control in the lead up to the collision.

16. Sergeant Bourke also gave evidence that, based on what are referred to as "*gouge marks*" at the collision scene, which are "*made by a vehicle when it strikes and moves across a surface, a metal item,*" the respondent's car made its first "*gouge mark*" 1.7 metres over the broken white line and on its wrong side of the road at the time of collision. He confirmed the evidence of Mr. Casey that weather conditions were perfect on the day in question; that "*the road itself was in good condition*"; and that "*there was nothing with the environment that could have contributed to the collision.*"

17. Garda Mike Reddy, who is a qualified automotive engineer and mechanic, and a Public Service Vehicles Inspector, testified as to the damage caused to both cars in the following terms:

> *The offside chassis rail in this car escaped the brunt of the impact, in that the offside front wheel and chassis of the Peugeot ran along the outside of the Mazda chassis. So it also lost protection of its own chassis, by virtue of the fact that the impact missed that component, thereby avoiding resistance associated with the front chassis. The engine and gearbox had broken free from its mounts. The offside front wheel and suspension were driven rearward by approximately 75 centimetres. The offside A pillar, that's the driver's door, A pillar, was driven rearward by approximately 50 centimetres in this case. This effectively brought the A pillar to the offside front corner of the driver seat base. The right front corner of the driver's seat, as such, was in contact with the pillar resulting in approximately 80% footwell intrusion at the driver's footwell. The dash and bulk head were driven deeply into the driver's cockpit. The roof and the near side front door, that's the left front door, were removed by rescue crew, and the base of the A pillar was cut after the accident. As a result of the collision, both front airbags were deployed, as were the front seat belt pretensioners. The driver's seat belt was worn at impact. Such was the level of destruction that conclusive testing of the electrical system was not possible. The offside front suspension sustained extensive collision damage. The suspension strut was separated from the hub assembly by impact. All steering and suspension joints were otherwise intact with the steering rack remaining intact. Anti lock braking was by means of disk brakes at all wheels. The brake master cylinder and peddle box were crushed by the collision. The hydraulic system was drained. Brake pads were in order and all braking surfaces were normal. Tyres were size 195/65 x 15. The offside, that's the right front tyre, was deflated as a result of the collision. All other tyres remained inflated. All tyres were above the minimum required thread depth of 1.6 millimetres, except for a small portion of near side rear tyre, that's the left rear. A small portion of the inner part of this tyre was marginally below the minimum allowable thread depth. However, I would not consider this to be significant under the circumstances. My examination revealed no evidence of any faults with the car which could have contributed to the collision. In the last part of my report, I explain that consideration was given to using AI Crush, which is a computer based program sometimes used to estimate closing speeds in collisions. The nature of the damage sustained by both cars would not allow any accurate determination of impact speed using the system in this case. The damage profile of Peugeot indicates a rearward force which is linear and parallel with the longitudinal access of the car."*

18. At the trial Garda Reddy also described the nature of the crash as an offside collision i.e. the front right hand side of both cars collided with each other. In explaining this type of collision to the jury, Mr. Reddy used his phone and his wallet to demonstrate how -

> *"[t]he deceased car and the defendant's car, one travelling this way and the other travelling that way, so the angle of contact was critical in that it brings in a 20 degree - approximately - angle from the side for the [deceased's] car. So that seated in that car, the force wasn't coming dead straight, it was coming this type of an angle, which probably increases the depth of crush but also an occupant is slightly more vulnerable with an angled contact."*

The initial point of impact, according to his evidence, was 30-35 centimetres wide in the right headlight area.

19. During cross-examination of Garda Reddy , the following exchanges took place:

"Q. Good morning, Garda Reddy. Just to clarify then, the initial contact, dealing with the Peugeot, which is Mr. P's car?

A. Yes.

Q. That's to the headlamp area on the driver's side?

A. Yes.

Q. Yes. So it's the front corner

A. Yes.

Q. of the Peugeot?

A. Yes.

Q. And then the Mazda, seems that the initial contact was to the same area of that car; is that right?

A. Yes, but slightly rearward

Q. Yes?

A. of it at initial -- but angled inward.

Q. Well, just leaving the angle aside for a moment, just the point of initial contact

A. Yes.

Q. is the headlamp area of the driver's side of the Mazda?

A. It is what we would generally term as a headlamp to headlamp strike

Q. Exactly?

A. which would be, unfortunately, fairly common in our road network.

Q. It would be fairly common; is that right?

A. Yes, those type of collisions are fairly common in our

Q. Yes?

A. road network, obviously.

Q. I see, I see. That's interesting?

A. With opposing traffic, you know.

Q. Yes?

A. We have a large network where we don't have

Q. Yes?

A. dual carriageway and motorway style.

Q. Yes. And just teasing that out a little bit, I mean if we look at the road involved here, perhaps photograph No. 4 is as good a photograph

A. Yes.

Q. as any. We've already heard evidence, I think each lane is approximately 11 feet. It's a relatively narrow road

A. Yes.

Q. it's 22 feet in total. I think it was about 6.8 metres, but in feet, 11 feet each. So you say that kind of accident can occur fairly frequently; is that right? Headlamp to headlamp?

A. Headlamp to headlamp collisions would be fairly common

Q. Yes?

A. in this -- as opposed to full overlap head-on collision.

Q. Exactly, exactly, because I think there was terminology used yesterday describing the accident at one point as a "near head on collision." And in my mind that suggests, just using your very helpful visuals there

A. Yes.

Q. if I could adopt the same terminology or the same methodology, if we say the phone is the deceased's car and the wallet is Mr. P's car?

A. Yes.

Q. Now, just to be clear to the jury, this is not that type of collision?

A. No, that would be what I'd call a full overlap.

Q. Exactly?

A. Yes.

Q. It's not head on in the way perhaps lay people like myself, who aren't schooled

A. Yes.

Q. in motor --

A. This would be partial overlap.

Q. Partial overlap. But, I mean, so it's not that?

A. No.

Q. Now, it's not either this type of thing either; is it?

A. No, it's not linear, there's an angle

Q. Yes?

A. to the contact.

Q. So, there, about half of Mr. P's car would be in contact with about half of the deceased's car; isn't that right, roughly, that's what I'm getting from it?

A. At the very front extreme it isn't, no.

Q. Sorry, well, yes, okay. But it's not a head on point of impact such as that? I mean, that's not

A. Well, 30 to 35%

Q. Yes?

A. is the overlap.

Q. Yes, yes?

A. Centimetres.

Q. Yes?

A. 30 to 35 centimetres.

Q. But what you're illustrating, it seems to me, is that type of scenario; is that right? Sorry, in fact even more so, it's about there; is that correct?

A. Well, 30 to 35 centimetres would have been the overlap at the initial contact.

Q. Yes, yes. But it's, in broad terms, it's the corner of one vehicle to the corner of another?

A. It would be a bit deeper than corner.

Q. A little bit deeper?

A. It would be deeper than corner, yes.

Q. Yes, but

A. You're looking at full headlamp and wheel to wheel overlap.

Q. Yes?

A. That's what you're looking at.

Q. Yes. Well, perhaps you can just somehow us one more time, using your own props?

A. That type of overlap

Q. Yes?

A. but the angle being critical.

Q. Yes, yes. The angle being critical to the consequences, in terms of the damage it would do to the occupant of the vehicle, I presume?

A. It is, and it is because it's also, you know, even from an escape from that type of contact

Q. Yes?

A. because you were talking about it not being a full head on

Q. Yes?

A. but if you were to step it back

Q. Yes?

A. a small direction, it was going to end up head on with the angular trajectory of the defence vehicle.

Q. Yes, but I suppose we can only deal with what the actual initial contact was and that's headlamp to headlamp, in terms of the starting point of the --

A. Yes.

Q. Yes, all right?

A. But the trajectory of both vehicles

Q. Yes?

A. would culminate in -- if you were to

Q. Yes?

A. bring the deceased's vehicle rearward a little bit

Q. Yes?

A. it was going to be more and more overlap, more of a contact.

Q. Well, obviously what happened next is clear and tragedy ensued?

A. Yes.

Q. Yes. But from a forensic point of view, the point of contact is headlamp to headlamp?

A. Yes."

Defence counsel's application for a direction.

20. At the close of the prosecution case, counsel for the defence made the following application to the trial judge:

> *"I'm asking the Court to withdraw the case from the jury and direct an acquittal in respect of the sole count on the indictment, being a count of alleged dangerous driving causing death. I'm asking the Court to withdraw it on the basis that the offence has not been made out and is in fact ill conceived. And I'm essentially going to make two submissions to the Court, which come at the issue and the evidence, or the lack of evidence, from two different angles, but ultimately arrive at the same destination and that is a conclusion that there is a fundamental deficit in the evidence which would prevent the case from going to the jury and in fact which would leave the Court with no option in law but to withdraw the case at this time."*

21. The first submission made in support of this application was the assertion made by defence counsel that "*the threshold for dangerous driving has not been met in the legal sense*". Counsel pointed to the "*six express categories averred to*" in s. 53 of the Act of 1961, so as to bring the driving in question into the threshold of dangerous driving for the purposes of the section, namely the speed of the vehicle; the condition of the vehicle; the nature of the collision location, and; the amount of traffic in the area. Counsel for the defence submitted that "*not one of them has application to the case, in terms of securing a conviction, even when taken at the height of the prosecution case.*" He also submitted that there "*is a complete vacuum of aggravating factors which might underpin or elevate or upgrade the driving on display, taking the prosecution case at its height, to the level of dangerousness*", namely, alcohol, phone use, and evidence from which fatigue or emotional instability, medical condition or use of medications could be inferred. It was submitted to be of significance that there was nothing "*sustained, or prolonged or extended about the act of driving that we've heard*, rather that the respondent, in veering across the road, had been "*momentarily inattentive*."

22. Counsel for the defence also opened two UK authorities to the trial judge, *Bensley v Smith* [1972] Crim. L.R. 239 and *Mundi v Warickshire Police* 2001 WL 825259; in which the accused in both cases had been charged with careless driving for veering across the white line on the road. Counsel for the defence also submitted that the consequences of the collision should not be taken into account when assessing whether the charge of dangerous driving had been made out. This submission was framed in the following terms:

> *"it would be particularly dangerous in this case, in my view, to let the case go to the jury, because no matter how many times they are told, there's a real danger that they may well focus on the consequences, the scale of the damage and not look properly at the actual act of the driving itself."*

23. The second submission made by defence counsel in support of the argument that the case should be withdrawn from the jury related to the *mens rea* of the respondent at the time of the incident. This submission was as follows:

> *"Mens rea has a limited role to play in driving cases generally and I'm not in any way contending that the prosecution would have to prove that the accused intended the consequences of his actions; that's not a proof and the onus is not on the prosecution. But there does have to be some level of proof or some level whereby an inference can be made that the driver was aware of what he was doing. He had to have been conscious of what he was doing. Now, that simply -- no such inference is capable of being drawn from the evidence in this case. In relation to that proposition, first of all, before looking at the evidence, I'll hand in, again, a couple of pages from Mr. Woods' book, page 385, under the heading "What constitutes dangerous driving?", and a few lines down he says this: "The determination of what amounts to dangerous driving is by means of a test which concentrates upon the manner of the driving rather than the defendant's state of mind. And in this regard, the offence is absolute in the sense that it is unnecessary to show that the defendant's mind was conscious of the consequences of his actions, it being necessary to show only that he was conscious of what he was doing." So that's a fundamental part of the requirement in relation to the limited mens rea, but there has to be some evidence upon which an inference can be drawn. Now, this doesn't normally apply in the majority of dangerous driving cases, because usually we have straightforward evidence of driving, such as driving through a red light, or a sustained act of driving, zig zagging, going around the corner at an excessive speed, engaging in manoeuvres when visibility is poor, et cetera, et cetera, but it's very, very clear that, rightly or wrongly, the driver has chosen to drive in this particular manner. So that element of the dangerous driving can be inferred readily from the evidence and there's no difficulty. But when you try and marry it with the evidence in this case, it just doesn't seem to there at all.*
>
> *And just before I focus on the evidence, I'll also go back if I could go back to what I'd already handed into you, Judge, from Mr. Pierse's book, one of the passages I handed in, a bundle, was from page 422 to 430, and at page 430 is what I'm relying on, and it refers to the classic test which was expressly mentioned, responsibly so by Ms Buckley during her opening, Judge Ó Briain's direction in the case of Quinlan: "Driving in a manner, including speed, which a reasonably prudent man..." and this is the key bit for my submission -- "…having knowledge of all the circumstances proved in court, would clearly recognise as involving an unjustifiably definite risk of harm for the public." So, in fact, I'll just continue reading what Mr. Pierse says in relation to that test: "This seems to be as good an explanation of the position that one can evolve. It emphasises the objective standard of the reasonably prudent driver's actions in the circumstances proved, and his realising of a direct and serious risk, he must have knowledge (mens rea) of all of the circumstances. This incorporates a subjective element." Now, that's critical, because look at the evidence in this case; there's only one eyewitness, and this is why I was very, very careful with him when he said that he didn't feel there was an overtaking manoeuvre happening. When I teased it out a little bit with him, he in fact offered three grounds for the basis of his evidence. He said that the lorry which was in front of Mr. Page was too far ahead, so it couldn't have been an overtaking manoeuvre. But notwithstanding that, when I asked him, "Well, just to be on the sure side, did you see any indication any indicator being used which might be suggestive of an attempted overtaking manoeuvre?" emphatically the answer was no. Did he see any surge in speed, which again would be suggestive of someone attempting to initiate an overtaking manoeuvre? The answer is no. So on a relatively narrow piece of road, where overtaking can be ruled out, what possible inference can be drawn that would assist the prosecution? How can a jury be satisfied beyond a reasonable doubt? Where is the evidence from which they can infer that this was a choice to drive in that particular manner at that time? The obvious and most damning inference that can be drawn from that particular evidence is an inference that he crossed the line without realising he was doing so. If he didn't realise, he lacked awareness, or to bring it back to Mr. Woods' commentary, he wasn't conscious of what was doing. That's the most damning inference that can be drawn and it's an understandable inference. This was bad driving, taken at its height, inattentive driving, a momentary lapse.*
>
> *Now, in the case of careless driving, the prosecution don't have to go as far with the mens rea. In fact, often the entire point of the exercise is that the driver didn't realise what he was doing when he should have. It's negligence, effectively. So the point of the exercise is to prove that he wasn't aware. But in dangerous driving cases, there must be some level of consciousness, some awareness on the part of the driver, and there's a complete absence of evidence in this case from which that inference can be drawn, and that's properly so, because all the evidence points to, at its height, is - and I keep coming back to it - momentary inattentiveness which is what section 52 cases are classically designed for. So, in my respectful submission, the case has to fail on that ground alone, because a critical and fundamental part of the prosecution proofs simply isn't there on any reading, even taken from the height of the prosecution case, the mens rea isn't there"*

The Prosecution's reply

24. In response to the second limb of the defence's application, counsel for the prosecution pointed the trial judge to O' Malley J.'s judgment in *People (Director of Public Prosecutions) v O'Shea* [2017] 3 I.R. 684, in which she approved the direction given by Judge Barra Ó Briain in *People (Attorney General) v Quinlan* (1962) ILT & SJ 123 that dangerous driving is *"[d]riving in a manner which a reasonably prudent man, having regard to all the circumstances, would recognise as involving a direct, immediate and serious risk to the public."* Counsel for the prosecution followed on from this in submitting that the test for dangerous driving in this jurisdiction is objective, and that the facts of this case certainly fall within this objective rubric. He submitted that: *"[w]hen one drives on the other side of the road, suddenly, 1.7 metres over the line, in the middle of the other side of the road, that of course is driving that presents a direct, immediate and serious risk to the public. It couldn't be anything other than that."*

25. The prosecution sought to further rely on O'Shea and the statement of O' Malley J. therein (at para 68) that:

> *"The concept of intention has always had a very limited role in cases of bad driving. This presumably is because of the ubiquity of the car in modern society, the dangers to members of the public caused by bad driving, and the fact that accidents are rarely intentional on anyone's part. A crash that causes physical injury will generally not constitute an assault.*
>
> *There must certainly be an intention to drive..."*

26. Prosecuting counsel further added:

> *"An intention plays a very small role in this case. He clearly had the intention to drive and he gave an account that he*

intended to drive directly from Galway to from Cork to Galway, and as he drove past the Charleville Park Hotel, which he recollects, he was driving and he intended to drive on his path and continue on his path home, so there's clear evidence that he intended to drive and I'm not required to prove that he adverted to the risk, there's sufficient evidence of intention in that regard."

27. In response to the second component of the defence's application, the prosecution sought to distinguish the two English cases relied upon by the defence, contending that they turned very much on their own facts and that the driving in those cases was considered in the context of whether it was careless or not. Further, it was argued, the court in those cases did not consider whether the driving was sufficient for dangerous driving as that issue did not arise for their consideration.

28. In respect of the defence's argument that the offence of dangerous driving must be of a prolonged nature, the prosecution argued that "*there's nothing to require that there has been a prolonged episode of bad driving, nothing whatsoever. To the contrary, the most learned and simple expression and description of the offence [that of Judge Ó Briain in People (Attorney General) v Quinlan] uses the word 'immediate*.'"

29. Further, the prosecution argued that the nature of the respondent's driving – veering 1.7 metres over the broken white line and into the path of oncoming traffic – clearly met the requisite threshold, as outlined in *O'Shea*; namely that the driving was of such a nature that a reasonably prudent man, having regard to all of the circumstances, would recognise it as involving a direct, immediate and serious risk to the public.

30. With respect to the categories outlined in s. 53 of the Act of 1961, the prosecution emphasised the following facts as demonstrating that the conduct of the respondent in veering across the broken white line amounted to dangerous driving for the purposes of the section; that the road was relatively narrow; that traffic was coming from both directions, and the fact that the road although quiet at the time of the accident was a national primary route and therefore generally busy, a fact confirmed by the evidence of Mr. Casey that "*within minutes there was a queue of cars*". In essence, then, the prosecution's case was that, as a result of the totality of the evidence led, there was sufficient evidence so as to allow the issue to go to the jury, and for the jury to make its determination as to whether the charge of dangerous driving had been made out.

31. Finally, in respect of the argument that there was an absence of aggravating factors tending to elevate the respondent's conduct to one of "*dangerous driving*", the prosecution at trial made the following submission:

"So I would say that it is it would be to usurp the function of the jury to take the case from them at this juncture. The prosecution case, taken at its height, has within it actual evidence of driving in a manner, in all of the circumstances, given the traffic that was actually on the road at the time, did present a direct, immediate and serious risk to the public. And the fact that there are some aggravating factors non-existent in this case, which no one is a saying do exist, that doesn't mean it cannot be an event of dangerous driving causing death. If it were a case -- because my friend had mentioned it, obviously I'm going to reply to it, it is a case that if the Court was leaving the charge of dangerous driving causing death go to the jury, the Court would be telling the jury that they could return a verdict of careless driving causing death. I'm not saying anything other than that, but obviously that would be something for the Court to charge the jury on. I know that Mr. Woods, in his book, and I think my friend has handed in the relevant pages from it, at -- at page 393 of his book, Mr. Woods talks about careless driving and he says, "In other words, careless driving is bad driving rather than dangerous driving." I would say, very simply in this case, this isn't just bad driving, this is dangerous driving. It's going onto the other side of the road, in the middle of the other road and that is more than just bad driving, that that is dangerous driving, because it does present a direct, immediate and serious risk to the public.

And the aggravating requirements, they're not prerequisites. They're not here. We're not saying they're here, and they're not required to be here. We're relying on the actual driving and the manner of that driving, in all of the circumstances, with the two lanes of traffic that then were travelling on the road on the day."

The Trial Judge's Ruling

32. After listening to the arguments on both sides, the trial judge gave his ruling, and ruled as follows:

"JUDGE: I see. I've listened to the evidence very carefully, as everybody has in the last couple of days, in respect of this matter. And these are extremely, extremely difficult cases. They're both extremely difficult from a factual point of view and they're extremely difficult from a point legal point of view as such. And the whole area of dangerous and careless driving and the preferring of charges arising out of accidents and indeed fatal accidents such as we have here as such, is a very, very complex matter and a matter of assessment of the evidence, and the DPP, in her discretion, deciding what is the appropriate charge. And I went through the evidence last night and I made my own notes in respect of the evidence and I was at it for quite a while. And insofar as it's concerned, given the evidence and particularly from the witnesses in the case, Mr. Casey and Mr. Ford, very clear, very, very straightforward. But from my perspective, it's not just about the evidence in the matter. From my perspective, it's I have to look at the charge, which is one of dangerous driving causing death on its own and I have to be satisfied that the charge, based on the evidence, is made out. And quite candidly, I wrote all my notes and I went back through them again for a second time, and I felt, in the overall context of things -- and I know that the interpretation that may be taken is that I'm deciding the facts in this case; I'm not. I've heard the facts as such, like everybody else and the jury has heard, but insofar as it's concerned, I had my doubts about the charge, the charge of dangerous driving causing death. And I actually felt that with -- I can say it from a position of experience in matters of this nature, in cases of this nature, that I thought that the charge of careless driving causing death would have been more appropriate in the circumstances. And I would be concerned that be it a charge of careless driving causing death or a charge of careless driving causing death going to a jury as such, in the circumstances that we have in this particular case, I would be very, very concerned that the consequences would outweigh the analysis of the driving and effectively the case is about the analysis of the driving.

Now, I am extremely, extremely conscious of the fact that there is a fatality in this particular road traffic accident, and Mr. C was here yesterday in respect of matters, and I just want it to be stressed that I am clearly conscious of the sense of loss that is there because of the particular accident. But I have a responsibility insofar as the law is concerned and I would have to say that I am not satisfied, based on where we're at at the moment, that it is appropriate to let a charge of careless driving causing death go to the jury.

DEFENCE COUNSEL: Dangerous driving.

JUDGE: Sorry, dangerous driving causing death go to the jury. And I am also conscious of the fact that it's -- I'll call it a two step process. If I were of the view that the dangerous driving charge should go to the jury, I can advise the jury that having considered the question of dangerous driving, if they are satisfied that the charge has not been proved beyond reasonable doubt, as is the onus on the State in the matter, that they could consider a charge of careless causing death, if they are satisfied again that the State have proved its case beyond reasonable doubt. But insofar as it's concerned, there is one charge on the indictment, the single charge of dangerous driving causing death, and I'm not sure I'm not satisfied that where we're at in the evidence in this matter, that this matter should go to the jury and I'm going to give the jury the appropriate direction accordingly, as such."

The Present Application

33. In her Notice of Application, dated the 26th of February 2018, the applicant seeks the following orders and determinations:

> i. A determination that the trial judge directed the jury to find the respondent not guilty in circumstances where the direction was wrong in law and the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned within the meaning of section 23 (3) (b) of the Criminal Procedure Act, 2010.
>
> ii. An order that the subsequent acquittal be quashed.
>
> iii. An order that the respondent be retried in respect of the charge of which he had been acquitted by the jury in the trial court at the direction of the trial judge.

The Applicant's submissions concerning the present application

34. In his written submissions, after rehearsing the applicable legal principles as set out in *R v. Galbraith* [1981] 1 WLR 1039, the appellant submits that the correct test to be applied by the trial judge in this case was whether, taking the prosecution case at its high point, there was sufficient evidence upon which a properly charged jury could return a guilty verdict. It is argued that, in contrast, what occurred in the present case was that the trial judge's decision was unduly influenced, and that he was led into legal error in dealing with the application for a direction then before him, by his own view that the charge preferred should have been one of careless driving causing death. In support of this contention the applicant points to the statement of the trial judge in his ruling that "*I thought that the charge of careless driving causing death would have been more appropriate in the circumstances.*" Thus, it is submitted, the trial judge essentially usurped the role of the jury and was overly influenced by his own view of the evidence, a course of action expressly proscribed by part 2(b) of Lord Lane's *Galbraith* test. The concerns of the trial judge, the applicant argues, could have been allayed by an appropriate charge to the jury.

35. Further, the applicant argues that the trial judge's concern that "*the consequences would outweigh the analysis of the driving and effectively the case is about the analysis of the driving*", was misplaced and his ultimate decision to withdraw the case from the jury was wrong in law. In this regard, we have been referred to the well-known textbook, "Road Traffic Offences" by James V. Woods. The author has this to say concerning what constitutes dangerous driving: -

> *"Whether a person has driven in a manner dangerous to the public is a question of fact for the court to decide in each particular case. For this reason reported decisions should be applied with caution and, even if a reported decision can be found to fit the facts of a case at hearing, there must be inevitably be some material variation in weather, light, traffic or some other factor. The determination of what amounts to dangerous driving is by means of a test, which concentrates on the manner of driving rather than the defendant's state of mind…"*

36. Thus, the applicant submits that there was sufficient evidence of dangerous driving – in circumstances where the respondent veered across a broken white line by 1.7 metres (where each lane measured 3.3 metres in width) into an oncoming lane of traffic on the other side of the road – so as to allow the case go to the jury. The "*nature, condition and use of such place*" and "*the amount of traffic which was … therein*" were such that there was sufficient evidence of dangerous driving for the matter to go to the jury. It is further submitted that, while there was no evidence that speed was a factor in the collision, the relevant section specifically provides that evidence that the speed limit was not broken this is not a defence.

37. The applicant has also drawn our attention to the principle, applied in *People (AG) v Clifford* (Cir.Ct.) (1962-1963) Ir Jur Rep 41, that, where a direction is granted on dangerous driving, a jury cannot then convict of the lesser charge of careless driving. Thus, the applicant says, in a situation where the state of the evidence would have permitted the charge of dangerous driving causing death to go to the jury, then notwithstanding the judge's personal view that dangerous driving causing death should not have been preferred as a charge, it should still have been allowed to go to the jury. It is suggested that if it had indeed been allowed to go the jury, the jury would, in the event of not being satisfied to convict of dangerous driving causing death, have had the option of returning an alternative verdict on the lesser charge of careless driving causing death. However, the applicant submits that, as a consequence of the trial judge's decision to grant a direction on the dangerous driving causing death charge, it had the practical consequential effect of depriving the jury of the possibility of considering careless driving causing death as an alternative.

38. The applicant has further drawn our attention to a decision of the former Court of Criminal Appeal in *People (Director of Public Prosecutions) v Higginbotham* (unreported, Court of Criminal Appeal, 17th November 2000) [2000] WJSC-CCA 2675, and we are asked to contrast the circumstances in the present case with those in the *Higginbotham* case. Giving judgment for the court, Keane C.J. in upholding the decision of the trial judge to accede to an application for a direction in a case of dangerous driving causing death, stated as follows:

> *"The court was satisfied, that at the close of the prosecution's case, the evidence was such that a properly directed jury could not have arrived at a conclusion beyond reasonable doubt that the applicant's van was, at the time of the fatal collision, being driven by the defendant in a manner (including speed) which, having regard to all the circumstances of the case, was dangerous to the public. As already noted, Mr. Kelly could say no more than that the van was 'not going slow'. Mr. Rossiter gave no evidence as to the speed at which it was travelling. As to the manner (other than speed) in which it was being driven, no doubt if this were a civil case, the doctrine of res ipsa loquitur could have been invoked so as to entitle the plaintiff to judgment in the absence of any explanation by the defendant as to how the accident had occurred. In a criminal case such as this, however, the onus of proof remains on the prosecution to satisfy the jury beyond reasonable doubt that the necessary ingredients of the offence were present and, at the conclusion of*

the prosecutor's case, in the absence of any evidence as to the vehicle being driven at a dangerous speed or otherwise in a dangerous manner and the existence of a reasonable possibility that the accident had been caused by the defendant's van going out of control on an oily surface, the jury would have been obliged to give the benefit of the doubt to the defendant. A fortiori *, at the conclusion of the evidence on behalf of the defendant, including his own evidence that the car went out of control when he attempted to apply the brakes, the evidence of the engineer that the presence of the oil would have rendered the road surface less skid resistant and the evidence of Mr. Maguire that there was no indication of any oil leaks from either of the vehicles after the collision, a conclusion by the jury that the prosecution had established beyond any reasonable doubt that the defendant's van was being driven at the time in a manner (including speed) which, in all the circumstances then prevailing, was dangerous to the public could not be regarded as a safe or satisfactory verdict.*

For these reasons, the court treated the application for leave to appeal as the hearing of the appeal, allowed the appeal and substituted for the order of the court of trial an order quashing the conviction without ordering a retrial."

39. Counsel for the applicant distinguishes the present case on its facts in that, in the present case at the conclusion of the prosecution case there was clear evidence that the vehicle was being driven in a dangerous manner and there was no evidence that the respondent had lost control of the vehicle for any reason at the relevant time.

The Respondent's submissions concerning the present application

40. The respondent submits that it is evident from the trial judge's ruling that he approached the legal issue and the evidence very carefully; and he stated explicitly that in deciding whether or not to grant a direction he would not be deciding the facts of the case. His meticulous attention to the evidence, it is argued, was also evident throughout the trial, as the trial judge asked that Mr. Reddy clarify his evidence again using the same aids as he had done previously (his phone and his wallet) so as to clarify the tenor of his evidence. Thus, the respondent argues that the trial judge was best positioned to assess that particular evidence and was certainly at a considerable advantage over any appellate court which is restricted to reviewing transcripts reflecting oral testimony.

41. In respect of the evidence more generally, the respondents point to the following factors as supporting the trial judge's decision to withdraw the case from the jury; there was no evidence of speed being a factor in the case, as evidenced by the evidence of Mr. Casey; the respondent's vehicle was not defective in any manner and the accident was not caused by any such defect that might incriminate him, as appears from the testimony of Garda Reddy Garda. Turning to "*the nature, condition and the use of the place*" the respondent's assertion, in seeking to refute the applicant's contention that it was a busy road, is that Mr. Casey's explicit evidence was that there was little to no traffic at the actual time of the accident (as opposed to post-accident). It was further submitted that there was no evidence of the respondent having taken alcohol, or any form of intoxicant, before or whilst driving; the evidence of Garda Elaine O' Donovan ruled out mobile phone use as a possibility; neither was there any evidence of fatigue, medication related negligence, suicidal ideation or any form of emotional instability on the part of the respondent which might have contributed to the accident. Indeed, counsel for the respondent highlights the respondent's own account – in his memo of interview with Gardaí- as introduced as part of the prosecution's evidence, which suggested that he had gone to bed relatively early on the night before in preparation for his job interview the following morning, which he felt had gone well. The respondent further points to the fact that the respondent was a fully qualified driver at the time, and the fact that the evidence disclosed that his vehicle crossed a broken white line and not a continuous one. Furthermore, the respondent's counsel places emphasis on the fact that the collision was described as a "*headlamp to headlamp*" strike by Garda Reddy; and the fact that the manoeuver was sudden and momentary in nature, involving crossing to the incorrect side of the road at a "*slight angle*" as testified to by Mr. Casey. This angle was estimated by the PSV Inspector as being approximately 20 degrees, and no issue was taken by him with Mr. Casey's aforesaid characterization of the angle as "*slight*". The PSV Inspector also testified that this type of collision is "*fairly common in our road network*" with a large proportion of our roads being two way systems as opposed to dual carriageway or motorway type set ups.

42. With reference to the the test as laid down in *People (Attorney General)v Quinlan*, as approved in *People (Director of Public Prosecutions) v O'Shea*, the respondent re-emphasises that Mr. Casey's direct evidence was that "*The road was actually quiet on the day, around that time of the day it was quiet, actually…There was one car there was just the one car in front of me all the time, actually no car passed me out on that road that day*". He also points, in this context, to the evidence of Mr. Forde that the respondent's car was the only car in front of him on the day in question – some 300 metres in front of him. The applicant submits that if the test as laid down in Quinlan is applied to these facts, neither Mr. Casey nor Mr. Forde could be said to have been, at any stage, under a "*direct, immediate and serious risk.*"

43. The respondent also submits that this tragic accident effectively occurred in the blink of an eye. The fact that the nature of the driving was sudden and momentary was a factor tending to reduce the respondent's conduct to careless driving. Further, it is submitted that the cases relied upon during the direction application had a number of similarities to the present case. In *Bensley v Smith* [1972] Crim L.R. 239, it is submitted, the defendant was the driver of a car that crossed a central white line, encroached on the carriageway on his offside, and collided with a car coming in the opposite direction. There was no evidence of a mechanical or vehicular defect; no evidence of his own physical condition being a factor and, just as in the instant case, the accused had no memory of the impact. The line crossed was described in the judgment simply as a "central white line" which arguably suggests it was a continuous line rather than a broken white line. While the defendant in *Bensley* was originally acquitted, that acquittal was reversed on appeal and it was held that the crossing of the white line was evidence of careless driving. The charge in the case was careless driving – notwithstanding a central white line was crossed onto the incorrect side of the road and there was an impact with a car coming in the opposite direction. There was no suggestion that the driving amounted to dangerous driving in the legal sense.

44. The second judgment opened during the direction application was that of *Manjit Singh Mundi v Warwickshire Police* [2001] EWHC 447. In this appeal to a Divisional Court in the Queen's Bench Division of the High Court of England and Wales, which was by way of a case stated, the evidence was that the appellant, who was challenging his conviction before a Magistrates Court for careless driving, had transgressed onto the incorrect side of the road. Half of the car was on the wrong side when a collision occurred with a vehicle coming from the opposite direction. The question for the opinion of the Divisional Court was whether on the facts found the magistrates were entitled to conclude that the appellant's driving had not shown the degree of care and attention expected of a reasonable and prudent driver in such circumstances. In dismissing the appeal, the Divisional Court applied *Bensley v Smith*, stating that it is settled law that crossing a central white line in the absence of an explanation is in itself evidence of careless driving. Again, while it is accepted that this prosecution was in respect of careless driving and not dangerous driving, the respondent asks us to attach significance to the fact that a collision with an oncoming car arising from a sudden departure onto the incorrect side of the road was considered in that case to be careless driving.

45. Counsel for the respondent also seeks to refute the contention of the applicant that the trial judge became "*completely distracted*" by his own view of what the appropriate charge should have been. On the contrary, it was submitted, the trial judge was mindful that dangerous driving causing death was the only charge on the indictment and that a jury could convict in relation to the

lesser charge of careless driving causing death, but only if there was evidence upon which a properly charged jury could possibly convict in respect of dangerous driving causing death. The trial judge, being of the view that there was no evidence upon which a properly charged jury could possibly convict in respect of dangerous driving causing death, had been right to grant the direction sought. The non-availability in those circumstances of an alternative charge to be considered by the jury was irrelevant.

46. Finally, the respondent submits that the applicant failed to include an important caveat to the *Galbraith* test in their analysis of the present case, namely that "*[t]here 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.*" In this regard, the respondent submits that this case, even when taken from its height, is no more than a borderline case and its determination was well within the discretion of the trial judge. Thus, the respondent submits that in all the circumstances, the trial judge was entitled to form the view that the sole charge in respect of the manner of driving had not been properly made out and by inference that no jury properly charged could properly convict the accused in respect of that particular class of offence on the evidence before him.

Discussion and Decision

47. We do not attach very much significance to the English cases of Bensley v Smith [1972] Crim L.R. 239 and *Manjit Singh Mundi v Warwickshire Police* [2001] EWHC 447, which were put before us for their persuasive influence. First of all, in both of those cases the offending conduct was charged as careless driving. However, there was nothing in either judgment to suggest that it might not have been charged as dangerous driving, had the prosecutor seen fit to do so. The focus in both cases was whether or not the charge of careless driving was made out, and all they establish of potential relevance to the present case is that crossing the centre-line on a road into the path of on-coming traffic is at least careless driving. Secondly, neither case establishes any legal principle of possible relevance – even on a persuasive basis – bearing on whether the respondent's driving could have amounted to dangerous driving, which is the issue that we are required to consider in the present case. Whether or not the conduct at issue in those cases could have amounted to dangerous driving was simply not considered.

48. The law on what can constitute dangerous driving in this country was most recently set out in the judgment of O'Malley J. in the Supreme Court case of *People (Director of Public Prosecutions) v O'Shea* [2017] 3 I.R. 684, namely that dangerous driving is *"[d]riving in a manner which a reasonably prudent man, having regard to all the circumstances, would recognise as involving a direct, immediate and serious risk to the public."* Moreover, as the submissions have correctly identified, the manner of driving constitutes the *actus reus* of the crime and only the general *mens rea* of intentional driving is required. It is not necessary that the accused should have intended to drive dangerously. The conduct constituting the actus reus can be committed negligently (*e.g.*, by inattention or misjudgement), recklessly (*e.g.*, by driving while under the influence of an intoxicant), or intentionally (*e.g.*, a joy-rider who deliberately engages in a dangerous manoeuvre in an effort to escape gardaí in hot pursuit of him). However, whether the dangerous driving conduct was negligently, recklessly or intentionally engaged in only bears on culpability (a matter clearly relevant to sentencing following conviction) but it does not bear on liability. It is sufficient for liability purposes that there was an intention to drive at the time that the dangerous driving was engaged in.

49. We have heard extensive arguments from both sides concerning whether the evidence relating to the manner of the respondent's driving was sufficient to have allowed the charge of dangerous driving causing death to go to the jury. On the state of the evidence at the end of the prosecution case there was no explanation for why the respondent should have crossed from his correct side of the road to his incorrect side of the road at the point at which he did. However, the circumstances were open to the inference that he became somehow distracted, or was simply momentarily inattentive, such that he lost situational awareness and did not realise that he was drifting from his own side of the road on to the incorrect side of the road. Was that dangerous driving? Arguably it was. In our view the issue should certainly have been left to the jury.

50. It is of course the case that not every incidence of such inattention could be characterised as dangerous. For example, if he had been driving along a normally very quiet road at 5 a.m. on a Sunday morning, with nothing coming against him, but happened to be observed by the occupants of an unmarked Garda car travelling behind him, momentarily drifting across the white line before realising that he had so drifted and taking corrective action, a strong case might be made that what he had done was certainly careless but not necessarily dangerous in that particular instance. However, that was not what happened in this case. The respondent was travelling along the N.20, the main Cork/Limerick road, which is a national primary route and by definition a busy road most of the time. Moreover, there was in fact traffic coming against him, i.e., the deceased's motor car. It can be readily argued that a reasonably prudent man, in those circumstances, would have appreciated the imperative of maintaining full attention to his driving, and of not allowing himself to become somehow distracted (if indeed that is what occurred), or of allowing his attention to wander momentarily, to the point of losing situational awareness and directional control of his vehicle. The actual evidence adduced at trial readily admits of the possibility that a jury could conclude that a reasonably prudent man would consider that in crossing, by reason of inattention, from his correct side of the road on to his incorrect side of the road in the face of an on-coming vehicle, he created a direct, immediate and serious risk to any person of persons who might have been travelling in that vehicle. In our view, there was certainly evidence that would have allowed the jury to conclude that the respondent was guilty of dangerous driving, and the matter ought to have been allowed to go to the jury.

51. The trial judge's rationale for not allowing the case to go to the jury is set out in his judgment. This was not an easy case, and we are satisfied that he approached the matter conscientiously and with care. He focussed on two issues in particular, that were evidently troubling him greatly. In our view, however, these issues were not of central relevance to the issue that he had to decide at that point, and in focussing unduly on them he fell into error. It appears that he was influenced by his personal belief that a charge of careless driving (causing death) would have been more appropriate and also by a concern that the jury would focus unduly on the consequences of the respondent's driving, rather than on an analysis of his driving. As regards the first of these considerations, the nature of the charge was not a relevant consideration in terms of whether the matter should be allowed go to the jury. On the contrary, the issue that ought to have been concentrated upon was whether, taking the prosecution's evidence at its high water mark, there was sufficient evidence on which a jury, properly charged, could convict of dangerous driving causing death. The trial judge did not directly engage with that question, and the failure to do so was an error. As regards the second issue, namely the concern about there being an undue focus on consequences, his apprehension in that regard was understandable. However, this was, in our view, a matter capable of being addressed by means of careful instructions to the jury. To the extent that he failed to consider the possibility of giving such instructions, that was also an error.

52. We should record in passing that although it was argued by both sides that the effect of the direction was that careless driving causing death could not then be left to the jury, we were not addressed on whether s.53(4) of the Act of 1961 as substituted by s. 4 of the Road Traffic (No. 2) Act 2011 would have had any impact upon the principle enunciated in *The People v Clifford*. It is not necessary for us to engage with that issue in order to decide this case, but we are not to be taken as having accepted the proposition that careless driving causing death could not have been left to the jury, notwithstanding the direction on dangerous driving causing death. Rather we are to be taken as having expressed no view on it one way or the other. It may be an issue for another day in another case.

53. We will allow the appeal.