VOLZ v THE QUEEN

Court of Criminal Appeal of the Northern Territory of Australia

Asche CJ, Kearney and Martin JJ.

28, 29 March and 29 May 1990, at Darwin.

Appeal-wrongful reception of evidence - whether substantial miscarriage of justice - applicable test.

Criminal Law - dangerous act - whether driving under the influence of intoxicating liquor can constitute an offence under Criminal Code s.154(1).

Criminal Law - dangerous act particularised as driving at excessive speed - whether concomitant state of intoxication to be viewed as a cause of the act or as a circumstance relevant to its dangerousness - Criminal Code ss.154(1) and (4).

Evidence - driving at excessive speed charged as dangerous act under Criminal Code s.154(1) - use to which evidence of concomitant intoxication can be put - whether relevance of intoxication to guilt analogous to motive, as a reason for act charged - Criminal Code s.154(1).

Practice and Procedure - ground of appeal that verdict against the weight of evidence - need for notice of appeal to identify the parts of the evidence relied upon, and its deficiencies.

Statutory Interpretation - Criminal Code ss.154(1) and (4).

Cases followed:

Baumer v The Queen (1988) 166 CLR 51
Chamberlain v The Queen (1984) 57 ALR 225
Maric v The Queen (1978) 52 ALJR 631
Morris v The Queen (1987) 163 CLR 454
Plomp v The Queen (1963) 110 CLR 234

Cases distinguished:

McBride v The Queen (1965-1966) 115 CLR 44
Reg v Juraszko (1967) Qd R 128

Cases referred to:

R v Ireland (1987) 49 NTR 10

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IN THE COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA

No. CA14 of 1989

BETWEEN:

KURT BERNARD VOLZ
Appellant

AND:

THE QUEEN
Respondent

CORAM: ASCHE CJ., KEARNEY AND MARTIN JJ.

REASONS FOR JUDGMENT
(Delivered 29 May 1990)

ASCHE C.J.

I agree with the judgment of Martin J. and the orders proposed by him.

KEARNEY J.

The issues on this appeal, and the matters which gave rise to those issues, are set out and discussed in the judgment of Martin J, which I have had the benefit of reading.

As to the second and third grounds of appeal I agree with Martin J, for the reasons which his Honour has stated, that no substantial miscarriage of justice actually occurred from the reception into evidence of the testimony of Mr Smart and Sergeant Tuckwell.

The fourth ground of appeal attacked the direction by the learned trial Judge that the jury could take into account evidence of intoxication under s.154(1) of the Code. Section 154(1) is set out by Martin J; it renders certain acts criminal.

The Indictment, as far as material, provided as follows:

> "[The accused] - - did an act, namely, drove [a vehicle] - - upon Shady Lane, Katherine, at an excessive speed so as to be unable to control the said vehicle thereby causing the said vehicle to leave the road and come into collision with a tree, which act caused serious danger to the life - - of [a passenger in the vehicle] in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done that act, which act was accompanied by the following circumstances of aggravation, namely - - at the time of doing the act [the accused] was under the influence of alcohol."

What was the criminal "act" charged? I consider it was the driving of the vehicle at a speed so excessive as to render the accused unable to control it properly. That was the

basis upon which the trial was conducted, and on which the learned trial Judge summed up to the jury; see, for example, Appeal Book pp.14.8, 143.8, 148.5, 149, 186.8, 187.3, 190.7, and para.3 of his Honour's aide memoire to the jury. I consider that the further allegations in the Indictment that the vehicle thereby left the road and collided with a tree relate to the consequences of the dangerous act charged, and are not part of that act itself. As material consequences they constitute circumstances surrounding the commission of the dangerous act, and are properly particularized in the Indictment. The further allegation in the Indictment that at the time the accused did the act charged he was under the influence of liquor, is accurately described therein as a "circumstance of aggravation", in view of the definition of that phrase in s.1 of the Code and the greater punishment provided by s.154(4). I consider that in the circumstances this circumstance of aggravation could be relied upon by the Crown as a circumstance which "accompanied" the "act" charged; that is, as a further material circumstance surrounding the commission of the offence. This will commonly be the case.

As Martin J has pointed out, in a case such as this evidence relating to the surrounding circumstance of intoxication is relevant to guilt. As the High Court

pointed out in Baumer v The Queen (1988) 166 CLR 51 at p. 56:-

> "It would not be surprising if in many cases under s.154 - - - the influence of an intoxicating substance was the only explanation for the commission of the offence."

I consider that in an appropriate case driving while under the influence of intoxicating liquor, simpliciter, may be charged as a dangerous act, under s.154(1); this was conceded both at the trial (Appeal Book p.16) and by Mr Mildren Q.C. before this Court (transcript, p.108). It was also the view of the trial Judge (Appeal Book, p.146). This was the way the Indictment was formulated in R v Ireland; it is set out in (1987) 49 NTR 10 at p.11. See also the observation by Muirhead J in Ireland at p.28 that "there may be cases where the fact that an accused is under the influence of liquor alone turns a legitimate or lawful act into a dangerous act". In such a case the maximum punishment would be 9 years imprisonment, not 5.

Martin J has set out that part of the direction of the learned trial Judge which gave rise to the fourth ground of appeal. His Honour had, rightly with respect, rejected during the trial a submission that the structure of s.154 was such that evidence of intoxication was always

inadmissible on a charge under s.154(1); the submission had been that no such evidence could be led until guilt had been established (Appeal Book, pp.19, 26-28, 150). As his Honour said in that connection, s.154(5) has created difficulties in the interpretation of s.154, particularly when its correlation with s.31(3) of the Code is considered.

However, in this Indictment, the Crown had not charged driving under the influence as a dangerous act; his Honour considered that it "should have been" charged and that in not doing so the Crown had "slipped up" (Appeal Book, p.148). His Honour ruled that he would tell the jury "that driving under the influence of liquor is not a specified dangerous act [in the Indictment] but they may have regard to the alcohol as part of the background in deciding the degree of probability of the existence at the relevant time of the dangerous acts actually alleged." (Appeal Book, p.30 see also p.150). His Honour later said:-

> "They [that is, the jury] can have regard to the intoxication for the purpose of enabling them to more readily explain the speed, but that's all. They can't have regard to it as a dangerous act in itself" (Appeal Book, p.146).

His Honour summed up to the jury on this basis (Appeal Book, pp.184-5). At Appeal Book p.197 his Honour put the significance of alcohol in this case to the jury as follows:-

> "- - if you find that he was intoxicated, you may regard alcohol as a circumstance with the other circumstances from which - - it may be possible for you to draw an inference that he was driving at an excessive speed in the circumstances.
> - - Because alcohol affects judgment and reaction time, it is more dangerous for an intoxicated person to drive at a certain speed in a given set of circumstances than it is for a person who is not intoxicated because he is less able to react to an emergency that might arise in the situation."

It can be seen that the learned trial Judge put intoxication to the jury as a circumstance relevant to assessing the dangerousness of whatever speed the jury found the accused to have driven at. With respect to those who take a different view, this direction appears to me to be completely correct. The Indictment had not charged driving while under the influence of liquor as the dangerous act in itself (though it could have), and his Honour did not direct the jury to that effect. I reject the fourth ground of appeal.

The first ground of appeal was that the verdict was against the evidence and the weight of the evidence. The Notice of Appeal should have identified the critical parts of the evidence relied upon, and set out its alleged deficiencies; although the matter was ultimately clarified, the proper procedure should be observed in future. The question to which this ground gives rise is whether on the circumstantial evidence placed before it the jury should

have had a reasonable doubt that the accused was guilty of the particular offence charged in the Indictment. I concur in the opinion of Martin J, for the reasons his Honour states, that on that evidence the jury should have had a reasonable doubt as to whether the accused's loss of control of the vehicle was caused by excessive speed as opposed to some other cause.

Mr Karczewski submitted that it was open to the jury to found its verdict on some cause suggested by the evidence other than excessive speed; he relied on observations by Barwick CJ in McBride v The Queen (1965-1966) 115 C.L.R. 44 at p.49. The learned Chief Justice there stated:-

> "- - if the evidence could properly suggest to the jurymen some other feature of the applicant's driving as itself dangerous to the public, the jury should be told that they are competent to treat that feature of the driving rather than the feature or features of the driving shown as dangerous by the Crown, as in breach of the section."

In the present case, the case was conducted throughout on the basis on which the Crown had formulated its case in the Indictment; accordingly, the jury were not told that they could approach their decision-making on the basis that the evidence warranted a conclusion that some cause other than excessive speed was the cause of loss of control. They

could not properly have founded their verdict on such a basis, in those circumstances. Similarly, the observations by Stable J in Reg v Juraszko (1967) Qd.R. 128 at pp.134-135 on which Mr Karczewski relied, are inapplicable here; the Crown limited the issues in this case by the way it framed the Indictment and presented its case.

As I consider that the appellant succeeds on his first ground of appeal, I agree that the appeal should be allowed and the conviction quashed.

MARTIN J.

On 13 October 1989 the appellant was found guilty on an indictment for that "on 5 December 1987 he did an act, namely drove a Ford Falcon Station Wagon upon Shady Lane, Katherine, at an excessive speed so as to be unable to control the vehicle properly, thereby causing it to leave the road and come into collision with a tree, which act caused serious danger to the life, health or safety of a member of the public, namely Steven Dean Jessen, in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not done that act". The jury also found that there were circumstances of aggravation, namely, that Volz thereby caused the death of Jessen and that at the time of doing the act the appellant was under the influence of alcohol.

The offence and elements of the offence are prescribed by s. 154(1) of the Criminal Code, and the aggravating circumstances when found, after the offence has been proved, increase the maximum penalty for the offence, s. 154(3) and (4) (Baumer v R (1989) 166 CLR 51).

All but one of the grounds of appeal raise questions of law going to evidentiary rulings of the learned trial Judge. The remaining ground is that the verdict was against the evidence and the weight of evidence. Section 410(b) of the Criminal Code provides that leave to appeal is required against conviction that involves a question of fact. That leave was given.

The first ground of appeal is that His Honour erred in law in that he failed to exclude the evidence of Mr Smart. That witness observed a motor vehicle of the same make, type and colour as that involved in the accident about 1½ hours before the accident. He described some unusual movements of that car. The driver of the vehicle at that time was not recognised. Clearly the evidence was inadmissible and the Crown concedes the point. In his summing up His Honour suggested to the jury in strong terms that it regard Smart's evidence as unreliable, that the evidence be put out of mind and forgotten altogether. That was a strong and sufficient warning to the jury that the

evidence was to be disregarded and I see no reason why the jury would not have obeyed that direction.

The next ground of appeal is that His Honour erred in law in that he failed to exclude the opinion evidence given by Sgt Tuckwell, a member of the Territory Police Force. He gave evidence of what he observed at the scene, "a green Ford Falcon station wagon, South Australian registration, SSC-151 at right angles across the road, with the front of the vehicle embedded in a tree" to the side of the road. He said the tree was impaled on the front of the vehicle to a depth of a half to three quarters of a metre, forcing the engine and parts of the front of the vehicle into the front passenger compartment. There is no dispute that the appellant was the driver of the vehicle at the time of the accident nor that the deceased was a passenger in the vehicle and died as a result of the injuries he sustained. No eye witness account of the circumstances of the collision was put in evidence.

The Sergeant went on to describe what he said was depicted in photographs of the scene including the road, which was unsealed. During the course of that description he referred to various slide marks and wheel marks which he said were made by the tyres of the vehicle. He also told of measurements being taken and of a plan being prepared, which

was admitted by consent. The plan shows a section of the road and what are described as "TYRE MARKS", "START SKID RHS" and "START SKID LHS", "SKID A", "SKID B", "SKID C", "SKID D". "RHS" and "LHS" stand for right hand side and left hand side respectively. At a distance of 70m from the point of impact there is one "TYRE MARK" depicted for a distance of about 16 metres, then over a distance of 4 metres the one mark becomes two. At that point, (described as "START SKID RHS") 50 metres from the point of impact, there appear two further marks (described as "START SKID LHS") and those four marks are depicted as diverging slightly to the left of the centre of the road until the furthest left hand mark ceases at a windrow on the left hand side of the road, the other three marks continuing until just prior to the point of impact of the car with the tree. No objection was made at that stage to the opinions expressed by the Sergeant in his oral evidence and as contained in the plan. However, objection was then made, in the absence of the jury, to any questions which might seek an expression of opinion from the Sergeant as to how the accident occurred, upon the basis that he was not qualified to do so. Counsel for the Crown indicated that he would seek to qualify the witness by leading evidence from him as to "certain marks on the roadway, what those marks indicated to him as being part of the car, which car they belonged to, where they led and any conclusions ...". He was then

interrupted and discussion ensued with His Honour during which counsel indicated that the witness might also give evidence as to how the car came to be at right angles to the road, in that it "hit the tree with such impact that the back actually bounced around. He can say that from the positions of the skid marks or the tyre marks leading up to the tree and stopping and the back of the car being found where it was". Counsel for the appellant said that if that was as far as the evidence was going he thought the witness could certainly give it.

Counsel for the Crown led the Sergeant through his experience and qualifications. The Sergeant had been a member of the force for 15 years and had performed a variety of duties, including traffic duties involving investigation of fatal or otherwise serious motor vehicle accidents. He estimated that he had investigated about 6 fatal accidents and numerous other serious accidents. After the accident giving rise to this matter, he had attended a course in relation to the investigation and interpretation of accident scenes, conducted by the Territory police force. He then proceeded to give further explanations of the features described on the plan without objection. Some of those explanations involved expressions of opinion, for example, in describing some marks as "Slide marks" or "tyre marks", and attributing to the marks described on the plan

the source of the marks, for example, as being caused by "the drivers side rear" and "passengers side front". The plan showed that the marks described as tyre marks and the like ceased 2.8 metres away from the tree with which the car had collided. Counsel for the appellant then objected to a question designed to elicit from the witness an opinion as to how the car came to be in the position in which it was found. His Honour allowed the question saying it was within the expertise of the witness "to give this kind of opinion", noting that it was only an opinion which the jury would treat as such. The Sergeant then said that the wheel tracks indicated that the vehicle was "off centre", that being indicated by the 4 distinct marks. "Therefore, it's hit the tree, again at that slight angle, and, as a result of the front of the vehicle hitting the tree, the rear of the vehicle has lifted for a distance and then come down to where it's rested at right angles across the road".

The essence of the charge, as detailed in the indictment, is that the appellant drove the car at an excessive speed which caused serious danger to the life of the deceased Jessen. The other matters pleaded, namely, loss of control, leaving the road and colliding with a tree, were alleged as links in the chain of causation from the speed to the danger. There was no direct evidence of the speed at which the vehicle was being driven at the relevant

time, that is, the time prior to the losing of control. What the prosecution attempted to prove was excessive speed by inference derived from facts it hoped to prove.

His Honour summed up the Crown case on this aspect of the matter by referring to the loose or gravel surface of the road, the corrugations in it, the wheel and other marks described by witnesses and depicted on the plan, how the vehicle came to be in the position in which it was found and the damage to it. As to the evidence of the Sergeant, His Honour directed the jury that although he had given opinion evidence "you will consider his opinion, but remember that they were his opinion and you will consider his opinion looking at that diagram, but remember you have to make the decision yourself ultimately, what the evidence signifies. There's a certain degree of expertise in Sergeant Tuckwell because he told you of his experience and the fact that he'd done a course, albeit after this event, but he did a course in 1988 which is part of his mental equipment, if you like, for giving evidence. So there's a degree of expertise there to which you can give some weight, but as I say, remember you don't blindly accept what any witness says, you must look at it critically in the proper sense of that word, before you accept it". Those directions were consistent with the ruling His Honour had previously made as to the expertise of Sergeant Tuckwell, although it

must be noted that that ruling was only made after objection to the question put to the Sergeant by the prosecutor relating to the movement of the car after it hit the tree and related only to that question.

Later in his summing up, after hearing submissions from counsel for the appellant, the learned trial judge redirected the jury as to the opinion expressed by Sergeant Tuckwell, saying that he was not an expert and directing the members of the jury that they were to disregard his opinions about the movements of the vehicle. His Honour also told them that they were entitled to form their own opinions without the assistance of experts - "but it must be your opinion and you can't adopt the Sergeant's opinion". No evidence was sought to be elicited as to the speed of the vehicle at any stage. All that was sought to be explained was how the vehicle came to be at right angles to the roadway after having struck the tree. The answer is obvious, that is, the momentum of the vehicle after the collision caused it to slew around the tree with the front of it acting as a pivot point. No expertise was required to explain that. In all the circumstances I do not consider that any substantial miscarriage of justice occurred as a result of His Honour's first permitting the Sergeant to express his opinion as to how the vehicle came to rest where it was. In saying this I bear in mind the test to be

applied in determining whether the wrongful admission of evidence has caused a miscarriage of justice. I am satisfied that that irregularity does not affect the verdict and that if that had been the only irregularity, the jury would certainly have returned the same verdict if the error had not occurred (Maric v The Queen (1978) 52 ALJR 631 at 635).

The next ground of appeal is that "the learned trial judge erred in law in that he directed the jury that they could take into account evidence of intoxication under s. 154(1)".

The subsection of the Criminal Code reads as follows:

> (1) "Any person who does or makes any act or omission that causes serious danger, actual or potential to the lives, health or safety of the public or to any member of it in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years".

An "act" is defined (s. 1) in relation to an accused person, as meaning "a deed alleged to have been done by him; it is not limited to bodily movement and includes the deed of another caused, induced, or adopted by him or done pursuant to a common intention".

There is no express reference to intoxication as being an element of the offence. Such a factor is taken up later in section 154:

> (4) "If at the time of doing or making such act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.
>
> (5) Voluntary intoxication may not be regarded for the purpose of determining whether a person is not guilty of the crime defined in this section."

A "person similarly circumstanced" does not include a person who is voluntarily intoxicated (s. 1).

The absence of intent or foresight as to the possible consequences of conduct does not provide an excuse from criminal responsibility for what is alleged to have been done or omitted to have been done by a person as constituting the act or omission complained of under s. 154(1) (s. 31(1) & (3)).

There is only one act specified in the indictment in this case as constituting the dangerous act, that is, the driving of the motor vehicle at an excessive speed. The words following describe the alleged consequence of that act. The allegation that the applicant was under the influence of alcohol is put forward in the indictment

only as a circumstance of aggravation. The act of driving in the manner described goes to the offence, the state of intoxication to penalty, if the offence is proved. There is a danger that the use to which evidence of intoxication may be put can be confused.

It is not a constituent element of the offence that the accused be shown to have been under the influence at the time of the doing of the act or making the omission. It is therefor not necessary for the Crown to lead evidence going to that issue if it is to succeed in proving the accused's guilt, and since voluntary intoxication may not be regarded for the purpose of determining whether a person is not guilty (my emphasis) (s. 154(5)), such evidence does not avail the accused. But none of that means that evidence of an accused's intoxication or otherwise may not be relevant on the question of guilt. It is analogous to the question of motive. In a case dependent upon circumstantial evidence, as here, it may well be important to prove whether an accused person was under the influence of intoxication or not. "All the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond reasonable doubt of the commission of the crime charged" (per Dixon CJ. Plomp v R (1963) 110 CLR 234 at 242, affirmed in Chamberlain v R (1984) 57 ALR 225 at 237). As

with motive, intoxication may provide a reason or explanation as to why something otherwise extraordinary and dangerous occurred, and assist a jury in determining whether the accused had acted or failed to act as alleged. However, if to be taken into account in that way in relation to proof of an offence under s. 154, it must be pointed out clearly that intoxication of itself is not the dangerous act nor part of it. It is a state of being, not of doing or of failing to do something. Concentration must be directed squarely on the dangerous act or omission alleged and its proof, not what may have caused it.

When His Honour first came to sum up to the jury in respect of the elements of the offence he made it quite clear that the members should not fall into the trap, as he put it, of simply saying that it was dangerous to drive under the influence of liquor because the offence had not been put in that way. He pointed to the specific allegation of excessive speed as pleaded, and proceeded to deal with the other elements of the offence before mentioning the circumstances of aggravation. On reaching that point His Honour said "You only have to consider those if you find the basic crime proved". That was correct.

On the issue of "excessive speed", His Honour directed the attention of the jury to the indictment, which

alleged that the speed was such as to cause the accused to be unable to control the vehicle, and related that to the creation of the danger; he then proceeded to deal with the objective test. A direction as to circumstantial evidence was then given during which His Honour pointed to evidence of things such as the gravel road surface, corrugations, bends in the road, poor light, wheel marks and other features shown on the plan, and damage to the vehicle. No objection is made to the way in which His Honour dealt with these matters, nor do I think there could be. It was for the jury to take all those pieces of evidence into account and decide whether the Crown had discharged the onus upon it. However, this ground of appeal is directed at what next fell from the learned trial Judge. He adverted to intoxication as being "another important circumstance", and referred to the evidence of an expert to the effect that ingestion of alcohol and consequent intoxication affects the central nervous system and reaction time, and continued:

> "So, ... if you find that he was intoxicated, you may regard alcohol as a circumstance with the other circumstances from which it is possible for you, it may be possible for you to draw an inference that he was driving at excessive speed in the circumstances. I'll just repeat that now so that you understand what I'm saying about the alcohol. Because alcohol affects judgment and reaction time, it is more dangerous for an intoxicated person to drive at a certain speed in a given set of circumstances than it is for a person who is not intoxicated because he is less able to react to an emergency that might arise in the situation. So it is a factor you can take into account".

In concluding his remarks on the aspect of the matter, His Honour again referred to intoxication along with evidence of the other matters mentioned as going to the allegation that the accused was driving at an excessive speed. He then put the defence case to the effect that hypotheses consistent with innocence could not be excluded so as to leave no reasonable doubt as to the guilt of the accused. At almost the conclusion of his summing up His Honour said that when considering alcohol the jury was entitled to consider that it can release inhibitions, "We all know that. It's just something that you have in mind, and you may, if you're looking for an explanation as to why someone would drive in a particular way, you might say, "Well the alcohol helps to explain that"".

Upon concluding his remarks, His Honour invited comments from counsel, but there were none on the issue.

Putting aside the influence of an intoxicating substance (which has no part to play in the ordinary person similarly circumstanced test), there may well be other circumstances creating, for example, sudden emergency which either could not have been clearly foreseen, or even if foreseen, operate so as to deprive the person of the capacity to desist from the act or to remedy the

omission. The cause of the act or omission is not relevant as part of it, it is relevant to the objective test to be applied once it is found beyond reasonable doubt that all of the elements of the offence preceding that test have been made out.

I have grave reservations about His Honour's remarks to the jury quoted above in the context of proof of the elements of the offence. Assuming, which I much doubt, that driving under the influence simpliciter is a dangerous act for the purpose of the section, it was not put forward by the Crown in that way. The Crown relied only on speed as being the feature of the driving which constituted the driving as a dangerous act. It would be open to allege that a person drove a vehicle without paying proper attention to the task, or whilst asleep or on the incorrect side of the road or any combination of these factors and more (such as might be seen in the more prolix pleadings for damages arising from motor vehicle accidents), including, in a case such as this, that he or she failed to stop, slow down or so maneuver the vehicle so as to avoid hitting the tree. That was not the course adopted, however, what was alleged was that the applicant drove too fast. Whatever was, or may have been alleged to have been the act or omission which caused the danger, the cause of the act can only be relevant as an explanation for, but not as part of the act. It may

well be relevant to the objective test (so long as it is not the influence of an intoxicating substance).

Subsection (4) of s. 154 draws the distinction I have been trying to demonstrate. It refers to the doing of an act whilst under the influence of the intoxicating substance. The state of being under such an influence is not a dangerous act. Evidence of whether a person is under the influence of an intoxicating substance at the time of doing the act or making the omission complained of is relevant only to explain the reason why the act or omission took place and as going to proof of that aggravating circumstance.

Taken in this light His Honour's remarks concerning the influence of alcohol, when read as a whole, may well have caused the jury to take that factor into account as a factor amounting to or contributing to the dangerous act alleged. That was an error of law sufficient to lead to the appeal being allowed.

It is not strictly necessary for me to deal with the remaining ground of appeal but since it loomed large in argument I should do so, albeit briefly. That ground was that the verdict was against the evidence and the weight of the evidence. The nature of an appeal on such a

ground has been recently restated by the High Court in Morris v R (1987) 163 CLR 454. The following is from the judgment of Mason CJ. commencing at p. 461:

> "The principal ground of appeal which the applicant seeks to raise in this Court is that the Court of Criminal Appeal was in error and should have concluded that the verdict was unreasonable or could not be supported having regard to the evidence. The scope of this ground of appeal was discussed in the joint judgment of Gibbs C.J. and myself in Chamberlain v The Queen [No. 2](7). It is unnecessary to recount the long line of cases in which the statutory provisions have been interpreted. It is sufficient to say that it is now well settled that a verdict may be set aside as unsafe and unsatisfactory notwithstanding that there was, as a matter of law, evidence upon which the accused could have been convicted: Whitehorn v The Queen (8); Chamberlain [No. 2](9). In Chamberlain Gibbs CJ and I, after noting that it was unnecessary to consider whether the jurisdiction exercised by the Court of Criminal Appeal in Australia is precisely the same as that exercised by the Court of Criminal Appeal in England, said (10):
>
> > "... the proper test to be applied in Australia is, as Dawson J. said, to ask whether the jury, acting reasonably, must have entertained a sufficient doubt to have entitled the accused to an acquittal, i.e. must have entertained a reasonable doubt as to the guilt of the accused. To say that the Court of Criminal Appeal thinks that it was unsafe or dangerous to convict, is another way of saying that the Court of Criminal Appeal thinks that a reasonable jury should have entertained such a doubt. The function which the Court of Appeal performs in making an independent assessment of the evidence is performed for the purpose of deciding that question. The responsibility of deciding upon the verdict, whether of conviction or acquittal, lies with the jury and we can see no justification, in the absence of express statutory provisions leading to a different result, for an appellate tribunal to usurp the function of the jury and disturb a

> verdict of conviction simply because it disagrees with the jury's conclusion. We do agree that in many cases the distinction will be of no practical consequence; it will be merely a matter of words. That will not generally be the case where questions of credibility are decisive. However, whether it matters from a practical point of view or not in a particular case, it is not unimportant to observe the distinction - the trial is by jury, and (absent other sources of error) the jury's verdict should not be interfered with unless the Court of Criminal Appeal concludes that a reasonable jury ought to have had a reasonable doubt.""

Since this ground of appeal involves a question of fact alone the leave of the Court is required (s. 410(b)), and was given.

Reviewing the evidence I am of the opinion that a reasonable jury ought to have had a reasonable doubt that driving at an excessive speed caused the danger. There are indications from the marks on the road, the distance over which they were seen, the position in which the car came to rest and the damage to it, that it was travelling fast prior to the impact. However, that evidence is all circumstantial and does not inevitably point to excessive speed alone as being the root cause of what took place. The possibility of a mechanical defect in the vehicle was open; the two rear tyres were less than safe and may have caused the slide or skid and affected the ability of the driver to regain control; there were passengers (including the

deceased) who may have interfered with the driver; there may have been a number of factors operating which in combination caused the accident. The doctrine of res ipsa loquitur has no place in the criminal law. The jury could not have excluded all reasonable hypotheses inconsistent with guilt and thus ought to have had a reasonable doubt.

I would allow the appeal and quash the conviction.
