Neutral Citation Number: [2023] CA (Bda) 15 Civ

Case No: Crim/2022/005

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA
SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
BEFORE THE HON. MR. JUSTICE WOLFFE
CASE NUMBER 2020: No. 010

Sessions House
Hamilton, Bermuda HM 12
Date: 23/06/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL, SIR ANTHONY SMELLIE, KCMG
and
JUSTICE OF APPEAL, DAME ELIZABETH GLOSTER, DBE

- -

Between:

TERRENCE WALKER

Appellant

-v-

THE KING

Respondents

Marc Daniels, Marc Geoffrey Barristers & Attorneys, for the Appellant

Carrington Mahoney, Office of the Director of Public Prosecutions, for the Respondent

Hearing date(s): 16 March 2023

- -

APPROVED JUDGMENT

Smellie JA:

1. The Appellant appeals against his conviction on 28 June 2022 by majority verdict of the jury and subsequent sentence on 3 February 2023 by the trial judge Justice Juan Wolffe (Acting as he then was), for the offence of Causing Death by Careless Driving.

2. The deceased was 18-year-old Jen-Naya Simmons. The circumstances under which she was found by the jury to have been fatally struck by the vehicle driven by the Appellant are described below.

3. While there were witnesses at the scene close in time to the collision who testified, there was no eye-witness to the incident itself. Evidence from CCTV footage from cameras along the road, in both directions along the eastbound and westbound lanes leading towards the site, was also adduced. This showed the manner of driving and riding, at different stages, of both the Appellant's van and the motor-cycle ridden by the deceased, factors which the jury was invited to take into account as will also be explained below.

4. The gravamen of the Prosecution's case and the Appellant's response to it, depended upon opinion evidence from Traffic Collision Investigators based upon their reconstruction of the incident. Evidence came to be presented by three experts by reference to (i) observations on site or through photographs of the scene and measurements at the scene; (ii) the condition of both the Appellant's van and the motor-cycle ridden by the deceased; and (iii) further, in the case of one expert only, Mr Glen Luben who testified for the Prosecution, pathologists' reports on the post-mortem examination of the body of the deceased and observations of certain tyre and other impressions on her body and the pattern of injuries she sustained.

5. There was disagreement between the experts, not only as between Mr Luben and Mr Michael Prime (the expert who testified for the Appellant) but also as between Mr Luben and Sgt. Olasunkanmi Akinmola of the Bermuda Police Service (BPS), the latter being a Traffic Collision Investigator assigned to the investigation of the case. There was also disagreement between Mr Prime and Sgt Akinmola. The points of disagreement went to the crucial issue of the location of the deceased on the road when she was struck by the Appellant's van – had she been thrown from her motor-cycle into the path of his van in the westbound lane (as Mr Prime opined), or trespassed while on her bike into the westbound lane into the path of the Appellant's van (as Sgt Akinmola opined), or had the Appellant's van trespassed into her lane, the eastbound lane, and run her over causing the fatal injuries (as Mr Luben opined). Despite their disagreement on how the deceased ended up in the westbound lane, Mr Prime and Sgt Akinmola both disagreed with Mr Luben's conclusion that the victim was struck and run over while in her correct eastbound lane.

6. The majority of the jury must be regarded as having accepted Mr Luben's testimony over that of the other experts in arriving at their verdict. It is primarily by reference to the fact that his evidence conflicted in this important respect with the evidence of the other experts, that the Appellant's main ground of appeal is based upon the proposition that the evidence of Mr Luben should not have been accepted and so the conviction is unsafe and should be set aside by this Court.

7. The Prosecution's case as presented to the jury may be summarized as follows.

8. On Saturday 14th July, 2018, during the early evening, Jada Simmons-Trott went to the home of the deceased Jen-Naya Simmons, her close friend, at Abbot Cliff's Road, to pick her up to attend a house party in Warwick parish later that night.

9. On her arrival at Jen-Naya's house, Jen-Naya borrowed Jada's 50cc auxiliary cycle registration 040AQ, to visit a friend in the Devil's Hole area of Smith's parish. Jen-Naya did not have a valid driver's licence but was fully capable of operating a bike safely, as Jada Simmons testified. Her riding ability, which became of some concern in the trial, the jury would also have been able to observe from CCTV footage of her riding later that night leading to the tragic scene of the incident.

10. On her return to her home, Jen-Naya related to Jada an incident which was later described to the jury as also going to the issue of Jen-Naya's motor-cycle riding ability. It was that on her way to her friend, as she was coming around a corner, she had come upon a lady who was walking a dog. The dog got into the road and the lady went after the dog. In trying to avoid hitting either of them she tried to go around them. That section of the road was sandy and wet and the bike went down on the road. However, she had regained her feet and control of the bike and eventually, continued to her friend's house and later returned to her home.

11. Jada also related that Jen-Naya was wearing a body suit at the time and she had observed bleeding through it in the area of her knee and a wet patch around her elbow due to the wetness of the road but no serious injuries. Jen-Naya then changed her clothes in dressing for the party. As Jen-Naya's younger sister, Yhanae Simmons, asked to go with them, another more powerful 150cc bike was borrowed from a neighbour.

12. Jada testified that she insisted that Jen-Naya go ahead of her so she could keep a close watch on her handling of the bike, being aware of the earlier fall she had sustained. They then departed to the house party in Warwick parish, with Jen-Naya riding Jada's 50cc motorcycle and Jada riding the more powerful motorcycle with Jen-Naya's sister, Yhanae, as her pillion passenger.

13. Later, at about 2am in the early morning of Sunday the 15th July, 2018, they left the party in Warwick. They stopped to purchase food at "Ice Queen" on Front Street, in the City of Hamilton. They then rode to the car park across from the Bermuda Aquarium where they ate before setting off again, heading home.

14. Jada and Yhanae were travelling east on North Shore Road, Hamilton parish, in the eastbound lane with Jen-Naya, for the first time that night, following behind. The roads were still wet.

15. In the general vicinity of the intersection of North Shore Road with East Point Lane, as Jada and Yhanae were travelling in the eastbound lane, they came upon a van

described by Jada as "white-greyish" in colour, later identified to be the Appellant's van, travelling west with its right wheels either on or slightly over the centre-line heading towards her at what she described as a very fast speed. The handles of the right doors and the driver's side mirror of the vehicle were on her side of the road, forcing her to swerve her motorcycle to her left closer to the wall. She felt that if she had not done that there was the possibility of the vehicles touching.

16. After continuing for about 15 seconds Jada noticed that Jen-Naya was no longer following on behind her and, after waiting a few more seconds, she made a U-turn and proceeded in the westbound lane in the direction that she was coming from in search of Jen-Naya.

17. In the vicinity of her near encounter with the van, they came upon the motorbike Jen-Naya was riding on its side in the eastbound lane with the wheels pointing west towards the body of Jen-Naya. The lights of the bike were still on, the handlebars were severely bent, both rear-view mirrors were pointing inward, and the key was still in the ignition switch. She observed that Jen-Naya's body was a few meters away from the bike on its back "slightly at a slant" in the eastbound lane. Her head was near the centre-line in the road. She was not moving. Her eyes were closed. Her feet were pointing towards the wheels of the bike. She was bleeding from her head. The white helmet that she was wearing was missing. The black dark visor from the helmet was in the eastbound lane. Throughout the night, Jen-Naya had been wearing a head scarf wrapped around her head and this was seen lying in the westbound lane. Her shoes (flip-flops) were off her feet, with one lying in the westbound and the other in the eastbound lane. Her bracelet was lying in the eastbound lane. A black object, later identified to be the helmet's strap clip, went through her chin and protruded out of her bottom lip. Other people were present when she got to Jen-Neya and traffic had stopped. Jada testified that after having tried to comfort Yhanae (who was naturally very distraught), she tried to call Jen-Naya's grand-mother and father without success. She then called 911 to summon the ambulance. She then proceeded to move the bike Jen-Naya was riding and placed it upright at the side of the road on the eastbound lane where it was found closer to the line of the road. It had been lying on its side and when asked why she moved it she replied "*Just instinct – it was instinct. There was no logical reason. I truly could not say. I just saw her – I mean, I just moved it. I can't tell you the motivation, to be honest. It wasn't until after that the people around me told me I shouldn't have touched it*."

18. This ill-advised interference with the scene of the incident did not however, prove to be consequential as the actual location of the bike on the road relative to the centre-line was determined, for the purposes of the examination of the scene by the three expert witnesses, from measurements taken by Sgt Akinmola. This was of a skid or scratch mark of 88.85 feet in length, left on the surface of the road opined by Sgt Akinmola (and subsequently agreed by the other experts) to have been from the right handlebar of the bike running in a straight line diagonally across the eastbound lane from the point where the handlebar first made contact, on the eastbound lane, just inside the yellow centre-line of the road, to where the

bike must have eventually come to rest. This, along with the locations of other items of evidential significance, were depicted on a manual sketch of the scene drawn by Sgt Akinmola and adduced in evidence at the trial.

19. At the trial, Jada Simmons-Trott was referred to Prosecution Exhibit 1 (a bundle of photographs of the scene) and she pointed out to the jury, the eastbound and westbound lanes, the sharp corner to the right beyond which she had lost sight of Jen-Naya after her own close encounter with the van and the location where that had happened, where the bike was lying when she first saw it in the eastbound lane, where she had placed it upright on its stand in the eastbound lane, where Jen-Naya's body was located with her head close to a pool of blood , and where other items of significance were seen, as described above.

20. In cross-examination, she acknowledged that although Jen-Naya was a competent rider, she had failed her driver's test three times. However, when they had set off that night, Jen-Naya was riding "with all the rules of the road" and she had told her that the second she showed "any funny business" she was going to pull her over. Jen-Naya told her that she was good and she saw, from riding behind her almost all the way, that Jen-Naya was perfectly capable of handling the bike. She testified that Jen-Naya came to a complete stop when she needed to and that she was not riding in an odd pattern. She had overtaken and was ahead of Jen-Naya only after they had left the area of the Aquarium where they had stopped to eat, shortly before the fatal incident. Although insistent that Jen-Naya had shown no signs of intoxication that night, she also acknowledged that Jen-Naya had had at least three drinks and that she had known Jen-Naya to have used a substance called "Molly" back when they were in High School. While she had not been in Jen-Naya's presence at all times, she did not see her take Molly that night and she saw none of the usual signs – such as clenching of the jaw, dilating of the eyes, bursts of energy and chatting a lot.

21. As mentioned, by the time Jada and Yhanae Simmons had returned to the site of the incident, other people were already on the scene seeking to offer assistance.

22. One of them, Quanae Burchall, had ridden her motor-cycle pass the Aquarium in the eastbound lane of North Shore Road, heading east at about 3:25 am, at about the time of the incident. About 5 seconds after passing the Aquarium's pedestrian crossing heading towards the scene of the incident, she saw a van, described by her as silver coloured, and later identified as the Appellant's van, coming towards her heading west (i.e continuing away from the scene of the incident). As soon as the driver of the van, who was wearing a white shirt, appeared to see her coming, he immediately turned off his vehicle lights. Both occupants in the front seats of the van were wearing white t-shirts, an observation which became of relevance because of the Appellant's denial that it was he, suggesting that it was the other person in white, who was the driver at the time.

23. Quanae Burchall kept on riding and noticed a helmet on the right side of the road.

In the circumstances of the case this was likely the helmet worn by Jen- Naya Simmons but it was never recovered. As Quannae Burchall went around the corner she came upon the body of a woman laying on its back, on the eastbound side of the road, just beyond the apex of a corner turning sharply to the right. The right arm was over the center line and so extended onto the westbound lane. Ms. Burchall stopped and checked for a pulse but found that there was no pulse. The person, whom she did not at first recognize but later turned out be her cousin, Jen-Naya Simmons, was bleeding from the head.

24. After she had waited by herself for what seemed about two minutes with the body, the same van came back to the scene heading east with its lights on, stopped for a few seconds in the westbound lane, the front passenger put his head out the window apparently looking at the body, and the van then drove off heading east. No one in the van said anything to her or offered any assistance. There were two males in the front of the van and two other persons in the back. It was then that Jada Simmons-Trott and Jen-Naya's sister turned up and they were screaming.

25. After the BPS arrived on the scene, although there had been some vehicular movement across it, the BPS cordoned it off in the usual way. Among the items found and seized was a silver-coloured fog lamp bezel that was lying in the eastbound lane. The said bezel was eventually found to fit the right front fog light of the Appellant's van. Photographs were taken of the scene and from the easterly and westerly approaches along North Shore Road to the scene. These were among the many photographs adduced into evidence at the trial.

26. Sgt Akinmola obtained CCTV footage from the cameras along North Shore Road aforementioned and carried out an examination of the movement of vehicles recorded on the night of 14 July into the early hours of the morning of 15 July 2018.

27. CCTV footage in the Shelby Bay area, located approximately 900 meters from the incident scene, showed the Appellant's vehicle heading west in the westbound lane at times driving on or slightly over the centre line towards the location where the incident occurred. The same vehicle was seen heading in the opposite direction at some speed in the east bound lane shortly after. It was via these footages that the Appellant's vehicle was identified by the BPS to be a silver Suzuki APV with registration number 49359 and was found to be registered to the Appellant.

28. On the 16th July, 2018, a post-mortem examination was performed on the body of the deceased. The pathologist, Dr Marva Phillip Williams, whose evidence was read to the jury by consent of the defence, observed that the body had multiple skull fractures with underlying traumatic brain injuries; multiple rib and sternum fractures with underlying aortic and pulmonary lacerations and hemorrhage; vertebral fractures; liver laceration, left upper extremity open fracture; multiple abrasions and lacerations.

29. On the skin, among signs of abrasions including (consistent with Jen-Naya's fall early during the evening of 14 July), around the elbow and knee, there was also partially legible writing noted on the upper right thigh. The cause of death was found to be polytrauma secondary to road traffic collision.

30. Dr. Mark Milroy, a forensic pathologist whose evidence was also read by agreement, opined as follows: *"1. The pattern of injury in this case is not typical of a person falling from a bike as the injuries are too extensive. Furthermore there are patterned injuries which indicate that the person has come into contact with structures with· pattern. The overall appearance is that of a person who has been run over by another vehicle while lying in the road. The patterned injuries have the appearance of being from the superstructure of the underside of a vehicle. There was patterned bruising on the right thigh with dirt that could be due to tyre tread. This would require comparison with a vehicular tyre. There was also patterned dirt on the left lower abdomen.* "

31. On Thursday 6 September 2018, Inspector Dorian Astwood looked at CCTV footage and observed that registration number 49359 matched a silver Suzuki APV van of the Appellant with an address at 20 Marsh Valley Road, Pembroke Parish.

32. On Friday the 7th September, 2018, at about 8:35 am Inspector Astwood, PC Walter Jackson and a team of police officers went to the Appellant's residence at 20 Marsh Folly Road, Pembroke, where grey Suzuki APV motor car registration number 49359 was parked in the driveway. PC Jackson introduced himself to the Appellant who acknowledged that he was the owner of the said vehicle.

33. The Appellant was questioned and answered, inter alia, as follows:

"PC Jackson:	***"Have you been involved in any accidents with that vehicle?"***
Appellant:	***"No. Well, my vehicle was involved in a fender bender thing. But not an accident."***
PC Jackson:	***"Has this vehicle been in a fender bender thing in the month of July?"***
Appellant:	***"Not that I know of."*****.....**
PC Jackson:	***"Have you had any recent paint or body work to your vehicle?"***
Appellant:	***"In June I got the back and side fixed. I had scratches to the left passenger side and back."***
PC Jackson:	***"Did you have a spray job?"***
Appellant:	***"Yes."***
PC Jackson:	***"Where did you get your spray job?"***
Appellant:	***"Across from the Cooperation of Hamilton."***
PC Jackson:	***"Canal Road?"***
Appellant:	***"Yes."***
A/Insp. D. Astwood:	***"Are you aware of your vehicle being driven on the***

14 th to 1 5 th of July? Were you the driver of the vehicle on the 15th July?"
Appellant: ***"More than likely."***
A/Insp. D. Astwood: ***"Is it safe to say you were the driver of the vehicle on the 14th to 15th July?"***
Appellant: ***"Safe to say."***
A/Insp. D. Astwood: ***"Is it safe to say that the time of day at the early hour of the morning?"***
Appellant: ***"Not to my knowledge.""***

34. The Appellant was also interviewed under caution. He acknowledged that he performed as a DJ (going by the name "Zedhi") but denied performing in the Baileys Bay area at all on the night of the incident. Subsequent investigations revealed, however, that he was one of several DJs scheduled to perform at Baileys Bay Cricket Club on the night of the 14th July, 2018. Further, as the trial judge came to explain to the jury, there was also evidence from BPS enquiry, that the Appellant in fact played at Bailey's Bay Cricket Club that night. A safe conclusion that he was the driver at the relevant time, could therefore have been reached by inference derived from his ownership of the van taken with that other evidence in the case, as well as from his fleeting admission as set out above and evidence of lies told as described below, from all of which, as the trial judge properly directed the jury, an inference of consciousness of guilt could be drawn.

35. Subsequent investigations also revealed that the garage on Canal Road did no work on his vehicle contrary to what he told the police.

36. The vehicle was seized and examined by Mr Rupert Knight who was tendered to testify for the prosecution as an expert in Auto Mechanics. It was revealed that extensive recent repairs and paint work had been done to the front right side of the bumper of the vehicle, which was welded and of a different colour from the rest of the bumper. The bezel recovered from the scene was a perfect match to the fog lamp of the driver side front bumper, around which another apparently more worn bezel had been fitted.

37. The fog lamp bracket of the nearside front bumper was in excellent condition according to manufacturing standards. However, the inner lower fog lamp bracket on the driver side of the bumper was repaired with plastic welding epoxy.

38. Recent repair work had also been done to the lower driver side radiator panel which was freshly painted. Noticeably, by contrast, the upper and left side of the radiator panel had rust and was not painted.

39. The right rocker panel or sill beneath the driver's door showed signs of damage and recent repair. In a cautioned interview, the Appellant had told the investigating officer, PC Walter Jackson, that the damage to the rocker panel had been caused when he ran over a wooden stump at a job site, at a client's yard and that on another occasion coming out of his own driveway he had "*scraped the underside*". However, tests carried out by the BPS with a similar Suzuki van at both locations discredited the Appellant's accounts of how the rocker panel could have been damaged and this was explained to the jury by PC Jackson.

40. The prosecution proposed to the jury that it was out of a consciousness of guilt for colliding with Jen-Naya Simmons that the Appellant carried out these repairs and lied to the police about them.

41. Inspector Dorian Astwood testified at the trial that a decision was taken on 13 September 2018 to request the assistance of Mr Glen Luben "*due to the complexities of the case*." His observations and findings about the condition of the Appellant's van became of importance to Mr Luben's opinion, as will be examined below.

The evidence of the traffic collision investigators

42. The foregoing summary of the evidence of the witnesses at the scene and from the pathologists, gives the context for a consideration of the expert evidence. Set out below are the relevant extracts as taken mainly from the trial Judge's careful summing up to the jury. Where necessary, the narrative of the evidence will be supplemented from the verbatim transcripts as indicated.

43. First that of **Sgt Akinmola** who was described by the judge to the jury as having been tendered as a traffic collision investigation expert:

> "*... on Sunday 15 July 2018, he attended the scene of a two-vehicle fatal road collision on North Shore Road in Hamilton Parish. When he arrived there, he saw a grey/silver Symphony motor bike, registration number 0408Q, moved from its final resting position. The road was wet but (unclear) and there was clear visibility. He said it was not raining. The only light source was a Belco pole at the North End side of the scene, on the left side of the eastbound lane. He stated that traveling east the road consists of a right-hand bend, which gradually inclined and declined as one approaches the sharp right-hand bend. As one travels west from that, looking at the church, the road is straight and continues to a sharp left hand bend.. He said there is a triangular warning road sign on the left of the westbound lane warning motorists of the sharp left-hand bend ahead. You may recall a question being asked of Mr Prime by the prosecution as to that sign.*
>
> *He said he did the following. He examined the scene, including an 88-foot scrape mark and a blood spot close to the centre yellow line. He showed you in photographs where that took place [(including the locations on the road of the items of debris from the incident)]. He said he collected debris such as the plastic bezel, sun glasses, a black visor, a black T-Shirt, flip flops.*
>
> *He attended the autopsy of Jen-Naya. He examined the bike. He concluded that it was in good condition. He examined the accused's van, including damages to the offside and the front offside tyre was different from the other three. He made a request for CCTV footage. He calculated a speed of 49359 travelling west to Shelby Bay as being 52 kilometers per hour, and he showed the CCTV footage in that regard. He calculated a speed of 49359 travelling back east from the scene of the accident as being 64 kilometers per hour, also as seen on the footage.*

He said that the driver of 49359 was driving faster to get away from the scene after the collision occurred. He did a sketch, prosecution exhibit 11. From this he concluded that as the driver of 0408Q negotiated a right-hand bend, she lost control and fell to the ground where she came to a final resting position along the eastbound lane as indicated by the blood spot.

He said that after the driver of 0408Q lost control of the cycle, the cycle slid diagonally across the eastbound lane on its offside as indicated by the 88 (foot) scrape mark which extended from the centre yellow line across to the eastbound lane into the final resting position of the cycle. He said the minimum speed at which the rider of the bike was travelling when she lost control was 53 kilometers and 59 (kilometers).

He said as the driver of 49359 negotiated [(what would have been for him)] the left-hand bend, the damaged profile at the front offside with the detachment of the bezel and the injury and marks on the body of 0408Q suggest that the front offside of 49359 and the body of the rider came into contact….He said that the collision most likely occurred close to the centre yellow line on the westbound lane in the area between the start of the scrape mark and the blood spot, which is the final rest position of the rider. He said he said this because of the blood spot in the eastbound lane as the rest of the actual impact area (was) in the westbound lane, i.e. where the vehicle and the body made contact. He said the moving vehicle pushed the rider to the final position where the blood spot was. Also, that the vehicle is moving in a western direction while the bike is moving in the opposite direction. So the body came in contact with the motor car in the westbound lane and the car, which is responsible for moving the body to the final resting position in the eastbound lane. He said that based on the location of the scrape marks found in the center yellow line this suggested that 0408Q was somewhere in the westbound lane prior to the loss of control by the rider and that she lost control in the westbound lane. This is also (unclear) he said by the straight line trajectory of the scrape mark after the first cut on the central yellow line. He added that 0408Q would not have slid across the eastbound lane in a straight line trajectory (if) 49359 encroached on the eastbound lane. He said all of this is supported by Newton's first law of motion. He said that the trajectory of the bike after the rider had lost control is a straight line as shown by the scrape marks to the rest position. He said that he did not note the scrape mark on the right side of the van and that he first noted it in court when Mr Mahoney showed it to him.

He said it was not clear to him why the rider of 0408Q encroached on the westbound lane. He said this could be as a result of her inexperience. The fact that she does not have a driver's licence suggests that she had no formal training in operating an (auxillary) cycle. Further, she was legally impaired with her alcohol level being 108, this coupled with the wet road as she negotiated the right-hand bend at an average speed of 35 kph. This could have been a challenge to her due to her experience (and) being impaired. He said that there was no evidence that the driver of 49359 encroached upon the eastbound lane. However, it is not clear why

> *the driver of 49359 failed to stop and report the collision…During cross-examination by Mr Daniels, he told you that the CCTV footage is taken up from high, and therefore perspective may change, that 49359 in the footage was close to the center line but there was nothing about this that stood out in his mind. This is why it did not appear in his report… He said that had the motor car been straddling the center line, it seems highly likely that it would have collided with the bike, although if there was a significant delay in Jen-Naya falling off and the motorcar arriving in the area, then the bike could have moved away from the center line before the motorcar arrived. He said that when Jen-Naya was struck by the car, she was displaced some distance from the impact area. He said that the physical evidence strongly supports the view that the collision occurred towards the outside of the westbound lane, but probably in the area of the start of the scratch mark or perhaps a little beyond the start of the mark. He said that the area of blood [(only one such area was seen on the surface of the road)] denotes the area in which Jen-Naya came to rest and not the area of the impact. He said the physical evidence supports the view that the motor car was on its correct side of the road….*
>
> ***During re-examination by Mr Mahoney**: "… He said that the bike was on the westbound lane close to the center yellow line but it could have been in the eastbound lane as Mr Prime stated… He did not make mention of Jen-Naya's panic braking [(in his report)] because he does not know why she lost control of the bike… If there was no uncompromising traffic, there would have been no need for Jen-Naya to panic."* **[Emphases added]**

44. I next turn to the summing up of the evidence of **Mr Glen Luben** but before so doing, it is important to note the different inter-related approaches he adopted to his investigation, as distinct from those of the other experts Mr Prime and Sgt Akinmola, and which would have been of significance to the jury's deliberations.

45. The first was that Mr Luben was the only one of the three trained and experienced in injury pattern analysis; that is, the analysis of the pattern of injuries sustained during vehicular collisions leading to conclusions on the relative positions of the persons and vehicles involved. This was of importance in the trial because of his conclusions, different from those of the other experts, that Jen-Naya was run over by the Appellant's van while she was on her correct side of the road, in the eastbound lane, rather than being struck and displaced from the westbound back into her eastbound lane.

46. The second distinction is that Mr Luben was the only one of the three who actually referred to and analysed the photographs and reports of the post-mortem examinations of Jen-Naya's body. And the third distinction, was that he was the only one of the three who conducted a detailed examination (including measurements) of the Appellant's van (including also observations from photographs of the under-carriage of the van) and of the bike Jen-Naya was riding, 0408Q.

47. With the context thus explained, Mr Luben's evidence follows, as summed up by the trial Judge (and as already mentioned, with such interpolations from the transcripts of evidence as are required to give the fullness of his evidence). For ease of reference, emphases will be added and given sequential numbering:

"*(Mr Glen Luben) was tendered as a road traffic collision reconstruction expert. He told you that he was contacted by the Bermuda Police Service in September 2018 and as a result travelled to Bermuda in October 2018. He had been provided with the investigation report, photographs of the scene, autopsy and vehicles involved and the CCTV footage. When he arrived in Bermuda, he went from the airport to the scene with Acting Inspector Astwood, because he said he wanted to see the lighting and how the vehicles interacted with each other and how the road was negotiated. He said it gave him an idea about how the road worked at night and also it is a challenging road, as so are many in Bermuda but people negotiate them every day.*

He said the next day, the 12th October 2022, he took measurements of the road, although most of the measurements had been provided to him prior. On the same day he also examined the van and the bike (at the police station) and took measurements of them. He observed that some repairs had been done to the van. He said that he also received CCTV footage of the van travelling west and within a short time prior to and towards the scene of the collision. It seemed to him that the van was travelling on or near to the center line at the time. He also saw in the CCTV footage the van as it was leaving the area. Viewing the right side damage to the bike, he said it was caused by sliding in its own lane of travel in the eastbound direction of North Shore Road. He said the bike seemed to have stopped 88 feet on the side of the road into a grass or soil area. He said by using a coefficient of friction he calculated the speed of the bike to be 40 kph. He also saw that there was a helmet visor close to where the head trauma impact occurred, a flip flop in the same general direction of the north side of travel, just to the left of this in the eastbound (lane) were some parts and a silver bulb light cover bezel that could be matched to a motor vehicle and a fork-like assembly.

He said that from the indications in the diagrams and photographs that the bike slid in a straight line and that once it was laid down on the ground the handlebar brake on the right hand side was bent up and there was dirt on the handlebar itself. This is on the same side of the road where it came to rest. He stated that blood and the chinstrap that had been embedded in Jen-Naya's chin were located in the left lane of travel, not too far from the centre left yellow line. He noticed a black head wrap that Jen-Naya had on her head and a flip flop in the westbound lane. He said that the (cone of debris) all lined up back to the eastbound lane and it is indicative of the point of impact in this collision, i.e. in the proper lane of travel with Jen-Naya. Describing the (cone of debris), he said that a (cone) is made from all the debris and you trace it back. The majority if not all of the debris and the scrape marks other than the head wrap and [one of] the flip flops all come back to the point where the blood spot is. He said there is no doubt in his mind that the point of impact was in the eastbound lane.

He said that he carried out injury (pattern) analysis, i.e. to establish where did the injuries come from or what other (object) bike or van caused the injury. Referring

to the injuries depicted in photographs (from the post-mortem examinations) … he said that the injuries to the jaw and chin are not normal injuries and it would take force or kenetic energy to (rip the helmet off). To him the chin, strap buckle and all the force to tear the helmet off had ripped the chin strap material with significant force. He said that in his 40 years of experience he had not seen this to that extent. As to the torso, there are scrapes and abrasions and circular hexagonal injuries on Jen-Naya's left side. He said there are hexagonal injuries on Jen-Naya's right torso which match those on her left side. He said the circles indicated to him that Jen-Naya had been run over because there are bolts on the undercarriage of the van. He is unable to say which bolts left compressions on Jen-Naya's body but the closest ones seem to be those of the (leaf springs).

Jen-Naya's entire body was under the undercarriage, from her feet to her head. He said that on her right thigh there are grazes on the rear surface as well as transfer writing from the tyre to Jen-Naya's skin. It appeared to him to have come from the side wall of the left rear tyre and is something that he had not seen in his 40 years of being a traffic collision investigator.

As to the examination of the van, he said that there was some paint over spraying… that the bezel was replaced on the van and looked out of place, that the bumper was shiny but the bezel was not..

He said that there was damage on the rocker panel under the driver's door on the right side but there was (Bondo filler) or patch material and paint overspray to try to cover that damage from the original impact.. he said it was not done professionally. He said the two front tyres and the right rear tyre were (installed) properly and they were not inside out. The left rear tyre was installed inside out. He took a police motorcycle helmet, which he accepted might have been bigger than the one used by Jen-Naya, and placed it under the rocker panel just below the damage that was bonded and sprayed-painted to see the height of the helmet and how it matched underneath there. He also measured from the ground to the rocker panel. He did this to clarify how the helmet got torn off Jen-Naya's head and face. He said that the helmet could not clearly have left any distance between the ground and the rocker panel. So it got hung up and tore the helmet off Jen-Nay's head.

From all this he concluded that Jen-Naya was travelling eastbound in her lane of travel when something near her (caused) her to drop her bike on its left (sic) side. [**see transcript at p 44(Record of Appeal p528) line 7],** which records the witness as here repeating from his report and confirming that " *Something made her drop the bike/scooter on to its right side*"]. *The most likely scenario being that the van encroached upon her lane and she took the evasive action or panic braked and she locked the front brake and front right-hand. This would have caused the bike to go down. The road was wet, which allowed the bike to slide further and the bike continued in a straight line to the grass area off to the east. As in Newton's first law of motion, an object continues in a straight line until (acted upon) from the outside.* **[1st Emphasis]**

He said that there is clear evidence that the van did not strike the bike at all and appears that it did strike Jen-Naya's helmet. The van went over the helmet, crushing Jen-Naya's skull causing massive head trauma as the tyre went over the helmet. The helmet became entangled with the rocker panel behind the front tyre, which tore the helmet off of Jen-Naya's head severing it from the chin strap and visor. He said that Jen-Naya's body was contorted into an angle where the van continued over the top of her. He said the rear left tyre which was put on backwards caused the (imprints) on Jen-Naya's right thigh as the left rear tyre passed over her. He said there was nothing significant to indicate that she was dragged anywhere. He said this proves that Jen-Naya was not on the wrong side of the road and dragged to her side of the road. He said it appears, that based on where her body was located, that Jen-Naya was within a few feet of where the impact occurred on her side of the road, the eastbound road. **[2nd Emphasis]**

During cross-examination by Mr Daniels *he said that Jen-Naya was in her eastbound lane .. he said that Jen-Naya was in her eastbound lane partly based on the scrape marks located just on the eastbound side of the centre line, which was about four inches wide. He said that the centre line was not clearly marked on Exhibit 11* [**(Sgt Akinmola's sketch)**] *, it appears to him that the scrape marks start at the central yellow line in the eastbound lane. He said that the scrape marks came from the handlebars because he had looked at the handlebars and the damage to the mirrors.*

He said that when the bike fell to the right, at some point Jen-Naya fell to the right. He did not believe that Jen-Naya fell straight over. What should be accounted for is (the) handlebar and the distance (unclear)..(they are out here, so she fell, the handle bar went just about the same distance as you are saying her body went, the bike is rotating on the handlebar, so she could have fallen behind that, not necessarily over the line) ***[see transcript at p52 (page 536 of the Record)]***
[And from page 72(566) lines 17-26]
Question from the Court*: "I just have a question, Sir, if you can help me out. So the scrape mark is going from near the center yellow line to the left?*
A*: Yes*
Q*: Not to the right?*
A*: Correct*
Q*: If the bike was falling and she was falling to the right, how then does the bike go to the left? Would it not, because of the momentum, continue to go to the right?*
A*: No.*
Q*: Explain why*
A*: No, it is Newton's first law of motion, and it is the reason it is on the line is because if you are higher… and I have done it, I have taken a motor cycle, a scooter in relation to space, sat on it and then video taped it or make a design to fit the project… but if your tyre is two or three feet nearer because your handle bars are out here, you are in your own lane here, but when it goes over, your handle bars will go two and a half three feet which then goes to the centre line, when you are clearly in your lane, because the marks are on the other side of the road.*

***Q**. I get that part but why does the bike continue to go 88 feet to the left?*
***A**. Because that is the direction of travel. Something would have had to hit it to redirect it to make it go in a different direction, it goes.. (unclear) which proves the straight line, it was in its own lane. It it was not, it would have went to the right to the wrong side of the road.]* **[3rd Emphasis]**

[Returning to the narrative from the summation]: " *He (the witness) could not say exactly how Jen-Naya would have fallen (as there was no helmet to examine). He said that he did not state that the blood spatter is where the point of impact took place, but it is where Jen-Naya's body ended up. He said that from the (scrape) marks he used a coefficient of friction of 0.23 to estimate the speed of the bike, but this is not as accurate as it could or should be based on the (road conditions, a wet road)* ***[transcript page 54(538)18 - 30 lines 21-22].***

He said that Jen-Naya's body was spun around and contorted because of the (dynamics) [page transcript 56(540)- line 30] of the helmet and the tyre going over it catching the frame rail, repositioning her head under the rocker panel and pulling the body. He said that there was no (road rash all over her back or anywhere) suggesting to him that her body did not travel very far. [And further from page 57(541) lines 1- 10] "..there was some traversing of her in the direction of travel but not very far and in the autopsy photo we can see the abrasion through.. the back of the hair. That is road rash, abrasion, after the helmet was torn off, of the road, asphalt of the road, peeling that hole in there, because obviously the vehicle had to go over her. We looked at these photos and saw the markings. That vehicle went directly over her and I know Mr Prime said it was not conceivable. He is incorrect that it is not conceivable that you are run over and not be dragged down the road. That can't (sic) happen, is what I say. It is inconceivable that she was hit by this vehicle because the vehicle had hit and dragged her underneath it… He is saying that Jen-Naya was not run over by a vehicle, and she clearly was by the torso imprints in the photographs"
[4th Emphasis]

***[And further at page57 (541) lines 18 – 30 and p 58 lines 4-7)]**:*
***Q**. Okay. I think what Mr Prime says is he questions your ability to comment upon medical matters and injury causation because there was nothing within your resume of qualifications that suggest you had that medical experience. What do you say in relation to that?..*
***A**. What I say to that is I am not a medical doctor. My experience in the medical field comes from testifying.. I am sorry, instructing and being part of the worldwide instruction group of injury pattern analysis. The fatalities that I have worked by the hundreds, the medical examiner's office is next door, attending to all autopsies. I am listening to the terminology given. Of course I can't get some of the words they use. So that is not my expertise, but I can do the injury pattern analysis and medical terminology as to what I said happened in the helmet being crushed and the ribs being crushed.. and all the markings. I do not have to be a medical doctor, but I can tell you that is how that happened… So it is not a medical course but they learn,*

and I do .. I do the medical interpretation of kenetics and how injury patterns are and what caused them inside the vehicle or outside or being run over."] **[5th Emphasis]**

***[Returning to the narrative of the summation]**: "As to the writing on Jen-Naya's right thigh, he said the right thigh would have made contact with the left rear tyre. He said that if she did not have all the other injuries, in other words, if we just had the tyre print, it is possible that the black writing could have come from the outside of the front offside tyre. …*

He said he could not say whether the van stopped the bike before or after the bike slid down the road, but since they [(ie:the bike and Jen-Naya)] the bike would keep going and the body did not move more than two to four feet. It was at this point that the front tyre of the van made contact with the body. He said it could have been a millisecond or half a second to the bike going down and the van making contact with the body. He said it all happened pretty quick and almost simultaneously. The contact was made from the ground level because if she was in the air there would have been more damage to the front end of the van… **[6th Emphasis]**

*He said that in his report he makes no mention of Jen-Naya being intoxicated because at the time he did his report it was not pertinent to the facts of the case and he did not receive the information. He accepted that being intoxicated could have caused Jen-Naya to lose control of her bike as well as when this is coupled with Jen-Naya being inexperienced. Further that the wet roads could have contributed to her losing control of the bike, and that this is feasible even without oncoming traffic.. He said that the van's action; i.e: the van being over the line, caused Jen-Naya's reaction which may have been an over-reaction. Even if the van's wheels are on the line, it would have caused Jen-Naya to go one way or the other. He was of the view that Jen-Naya's reaction would not have happened if there was not a vehicle which appeared to be in her lane or coming in her lane…***[7th Emphasis]**
You will remember Mr Daniels used a tape measure to measure six meters as being 19.68 feet approximately from the bench to where the jury also was sitting. He said that he was not able to use a scaled diagram to say that this was the distance between the pool of blood and the beginning of the scrape mark. He said that since he was not at the scene he cannot say if Jen-Naya fell off the bike in the area of the blood spot and that the bike fish-tailed another 20 feet before hitting the ground and sliding another 88 feet. He said though that he has seen this happen. He could not see if this happened in this case but he could say that Jen-Naya was separated from the bike and somehow was then redirected by the van.

He said that when the van collided with Jen-Naya she went back instead of forward and it could have been 6 meters or 19 feet **.[8th Emphasis]** *He did not accept that the van must have been further east of the scooter when the scooter was sliding (unclear) . From when the scooter hit the scrape mark and slid 88 feet, that the van must have been further east of the motor cycle* ***[see also transcript p86 (570) lines11- 14].***

He said that when the van went up over Jen-Naya her body was contorted by the tyre, (it) ran over her helmet and her body turned and this redirected her. He said it cannot be ruled out that Jen-Naya fell to her right and her head could have been close to the central yellow line. He did not accept that any part of Jen-Naya was over the centre line, based on the fact that (her body) was nowhere near the centre line.

*[**And further at p 102 (586) lines 21 - 25**]: "When I go back to that scalp injury that I told you about, that is a prone mark, on the back, that is a prone – that caused that hole in the scalp in the round- that is a prone body, as well as the injuries on the torso from the undercarriage of the car. There is nothing to indicate that she was on her stomach and the back was run over, or that she was dragged a very significant distance***."[9th Emphasis]**

He said that the debris at the scene of the collision is part of the totality of the investigation.

He said that it is a possibility that cars travelling towards the scene could displace some debris but that blood cannot be transported by a vehicle to somewhere else. The flip flop and the head wrap could have been displaced but not the blood. He said it is possible that the bezel could have been displaced but there is no evidence of this. He said that the bezel was not moved by (contact with) a vehicle because it is shiny. It is not damaged and does not have a tyre mark on it. It was not deposited there by someone running over it.

He did speak about the report of Mr Prime. He said he did not agree that Jen-Naya would have fallen to her right or that she would have landed to the right of the center line and therefore westbound close to the lane. He did not agree that when Jen-Naya was struck by the car she was displaced some distance from the point of impact. He said the physical evidence showed that the opposite happened" **[10th Emphasis]**

*[**Returning to the narrative of the summation**]:*
*"**In answers to questions from the court**, he said that the van would have gone over Jen-Naya's head with the helmet at the centre yellow line or inside the eastbound lane, i.e. her lane, and that when the tyre left the imprint on her body it would have occurred well into Jen-Naya's lane. He referred to the (condition of the van) [**see transcript at p 104(588) lines 15-16**] to establish this. He said that if he had seen the original bumper to the van, he could have possibly seen if there was contact with Jen-Naya's helmet, if there was some curling of the bumper and if the handlebar had left a gouge mark in the bumper. This he said would have helped him with where the impact was, whether there was a collision between the bike and the van, who was on what side of the road and how the scrape marks came to be. He said that there had to have been force applied to the bumper for the (bezel) to have come out. Also that the helmet would have assisted in determining what*

> *occurred.* **[11th Emphasis].**
> *In questions from the court, he said that the head wrap in the westbound lane was either moved or blown there and it is not where the helmet came off Jen-Naya's head because there no markings in the road. He could not conclusively say how it got there.*
>
> ***[In re-examination by Mr Mahoney from pp 108- 109(592-593)of the transcript]:***
> ***Q: (Referring to paragraph 11 of Mr Prime's report):*** *"Area of blood denotes the area in which Ms Simmons came to rest and not the area of impact" You said for the most part you would agree. Why did you say for the most part you would agree?*
> ***A:*** *Because she was not displaced very far. It is obvious there was a short distance, if you look at the impact with the handlebars to the road, the distance (s)he went out to here, that is (unclear) bike, bit of a dip, all that on its own is one thing, but where she landed, she was put into that position from the eastbound lane. She would have been knocked forward in the westbound lane. If the vehicle, the motor car, the Suzuki van was in its own lane, all this stuff would have been in the westbound lane, continuing westbound, not all in the eastbound lane where it ended up. The scooter is in the eastbound lane, the physical evidence, the bezel, her body, they are all, and the chin strap, in the eastbound lane. They are not in the center line. They are clearly in the eastbound lane, which is Jen-Naya's lawful right of way- travel lane; it is hers for that direction…. Nothing is in the westbound lane at all, other than that wrap from the head and the flip-flop which could have been moved.."*
> **[12th Emphasis]**

48. At the closure of the prosecution case the Appellant exercised his right to remain silent. Mr Michael Prime was called to testify, by video-link, on behalf of the Appellant.

49. What follows is the trial judge's summation of Mr Prime's evidence, also with interpolations from the transcript as required and numbered sets of emphases for ease of reference:

> '*..we heard from Michael Prime. He was tendered as an expert in forensic collision investigation.*
>
> *He told you that he received the witness statements, reports, photographs, site description in relation to this collision. He said that he had not attended at the scene but he did go on Google Maps in referring to the measurements of Sergeant Akinmola. He does not think that his results were compromised in any way by not doing that.*
>
> *He said it was better to be at the scene after a collision. He said that his report was concerned only with the circumstances of the collision and not with the identification of the vehicle and the driver who it is alleged failed to stop. He said that the primary evidence of where Jen-Naya fell to the ground was the scratch mark which is about (88) feet long…*
>
> *He referred to the photographs and the mark of C on Sergeant Akinmola's sketch*

to say in this case the scratch mark started towards the offside of the eastbound lane near the impact of the van. He said that Jen-Naya fell to the right, which is expected, since she was going around a right-hand bend and bending over to the right..

So he stated that Jen-Naya fell to the right which was expected since she was going around a right-hand bend and braking and bending over to the right. So, with the scratch mark on the eastbound lane, this tells him that the bike must have been in the correct lane when it hit the ground. You may remember they use a (unclear). He said if you lie the bike down you will find that the wheels will be to the left of the scratch marks which were not made by the tyre but by something else. He said invariably if a motorcycle falls to the right the rider will fall to the right with it and eventually part company with the motorcycle. So he said that Jen-Naya would have fallen to the right of the bike and the start of the scratch mark being closets to the line, it would be no surprise if Jen-Naya fell into the westbound lane whilst the bike was not. It is his opinion that Jen-Naya did fall into the westbound lane, probably to the offside of that lane and then came in contact with the offside of the van travelling correctly in the westbound lane. His conclusion is that the collision between Jen-Naya and the van occurred in the westbound lane. . **[1st Emphasis]**
*He did nothing --- and Mr Luben made much of the scratch marks – other than to (calculate) the speed of Jen-Naya's bike. He said (this is perfectly legitimate if you I know how far the bike slid from the start of the scratch to the end and you know its speed at the end, i.e. stationary probably in this case, that is where the bike ended up more or less, then you can work out the speed at the start of the scratch mark. And there is a little bit of a debate amongst the experts in this case as to the speed of the bike and really any one of us could be right.)**[See also transcript Vol B-2 p12(607)]***

What Mr Luben had done is use the scratch marks to determine the position of the bike when it fell over.

He disagreed with Sergeant Akinmola's opinion that Jen-Naya was in the westbound lane when the bike fell over and made the scratch. He said that had the wheels of the bike been in the westbound lane and fallen to its right, the scratch mark would have been to the right of the bike's wheel and in the westbound lane. He said that the bike did not collide with the van because if it did there would have been far more damage to its structure such as (unclear). **[2nd Emphasis]**
[For clarification see also as follows from Transcript Vol B-2 P13(608)]:
Q:*Now we saw photographs of the motorcycle after it hit – when the police attended the scene and took photographs, you saw photographs of the motor cycle, yes, at the scene?*
A:*Yes, I have seen photographs, your Honour, yes.*
Q: *And having regard to those photographs, what opinion, if any do you express about the damage to the motor cycle in determining whether or not it may have collided with the motor car?*
A: *I am pretty confident the motor cycle has not collided with the car , your Honour*

Q: *And why is that?*
A: *Because if it had, you would expect significant damage and deformation to either its bodywork or its structure…"*
(Resuming from the summation)*:…*

"He referred to the blood spot shown as G on Sergeant Akinmola's sketch plan. The distance from the blood spot (to the scrape mark) was six meters or 19 feet 6 inches. He disagreed with Mr Luben that the collision occurred in the eastbound lane or close to the bloodspot because Mr Luben on the one hand says that Jen-Naya was not displaced past the (unclear) ***[For clarification see transcript Vol B-2, p17 (612)- p 18 (613)]****:"Mr Luben is insistent in his report in various places that Miss Simmons was not displaced as a result of her impact with the car. But then he goes on to say that she may have been rotated or spun around or words to that effect or her head may have been moved a couple of feet. So I think, having read his report, I found some of it a little bit contradictory, because on the one hand he was saying she hadn't been displaced but on the other hand he was saying she might have been displaced a little bit.* **[3rd Emphasis]** *I have yet to go to a collision involving a pedestrian that is struck by a car or a vehicle similar to this, it doesn't really matter what it is – cars, 4x4s, light vans, mini-buses , that sort of thing. They are all similar ground clearance, some a little bit more than others… I am yet to go to a collision involving a vehicle such as that—I have not yet seen one where the body has not been displaced some reasonable distance along the road in the direction of the car's travel and I don't consider that this one would be any exception* **[4th Emphasis]…** *So my conclusion from that analysis and experience is that the marks on the road will start pretty much as soon as the bike goes down on the road*

Q: *And I believe you said it was your opinion that Miss Simmons would have gone down with the bike?*
A: *Initially yes. But she would fall off it to the right, as all motor- cyclists part company with the bike when they go down – I don't think I've ever dealt one that hasn't – and invariably they fall off… if the bike goes to the right, they will go to the right of the bike. If the bike falls to the left, they'll go to the left of the bike .*
Q: *And then you said that you believe that based on all this detail, Miss Simmons would have fallen into the westbound lane?*
A: *Yes, because the scratch mark is so close to the centre lines and if you think of the height of the body sitting on a bike above the handlebars, there is some significant height of body above the handlebars. So without question, in my opinion, she will have ended up in the wrong lane. Whilst the motorcycle didn't, she would have done.* **"[5th Emphasis]**

(Resuming from the summation):
" He said that when Jen-Naya first came off the bike she continued to travel east in the direction of the bike and took some time to come to a stop, probably 12,13 or 14 meters. **[5th Emphasis cont'd]** *When she came in contact with the van, she would be turned around and pushed back into the direction from where she came, that is,*

towards the west. The distance she travels back would be dependent on the speed of the van and nature of the impact. It therefore was no surprise to him that she ended back into the eastbound lane close to the central line and not far from the offside of the van. How far back Jen-Naya was pushed back he could not say.

He strongly disagreed with Mr Luben that the driver of the van crossed over the center line into the westbound lane, hit Jen-Naya and left her at the blood spot. He said it was unrealistic that Jen-Naya's body would not have been moved by the impact of the van. He stated that this is an absolute certainty that Jen-Naya did not fall off her bike in the area of the blood spot and that is because when a rider falls off a motorcycle it would take them time some time to come to a stop. He said it is impossible for her to fall off the bike and stop instantly where she fell off unless she hit something that stopped her, like a wall. He did not see a bold trail from the photos or any evidence of it. **[6th Emphasis]**

As to debris, Mr Luben (sic) said that debris is notoriously unreliable because it gets scattered around It can give an indication as to where it points along a road collision occurred, but very rarely, unless there is a lot of it in one location, can it pinpoint where the collision actually occurred. He did not agree with Mr Luben that the debris formed a type of (cone) and to him it looked scattered around. He said that debris can be displaced by the (unclear) or vehicles moving around, through the scene or by weather conditions.

He said in his report that given the collision occurred towards the offside of the westbound lane close to the center line and that the body may be rotated as a result of the impact, as suggested by Mr Luben, it is no surprise that Jen-Naya's post-collision position was that in the eastbound lane…

He said Jen-Naya would have fallen to her right and given that her bike landed on the center line, she would have landed to the right of it (the center line) in the westbound lane close to the center line. This placed her in line for offside of the westbound vehicle that was correctly positioned within the westbound lane and she was struck by another motor car that was travelling west. He said Jen-Naya's bike was not in collision with the opposing motor car and that it slid in a straight line across the eastbound lane to its collision position. **[7th Emphasis]**

He said that had the motor car been straddling the center line, it seems highly likely it would have collided with the bike, although if there was significant delay in Jen-Naya falling off and the motor car arriving in the area then the bike could have moved away from the center line before the motor car arrived.

He said that when Jen-Naya was struck by the car, she was displaced some distance from the point of impact. He said that physical evidence strongly supports the view the collision occurred towards the offside of the westbound lan probably in the area of the start of the scratch mark or perhaps a little bit under the start of the mark. He said the physical evidence caused a view that the motor car was on its correct

> *side of the road"* **[8th Emphasis]**
> ***During cross-examination by Mr Mahoney*** *he said that he did not feel handicapped by (not) visiting the scene himself.. as he had dealt with many collisions where he has not visited the scene. He said it would have been a heavy cost and sometimes it is not practical. He said that in this case he would have expected to be (unclear) at the scene. He said that also it would have been preferable to have come to the scene.. if possible, he was not at a disadvantage for not doing so.*
>
> *He said that his focus was on the reconstruction of the collision and not on the identity of the vehicle or the driver because it is a job of others not him. He said that he was provided with information about 49359. He said that he did not look at the CCTV footage near Shelby Bay because the area is 931 meters away from the scene and so of no relevance to him as far as the reconstruction was concerned. … the manner of driving was completely irrelevant to the reconstruction of the collision. He said he had not seen any of the CCTV footage in this case including that showing the manner of driving of Jen-Naya.*
>
> *He said he looked at the photographs of the damage to the van but he did not include it in his report because there was a very little damage to be seen…*
>
> *He accepted that he did not have any training in injury pattern analysis and that the person who peer-reviewed the report also did not have such training. He said he had never found the need to be trained in injury pattern analysis.* **[9th Emphasis]***He accepted that injury pattern analysis can be a useful tool. He said he did not take consideration of the injuries to Jen-Naya because injuries do not assist in the reconstruction of the collision and are not much use because they do not tell how Jen-Naya fell off the bike in the first place"*

50. From the summaries of the experts' evidence, it is clear that the critical issue of disagreement between them was in relation to the location of Jen-Naya Simmons when she was struck by the van. The underlined portions of their respective testimonies speak to this issue and in dealing with the grounds of appeal and the arguments on both sides, it will be necessary to return, especially to these aspects of their evidence.

51. On the appeal against conviction, Mr Daniels argued three main grounds of appeal in seeking to justify his overall criticism of the jury's verdict as unsafe, or giving rise to a "lurking doubt" such as to justify the intervention of this Court.

52. **Ground 3** (taking them in reverse order for convenience):***"The Learned Trial Judge erred, as a matter of law, when he directed the jury on inferences. Having given the jury the standard direction on inferences, the Learned Trial Judge directed the jury that they were entitled to draw the inference that it was the Appellant that drove 49359 at the material time of the collision, in circumstances where the evidence was clear that there were two indistinguishable males, one sitting in the driver seat and one sitting in the front passenger seat,. The Learned Trial judge failed to direct the jury that as a matter of law, not as a matter of the Defence case, that one***

cannot presume that the owner of a vehicle was driving it at a material time; and yet, the Learned Trial Judge invited the jury to draw the exact inference".

Mr Daniel sought to develop this ground in his submissions to the Court.

53. From [28] – [34] of his submissions: "*[28]..in the absence of any direct witness evidence, or CCTV footage, the jury could only speculate that Mr Walker was the driver at the material time of the accident. [29] The evidence of two males in the front seat is capable of drawing the following inferences: (i) Either Mr Walker drove his motor vehicle; or (ii) someone else drove Mr Walker's vehicle. [30] There is no evidence upon which the jury could determine which of these two propositions is accurate, such that they could feel sure. [31] There is no cogent evidence to reasonably infer that the only person that could have driven that motor vehicle, at that time, was in fact, Mr Walker. [32] It follows that this is a case of suspicion; and it cannot be elevated higher in order to convict the Appellant of this charge.[33] Finally, on very similar facts, in the case of* ***Armstrong v The Queen****,[2010] C.A (Bda) 6 Crim, the Court of Appeal overturned the conviction due to a lack of proper direction. [34] Whilst there is no overwhelming criticism against the Learned Trial Judge, it is clear that the jury could not have properly applied the inference direction*."

54. These submissions are unacceptable. It is clear, as Mr Daniel acknowledges, that the jury were properly directed both as to the requirement of proof of the elements of the offence including causation, the burden of proof and as to the proper drawing of inferences. Together with those clear directions [recorded at transcript pp792-794], the following directions were given by the Judge on this very issue of the identity of the driver.

First from the Summing up at page 791 of the record starting at line 20:

> "*There is no dispute that the accused was the sole registered owner of 49359 and that 49359 was involved in a road traffic collision on a public road, that being North Shore Road in Hamilton Parish on 15 July 2018 at approximately 3.24 a.m.. However, it is very much in dispute that the accused actually drove 49359 at the material time in the place of the collision. Therefore, it is in dispute that the accused caused the death of Jen-Naya Simmons by carelessly driving 49359.*
>
> *Therefore, you must be sure that (i) the accused drove 49359 and that he did so without due care and attention and that his driving was below what was expected of a competent and careful driver, and (ii) that as a result of his careless driving, the accused caused the death of Jen-Naya Simmons.*
>
> *The prosecution say that you can determine that the accused drove 49539 on 15 July 2018 at the material time of the collision by looking at the following pieces of evidence: (i) the accused was the sole owner and primary driver of 49359; (ii) that there is no evidence that anyone else was driving 49359 at the material time; (iii) that earlier in the day on 14 July 2018 the accused was seen on CCTV footage taken on Front Street that (shows he) was actually driving 49359; (iv) that on 14 July 2018 the accused [going by the moniker "Zedhi"] was scheduled to be a DJ at an event at Bailey's Bay Cricket Club in Hamilton Parish, which was to the east*

> *of the scene of the collision, and that the accused lived on marsh Folly Road in Hamilton Parish which is to the west of the scene of the collision".*

And further (from pp804-805):

> "*You will have heard evidence from PC 2446 Keisha Brooks. I mentioned her earlier. She indicated that on 10 September 2018 she was provided with a flyer from the event that was held in Bailey's Bay Cricket Club in Hamilton Parish on the night leading up to the collision and that the flyer featured a number of DJs, including Zedhi, and she said that enquiries revealed that all the DJs listed played that night except someone called Eternity.*
>
> *Also you may recall in my earlier summing up I indicated various pieces of evidence which the Crown had indicated shows that the accused was in fact driving his vehicle on the night. There is an additional piece of evidence, if you choose to accept it, which may point to whether or not he drove the vehicle that night, and that will come from the evidence of Walter Jackson, which I will go through again, in which the line of questioning by Acting Detective Inspector (Astwood) in which he asked the defendant, you may recall, if these words were actually spoken verbatim at the time. "Are you aware of your vehicle being driven on 14-15 July ?" Also, "Were you the driver of the vehicle on 15 July?" The accused replied, "More than likely". Acting Detective Inspector (Astwood) asked the defendant, "Is it safe to say you were the driver of the vehicle on the 14th-15th July?". The defendant replied, "Safe to say". Then Acting Detective Inspector (Astwood) asked the defendant, "Is it safe to say at the time of day at the early hour of the morning?" The defendant replied, "Not to my knowledge".*
>
> *The prosecution say that that evidence points to the defendant driving the vehicle on the night at the material time. Again, that is a matter for you as to what you make of that piece of evidence*."

55. From all the foregoing, it appears that there was clear and ample evidence from which the jury could have concluded, and, it is safe to assume, that at least the majority must have concluded, that the Appellant was the driver at the material time.

56. Nor does the case of ***Armstrong*** (above) assist Mr Daniels' argument in this regard. There the conviction was overturned not for want of identification evidence but for want of proper directions as to the constituents of the offence of causing death by dangerous driving, and secondarily, for a misdirection to the jury that the state of intoxication of the deceased driver of the car involved in the collision with Armstrong's vehicle, was irrelevant. No such criticisms have been or could properly be levelled against the directions to the jury in this case.

57. **Ground 2: "The (Judge) erred, as a matter of law, by permitting the Crown's expert, Mr Glen Luben, to provide evidence of a nature and quality that would typically be given by a forensic pathologist, in circumstances where Mr Luben did not (possess) such experience, or expertise. The conviction is unsafe because Mr Luben provided qualified opinion evidence concerning the cause of death that went far beyond his experience as a road traffic collision**

expert, as set out in his Curriculum Vitae and his viva voce evidence."

58. At [15] of his written submissions, Mr Daniels sought to expand upon this Ground: "[15] *That Mr Luben was able to present his strong views, absent the relevant medical experience proved to be highly prejudicial against the Appellant and should be rejected on the basis that Mr Luben lacks the necessary qualifications, despite his claims that his experience in the field of injury pattern analysis and his personal experience with head trauma made him competent to comment*".

59. This argument reveals a misunderstanding of the basis upon which Mr Luben was allowed to testify as a traffic collision investigator with expertise in injury pattern analysis. As shown above in the excerpts from his testimony under-cross-examination by Mr Daniels himself, Mr Luben was at pains to explain that he claimed no qualification or expertise in medicine but that as he said **[5th Emphasis in his evidence at page 17 above**] speaking about his training and experience in this regard: " *.. it is not a medical course.. I do the medical interpretation of kenetics and how injury patterns are and what caused them inside the vehicle or outside or being run over*." The purpose of his evidence in this regard was to relate the pattern of injuries on her body to Jen-Naya's position relative to the vehicle which ran her over and the location, in the eastbound lane, where her body was found.

60. There is, moreover, no reasonable basis for thinking that the jury could have been mislead about the import of Mr Luben's testimony in this regard. The medical evidence of her condition upon arrival at the hospital came from Dr Phillip Jones, the emergency room doctor who attempted cardiac resuscitation on Jen-Naya Simmons but sadly, had to pronounce her dead. Dr Marva Phillips Williams, pathologist, gave the medical cause of death, and the primary evidence of the pattern of injuries to Jen-Naya's body came from Forensic Pathologist Dr Mark Milroy. The reports of these three doctors were read to the jury by agreement. Their evidence was summed up to the jury by the Judge as recorded at pp 813 – 814 of the transcript and in the case of Doctors Williams and Milroy, in terms as set out above at [28] to [29]. Accordingly, I would also reject this ground of appeal.

61. **Ground 1: "The conviction is unsafe because:**

(i) Two road traffic collision reconstruction experts; namely Sgt Akinmola for the Crown and Mr Michael Prime for the defence, opined that the driver of 49359 was innocent. The Crown called a second road traffic collision expert, Mr Glen Luben, who relied on Sgt Akinmola's work, but disagreed with his conclusion and opined that the driver was guilty; and

(ii) In response to questions posed by (the Judge), Mr Luben undermined his initial testimony as it relates to the certainty of guilt, by conceding that he lacked sufficient physical evidence to determine, beyond a reasonable doubt, the driver's guilt to such an extent that it was illogical and unreasonable for a jury, properly directed, to convict the Appellant."

62. As a first order of business, it must be said that it is a rather heavy gloss upon Mr Luben's evidence to suggest that he opined as to the Appellant's guilt. That was not the import of his evidence and any such incursion into the domain of the jury would no doubt have been readily disapproved of

by the Judge. Rather, the significance and purpose of his evidence was as described immediately above in [59].

63. In elaborating upon his written submissions on Ground 1(i) (above), Mr Daniels invited the court to take a "macro-view" of the case which he argued would lead to a "lurking doubt" and to the conclusion that the conviction of the Appellant was unsafe and should therefore be set aside.

64. While it will indeed be necessary to take a broad overview of the evidence in addressing this ground of appeal, the starting point is with the law governing the determination of an appeal against conviction on a ground which invites the setting aside of the jury's verdict having regard to the facts of the case, this being such a case and one for which leave to appeal was granted pursuant to section 17(1)(b). Iin this regard section 21 (1) of the Court of Appeal Act 1964, ("**the Act**") in relevant part reads as follows:

> "21(1*) Upon the hearing of an appeal under section 17(1)(a) or (b), the Court of Appeal shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Supreme Court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, or in any other case shall dismiss the appeal":* [emphasis added]...[then follows the proviso which does not arise for consideration here]

65. Thus, what is required before this Court might set aside the jury's verdict (in this case by a majority of 9 to 3), is a finding that it is unreasonable (with the connotation of irrationality), or cannot be supported having regard to the evidence, and I would add, "*in its totality*".

66. The test is different and distinct from that adopted in the earlier cases turning upon the notion of an undefined "*lurking doubt*" or upon whether there is generally a sense of the verdict being "*unsafe*". The test is more principled and the distinction is aptly recognised in the concluding paragraph from the judgment of this Court, per Sir Alastair Blair-Kerr in ***Terrelonge v The Queen*** [1987] Bda LR 9 , in setting aside a conviction for lack of evidence that the appellant Terrelonge was involved in a conspiracy to import and distribute marijuana:

> "*We had more than a lurking doubt as to the correctness of the jury's verdict. But the question was not whether it was "unsafe" to allow it stand. The question was whether the verdict could be supported having regard to the evidence; and, after careful consideration, but with some hesitation, we answered that question in the negative. For these reasons, the appeal was allowed*".

67. The approach to be taken is not simply for this Court to discern (as was classically stated in ***R v Cooper (Sean***) [1969] 1 Q.B. 267) whether we have "*some lurking doubt in our minds which makes us wonder whether an injustice has been done.. a reaction which may not be based strictly on the evidence as such.. a reaction which can be produced by the general feel of the case as the court experiences it*".

68. The reason for the distinction is important. In ***Pendleton v R*** [2002] 1 WLR 72, in considering the

impact of the introduction in England and Wales in 1995 of the new "safety test", Lord Bingham was careful to recognize that the change did not herald a two-tier system of trial- by jury at first instance and by the Court of Appeal on appeal. In that case he said at [17]:

> "*My Lords, Mr Mansfield is right to emphasise the central role of the jury in a trial on indictment. This is an important and greatly-prized feature of our constitution. Trial by jury does not mean trial by jury in the first instance and trial by judges of the Court of Appeal in the second. The Court of Appeal is entrusted with a power of review to guard against the possibility of injustice but it is a power to be exercised with caution, mindful that the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury*."

69. These cautionary words, which were approved and applied by the Court of Appeal for Northern Ireland in ***Regina v Pollock*** [2004] NICA 34 having regard to a similar test of 'unsafe" verdict there, must be *a fortiori* applicable under section 21 (1) of the Act, requiring as it does, this Court to undertake a careful analysis of all the evidence in order to decide upon the reasonableness or rationality of the jury's verdict.

70. The distinction between the old "*lurking doubt*" and the current safety test in England & Wales, , was recognized in even more trenchant terms by Lord Judge CJ on behalf of the Court of Appeal in ***Pope*** [2012] EWCA Crim. 2241, [2013] 1 Cr App R 14 where at [14] he observed:

> *"As a matter of principle, in the administration of justice when there is a trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the judge, nor indeed with this court, but with the jury. If therefore there is a case to answer and, after proper directions, the jury convicted, it is not open to the court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is unsafe. Where it arises for consideration at all, the application of the "lurking doubt" concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe. It can therefore only be in the most exceptional circumstances that the conviction will be quashed on this ground alone, and even more exceptional if the attention of the court is confined to a re-examination of the material before the jury*".

71. Accordingly, having regard to the case law and the requirements of section 21(1) of the Act, there can be no less of a need for "*reasoned analysis of the evidence or the trial process, or both*" and the following approach may appropriately be distilled:

(i) The Court of Appeal should concentrate on the question "does it think that the verdict is unreasonable or cannot be supported having regard to the totality of the evidence"?

(ii) This exercise does not involve trying the case again. Rather, it requires the Court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to assess the reasonableness of the verdict against

that background.

(iii) The Court should eschew speculation as to what may have influenced the jury in arriving at their verdict.

(iv) The Court of Appeal must be persuaded that the verdict is unreasonable or cannot be supported on the evidence as a whole. It is only if, having conducted a reasoned analysis of the evidence the Court concludes that the verdict falls into either of those categories that it should allow the appeal.

72. The process of reasoned analysis in this case begins against the background of the directions to the jury on their approach to expert evidence. Those directions were given in clear and unexceptionable terms by the Judge beginning at page 774 line 18 to page775 line 19. More particularly of relevance here, due to the nature of the criticism of Mr Luben's opinion evidence, the following directions were given:

> "*Expert evidence is admissible for matters relating to science, skill or trade beyond the knowledge of the ordinary layperson in respect of his specific field of training or expertise. In other words, expert witnesses give evidence and opinions at criminal trials to assist juries on matters of a specialist kind which are not of common knowledge.*
>
> *However, expert evidence is still evidence of fact and your verdict must be based on the evidence as a whole of which the expert evidence forms only a part. Even though you may pay due regard to the opinion of the expert as being worthy of credit, you are not bound to accept that evidence if you do not wish to do so. Even if that evidence is untested. Therefore, if elsewhere in the evidence you find material which contradicts, outweighs or displaces the opinion of the expert, you are free to attach such weight to the expert evidence as you may think appropriate.*
>
> *Remember you are the sole judges of the facts and you are entitled to assess and accept or reject any such opinion evidence as you see fit… This is a trial by jury, not a trial by expert. It is up to you to decide what weight or importance you give to their opinion or indeed whether you accept their opinion at all...*"

73. This direction goes to the first of Mr Daniels' argument, which in essence, is that as both Sgt Akinmola and Mr Luben were prosecution witnesses who gave conflicting evidence as to the crucial issue of Jen-Naya Simmons' position on the road at the time of the collision, it was inherently unsafe for the jury to have convicted on that state of the prosecution's case.

74. But the point is that it was a matter for the jury to decide which, if any of the three experts' conflicting opinions, to accept. This was indeed so, despite the fact that Sgt Akinmola's opinion that Jen-Naya was struck having trespassed into the westbound lane, was shared by Mr Prime, even while he disagreed with Sgt Akinmola's opinion that her bike had also entered the westbound lane; and that Mr Luben disagreed with both of them.

75. Subject to the overarching test of reasonableness, it was all a matter for the jury. Moreover, as Mr

Mahoney submitted, the prosecution was duty bound to present all relevant evidence in its possession and leave it to the jury to decide whose evidence to accept or reject. In this regard he cited the following dictum from Leggatt LJ in the English Court of Appeal in ***R v Smith et al*** [2019] EWCA Crim 1151 at [28] which we endorse and accept:

> " *The relevant principles can, we think, be summarized as follows:*
>
> *(1) Subject to overall control of the court, the prosecution has a discretion as to what witnesses to call at a trial, but that discretion must be exercised in accordance with the interests of justice and the general duty of the prosecution to put all evidence which it considers relevant and capable of belief before the jury.*
>
> *(2) It is open to the prosecution – and indeed the interests of justice may require it – to call a witness to give evidence only part of which the prosecution considers to be worthy of belief.*
>
> *(3) In such circumstances the prosecution is in principle entitled to adduce other evidence to contradict that part of the witness's evidence which the prosecution considers to be inaccurate or false, and to invite the jury to reject that part of the witness's evidence.*
>
> *(4) That may be done without applying to treat the witness as hostile. However, unless the witness is declared hostile, evidence adduced to contradict the witness may not include a previous inconsistent statement of that witness, nor is the prosecution, as the party calling the witness, entitled to cross-examine the witness."*

76. Accordingly, the prosecution was entitled to present and rely upon Sgt Akinmola's evidence for purposes such as his depiction of the scene on his Exhibit 11 (the hand drawn not-to- scale sketch) for the location of the scratch mark left by the bike, even while not relying upon him and presenting Mr Luben as the witness to be preferred on the most crucial issue, namelyf Jen-Naya Simmons' location when she was struck by the Appellant's van.

77. That most crucial issue was of course, also, as they were directed properly by the Judge, a matter for the jury to decide depending on which of the experts' opinions they accepted or rejected. It is to be assumed that they must have accepted Mr Luben's opinion and it is therefore to the exercise of the assessment of the reasonableness of their decision in this regard that we must now turn. With the benefit of reference to the summations of the evidence of the experts as set out above, this assessment need not be lengthy.

78. First, on the differences between the experts as to whether Jen-Naya remained in her eastbound lane or must have entered on her bike or been thrown into the westbound lane as she separated from her bike, the jury heard distinct and telling evidence. The issue for the jury would have been whether to accept Mr Luben's opinion in this respect or Sgt Akinmola's or Mr Prime's (or none of their opinions). Again, it is to be assumed that they accepted Mr Luben's and so were they

reasonable in doing so?

79. His testimony in this regard is set out above first at pages 15-17 **[1st Emphasis]** and **[3rd Emphasis],** at bottom of page 17 **[6th Emphasis**], on page 18 **[7th Emphasis]** and then again at page 18 **[9th Emphasis**].

80. At the **[3nd Emphasis]**, he explains in response to the Judge, that while it may seem counter-intuitive for a bike and rider to have been negotiating a right-hand turn but ended up after a fall, in the left-hand lane, this is the result of "Newton's first law of motion" in operation (also earlier mentioned at the **[1st Emphasis])**. A shift in momentum to the left which at the **[1st Emphases]** and **[7th Emphasis**] he opined would have been the result of Jen-Naya trying to take evasive action to the left as she encountered the Appellant's van coming around the corner into her eastbound lane, instead of negotiating what would have been a left-hand corner for the Appellant. The bike ended up at 88 feet to the left because that had become its direction of travel. Absent any evidence of impact from the van while in the westbound lane - a scenario which both Mr Prime and Mr Luben rejected - the straight skid mark left entirely in the left (eastbound) lane by the handlebar of the bike shows that the bike never left its correct lane. And so, according to Mr Luben at the **[5th Emphasis**] and [**8th Emphasis**] Jen-Naya most likely did not enter the westbound lane, her momentum would have shifted momentarily with that of the bike to the left and although she would have fallen to the right of the bike, given her distance at arms outstretched from the front of the bike, she would have fallen in the eastbound lane. It all happened very quickly "*in a millisecond or half second*" and she would have first been struck on the head with her helmet then on, by the front wheel of the van at close to ground level. Had she been more upright with the full frame of her body coming in contact with the van, the damage to the van and the extent and pattern of her injuries would have been different, in particular, the crushing injury to her head (as to which see below on his injury pattern analysis).

81. Perhaps surprisingly, there was some support to be found for Mr Luben's opinion in this regard from Mr Prime's testimony. While at the **[1st Emphasis], [5th Emphasei]** and **[7th Emphasis]** in the summing up of his evidence (at pages 19, 20 and 21 above), Mr Prime was insistent in his conclusion that Jen-Naya fell into the westbound lane, significantly in answer at page 19 to the second question he said as follows:

> *Q: And I believe you said it was your opinion that Miss Simmons would have gone down with the bike?*
>
> *A: Initially yes. But she would fall off it to the right, as all motor-cyclists part company with the bike when they go down, if the bike goes to the right, they will go to the right. <u>If the bike falls to the left, they'll go to the left of the bike</u>... whilst the bike didn't end up in the wrong lane, she would have done.. <u>when Jen-Naya first came off her bike she continued to travel east in the direction of the bike</u> and took some time to come to a stop, probably 12,13 or 14 meters."* **[emphases here added again].**

82. Mr Prime, having himself expressed familiarity with Newton's first law of motion, could have been regarded by the jury as here giving unintended support to Mr Luben's opinion, if they had also accepted that an evasive manoeuvre by Jen-Naya <u>to her left</u> explained how her bike would

have ended up in the eastbound lane after it fell to the ground in a split second after being separated from Jen-Naya and without being struck by the Appellant's van. The inference open to them would have been that Jen-Naya's shift of momentum, like that of the bike, would have kept her in the eastbound lane. It would also have been open to the jury to find some support for Mr Luben's opinion from the evidence of the manner in which the van was then being driven, first as detected on CCTV footage some 900 meters away at Shelby Bay as it approached the scene and again from Jada Simmons-Trott's account of her close encounter, due to its incursion upon her eastbound lane only just before it entered the fatal corner.

83. Likely even more compelling to the jury in arriving at their majority verdict, would have been Mr Luben's evidence based upon his analysis of the injury patterns on Jen-Naya's body. In this regard, the jury would also have had regard to the fact that the pattern of these injuries had been noticed and recorded by the forensic pathologist as: " *The overall appearance is that of a person who has been run over by another vehicle while lying in the road. The patterned injuries have the appearance of being from the superstructure of the underside of a vehicle*." [See [30] above].

84. The ultimate question for the jury would have been how could such a pattern of injuries have been left on Jen-Naya's body as it was found lying supine in the eastbound lane? Mr Luben's was the only testimony they had in this regard and as set out above at **[1st, 4th, 8th and 9th Emphases]** , the jury would have been entitled to regard it as logical and compelling when compared to the other hypothesis of her body having been struck in the westbound lane and displaced to the eastbound lane. That hypothesis was, the jury were entitled to find, simply inconsistent with the absence of any signs in the westbound lane of blood resulting from a crushing injury to the head, the absence of road rash suggesting of a body having been displaced along the surface of the road at some distance and inconsistent also with the great bulk of the debris from the collision ending up along with the body in the eastbound lane, as Mr Luben observed **[12th Emphasis].**

85. The impression left on Jen-Naya's right thigh by the inside of the left rear tyre of the van was particularly telling on Mr Luben's account, as set out above at the **[2nd and 4th Emphases].** There he was insistent in his opinion that her body had been run over from her feet to her head and that that could only have taken place in her eastbound lane. And while from the scalp injury at the back of her head it appeared that she had been dragged beneath the van on her back for some distance, this was not very far. On the assumption that her first contact with the van was about where the bike skid mark began (as suggested to him by Mr Daniels in cross-examination), this perhaps could have been as much as 6 meters or 19 feet to where the pool of blood was seen. This nonetheless would all have taken place in the eastbound lane.

86. On careful analysis, it cannot be said that there was any unreasonableness or irrationality in the majority of the jury's acceptance of Mr Luben's testimony. There were sound bases upon which they could have preferred his evidence over that, in particular, of Mr Pride. And this was so notwithstanding the evidence of Jen-Naya's blood/alcohol level being over the legal limit, the presence of Molly found by the forensic toxicology report and her relative inexperience as a rider, simply because the jury would have seen for themselves on the CCTV footage that in keeping with Jada Simmons-Trott's evidence, Jen-Naya was riding competently at the material times. It follows that this ground of appeal must also be refused.

87. That then brings us to Ground 1(ii), based on the proposition that in response to questions from

the Judge, Mr Luben undermined his initial opinion upon which the jury must have relied, "*by conceding that he lacked sufficient evidence to determine, beyond reasonable doubt, the driver's guilt to such an extent that it was illogical and unreasonable*" for the jury to convict. Here again Mr Daniels appears to confuse Mr Luben's role as an expert witness with that of the jury whose responsibility it was to determine the verdict. But that aside, it is also clear that when Mr Luben's evidence in this regard is considered (as set out above at page 18 at the **[11th Emphasis],** it does not carry the import for which Mr Daniels contends.

88. We agree with Mr Mahoney's submission that the import of Mr Luben's evidence on this point was that had he seen the actual damage to the "original" bumper of the van (ie: before it was surreptitiously repaired by the Appellant) and had sight also of the helmet Jen-Naya had been wearing, those things would have assisted him in his analysis; not that their absence or unavailability meant that he was uncertain or had wavered about his conclusions.

89. Moreover, as Mr Mahoney also submits, citing ***PR v R*** [2019] EWCA Crim 1225, and testing Mr Daniels' proposition another way, had an application been made for a stay of the trial on account of the unavailability of these items of evidence, it would inevitably have been refused on the basis that a fair trial would nonetheless have been afforded the Appellant. As it happened, quite properly no such application was made and so the issue becomes simply, whether or not Mr Luben could be regarded as having wavered so as to undermine his own evidence. This, had it been contended before them, would have been a matter of weight for the jury. By the verdict of its majority, the jury must not have attached to this aspect of Mr Luben's testimony the contended significance or import. It follows that this ground of appeal against conviction also fails and the appeal against conviction is accordingly dismissed.

Appeal against Sentence.

90. By the majority verdict of the jury, the Appellant was convicted on 28 June 2022 for the offence of Causing Death by Careless Driving, contrary to section 37A of the Road Traffic Act 1947 (as amended)[1] ("the RTA").

91. On 3rd February 2023, the Appellant was sentenced by the trial Judge, Wolffe J, as follows:

(i) Three (3) years imprisonment

(ii) Disqualification from driving all vehicles for five (5) years (as mandated by the Traffic Offences (Penalties) Act 1976 ("the TOPA")

(iii) Twelve (12) demerit points (also as mandated by the TOPA.

92. On 27th February 2023, Wolffe J delivered a written judgment carefully explaining his reasons for sentence (and the reasons for the delay between conviction and sentence which were due mainly, to the Appellant's lack of co-operation required for preparation of his Social Inquiry Report (SIR)).

93. In his judgment, the learned Judge also reviewed relevant Bermudian, English and Canadian case

[1] By the Road Traffic Amendment Act 2012

law. In particular, he considered the judgment of this court in ***Regina v Daniel***, Criminal Appeal No. 22 of 2015. In that case, in assessing the appropriate range of sentence for an offence of causing death by dangerous driving, Scott Baker P had in turn considered the leading English Court of Appeal authority of a joint appeal in ***R v Cooksley and others*** [2003] EWCA Crim 996 in which guidelines for sentencing for the offences of causing death by dangerous driving and by careless driving under the influence of drink, were proposed. In ***R v Daniel,*** Baker P, against the background of a finding at [16] that " (*t)here is no clear guidance on the appropriate level of sentence in Bermuda for causing death by dangerous driving*" also found at [20] (et. seq.) that "*Much greater assistance is to be found in the judgment of the English Court of Appeal in* ***Cooksley*** *(than in certain earlier Bermudian cases cited). I regard the principles in that case as applicable to Bermuda but the sentencing ranges have to be taken with the caveat that the maximum penalty in Bermuda [(for causing death by dangerous driving or by careless driving)] is 8 years, i.e. two years less than in England. The Court adopted a series of aggravating and mitigating factors set out in the Sentencing Advisory Panel's Advice, with the qualification that they should not be regarded as exhaustive and the significance of the factors can differ. The aggravating factors are divided into four categories. I set them out here for convenience: [then followed the aggravating factors]… [21]. There are six mitigating factors which I again set out: [also then set out]. [22] The Court went on in Cooksley to set out four starting points for sentence in death by dangerous driving cases emphasizing that the sentence had to avoid the trap of double accounting by taking aggravating circumstances to place the sentence in a higher category and then adding to it because of the very same aggravating features. [23] The four starting points are:*

No aggravating circumstances	*12-18 months*
Intermediate culpability	*2 – 3 years*
Higher culpability	*4 – 5 years*
Most serious culpability	*6 years or over*

> *[24] Bearing in mind the higher maximum penalty of 10 rather than 8 years in England, these starting points are slightly on the high side for Bermuda. These starting points are, of course, for contested cases. The Court made clear that in setting its recommendation for starting points it had made allowances for the fact that those who commit offences of dangerous driving resulting in death are less likely, having served their sentence, to commit the same offence again. Apart from their involvement in the offence which resulted in death, they can be individuals who would not otherwise dream of committing a crime. They, unlike those who commit crimes of violence, also do not intend to harm their victims."*

94. On the basis of that analysis of ***Cooksley****,* and the guidelines adopted from it*,* Baker P proceeded in ***Daniel*****,** to substitute a sentence of 2 years imprisonment for the manifestly inadequate sentence of 6 months imprisonment imposed at first instance.

95. In the instant case, the learned Judge, having considered both ***Cooksley*** and ***Daniel*** and in recognition of the absence of guidelines for sentencing in cases of causing death by careless driving (such as this) sought to address the issue in the following manner:

> "*[35] So where does that leave us in Bermuda? We are just under twenty (20) years*

> *on from **Cooksley** and about seven (7) years on from the decision in **Daniel.** Therefore, the application of any starting points for sentencing offenders who have caused death by careless driving should reasonably reflect this, particularly in light of the prevalence of fatal road traffic collisions for the period 2016 to 2020 (the Bermuda Police Service's Official Statistics Report 2020 was provided by the Prosecution). Moreover, considering that the maximum penalty of 8 years' imprisonment in Bermuda for causing death by careless driving is three (3) years more than the maximum in England for the same offence, then any starting points for Bermuda should justifiably be higher than the current starting points set by the Sentencing Council. Therefore, relying on the guidance provided by **Cooksley** and **Daniel** (including the aggravating and mitigating features which are to be factored in) I would suggest the following starting points for imprisonment for the offence of causing death by careless driving where there is a not guilty plea i.e. after trial:*
>
> *Lesser Culpability 9 – 12 months (with no aggravating circumstances)*
>
> *Intermediate Culpability 18 months – 3 years*
>
> *Higher Culpability 4 – 5 years*
>
> *Most serious culpability 6 years or over"*

96. Applying those starting points and after considering the aggravating and mitigating circumstances of the case, the learned Judge explained the sentence of 3 years imprisonment which he imposed on the Appellant, treating him as coming within the starting point of Intermediate Culpability.

97. While the Judge clearly explained his approach to the difficult judicial task of sentencing in cases like the present, there are potential anomalies which must be addressed. The first is that, despite his declared intention to be guided by the decision of this Court in ***Daniel,*** he ends up imposing a higher sentence of three (3) years imprisonment for the offence of causing death by careless driving than the sentence of 2 years imprisonment imposed in ***Daniel*** for the offence of causing death by dangerous driving and although the appellant Daniel, was treated also as coming within the starting point of Intermediate Culpability. This outcome can be justified in this case but only if rationalised in the way we seek to explain below. The second potential anomaly is that while in the first two of his four starting points, the range of terms of imprisonment suggested by the Judge is lower than the corresponding ranges adopted in ***Daniel*** (suitably so because of the inherently more serious nature of the offence of causing death by dangerous driving) that approach does not carry through to the other two starting points suggested by the Judge. There for "Higher Culpabilty" and "Most Serious Culpability", the suggested ranges are 4-5 years and 6 years and over, respectively, exactly the same as adopted in ***Daniel*** for causing death by dangerous driving. For the sake of certainty and consistency of approach, these must be adjusted in line with the other two starting points and this will also be addressed below.

98. The fact that (as the Judge notes) the offence of causing death by careless driving carries a maximum penalty of eight (8) years in Bermuda, three (3) more than the maximum in England, cannot explain why at any starting point for sentencing in Bermuda, the offence of causing death

by careless driving should carry the same starting point ranges as those for causing death by dangerous driving. Indeed, as the learned Judge himself recognizes at [33] of his Reasons for Sentencing, although these two different offences attract the same statutory maximum penalty of eight (8) years imprisonment, it has to be recognized for the purpose of the sentencing exercise, that they do not carry the same degree of culpability. While the consequence of loss of life will be equally devastating in each case, the sentence cannot meaningfully be measured against the gravity of the consequences. As the Courts both in ***Cooksley*** and ***Daniel*** noted, the tragic loss of life is not regarded as intended by the offender. And so, the differentiation of treatment for sentencing purposes arises, fundamentally and logically, from the fact that dangerous driving is regarded as conduct which is more culpable than careless driving.

99. It is primarily for those reasons that we find we must depart, if only slightly, from the approach of the Judge. We would adjust his second, third and fourth starting point ranges for sentencing for offences of causing death by careless driving to be "18 months – 2 years", "3-4 years" and "5 years or over"; respectively.

100. However, that does not mean that the sentence of 3 year's imprisonment is wrong in the circumstances of this case. We accept as correct, the Judge's assessment of the nature of the Appellant's careless driving as coming within the range of starting points for Intermediate Culpability. But the identification of the starting points for the category of culpability is only the beginning of the sentencing exercise. The aggravating and mitigating circumstances of the case must also be assessed and we agree with the Judge's conclusion that the former far outweigh the latter in this case, one in which, after a fully contested trial, the Appellant can get no credit for admission of guilt or expression of true remorse. Especially egregious here, was what the Judge described as the Appellant's "irresponsible behaviour at the time of the offence "- his callous failure to stop to lend assistance after the collision, even after he had turned his van around and returned to the scene. It is clear that he had no concern for his victim, his only concern was to evade detection for his offence and this evasive conduct was, as the Judge also found "taken to the next level by repairing the damage caused to his van by the collision with Jen-Naya and modifying its appearance by installing the roof rack".

101. As noted above, the starting point range for "Intermediate Culpability" for the offence of causing death by careless driving, is simply that, the starting point. If, as we have found, the aggravating features are so egregious as to justify a sentence beyond the starting point range, then the Court's discretion will not be fettered by the range. That is the decision at which we have arrived in this case. While we have adjusted the range for Intermediate Culpability to 18 months to 2 years for the reasons explained above, we agree with the Judge's overall assessment and that the sentence should be three (3) years imprisonment[2].

102. We should not part from the subject of sentencing for offences of driving causing death without making the following further observations. While we have sought to rationalise the guidelines and apply them in this case as explained above, we should not be taken as indicating that a term of imprisonment must be imposed in every case of careless driving causing death. The offending course of driving could involve the most momentary lapse of attention but causing the same tragic

[2] We note that mention was made of ***R v Clinton Smith*** (unreported, Bermuda Supreme Court), in which, as explained by Mr Mahoney, in 2018 a sentence of 18 months imprisonment was imposed for an offence of causing death by careless driving following conviction at trial.

outcome of loss of life. In such a case, if fault is admitted and genuine remorse shown, a non-custodial dispensation could remain within the proper exercise of discretion by the Court when sentencing. Everything will, indeed, depend upon the circumstances of the case. We have reflected also, as the learned Judge did, upon the need for a comprehensive legislative review of the subject. The prevalence of driving offences causing death in Bermuda was rightly noted by the Judge. And, while in England there has recently been a relative decline in the numbers of such offences, that may to some significant degree be attributable to the fact that Parliament has, since ***Cooksley,*** very severely increased the maximum penalty for causing death by dangerous driving to life imprisonment[3]. Whether or not the guidance received in Bermuda from ***Cooksley*** or indeed from this Court in ***Daniel*** and the instant case**,** should remain operable, may therefore be regarded as very much a matter for legislative attention.

GLOSTER JA:

103. I agree.

CLARKE P:

104. I, also, agree. The appeal against conviction and sentence is therefore dismissed.

[3] By the enactment of section 86(2) of the Police, Crime Sentencing Act 2022. (noted also by the trial Judge at [31] of his Reasons).