SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thomas* [2002] QCA 23
PARTIES:	**R** **v** **THOMAS, Wayne Keith** (appellant)
FILE NO/S:	CA No 253 of 2001 SC No 11 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	15 February 2002
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2002
JUDGES:	Davies and Williams JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal against conviction allowed, conviction quashed, retrial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – CONSIDERATION OF SUMMING UP AS A WHOLE – whether error in summing up on the issue of causation – jury must be satisfied beyond reasonable doubt that the conduct of the appellant constituting criminal negligence "contributed significantly" to the death of the deceased. CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – HOMICIDE – MANSLAUGHTER – CRIMINAL NEGLIGENCE – whether a person could be held liable for the death of another for allowing an unlicensed and inexperienced person to drive a motor vehicle – appellant backseat passenger at time of incident. *Criminal Code* (Qld), s289 *R v Kidd* [2001] QCA 536, CA No 246 of 2001, 30 November 2001, considered *R v Stott and Van Embden* [2001] QCA 313, CA No 372 &

377 of 2000, 7 August 2000, considered

COUNSEL: J M McLennan for the appellant
S G Bain for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Department of Public Prosecutions (Queensland) for the respondent

[1] **DAVIES JA:** I agree with the judgment of Williams JA and with his reasons.

[2] **WILLIAMS JA:** The appellant has appealed against his conviction for manslaughter arising out of a motor vehicle incident. The background circumstances are unusual, and the issues have been further complicated by the fact that the trial took place more than five years after the incident occurred.

[3] The accident in question occurred in the early hours of the morning of 13 July 1996 near Gracemere outside of Rockhampton. The police evidence was that the incident occurred approximately 850 metres north of the Gracemere-Gavial Road intersection on the Burnett Highway, probably between 1 and 2am.

[4] There were three people in the motor vehicle, a 1988 Nissan manual sedan. The appellant, then a man aged 42, was the owner of that vehicle. At the time of the incident he was a passenger, sitting behind the driver. Rachel Sherie Allan, a girl aged 16, was the driver; she died and the relevant charge against the appellant was based on her death. The other passenger in the car was another 16 year old girl, Janelle Elizabeth Parsons; she was seated in the front passenger seat alongside the driver. Neither girl was licensed to drive a motor vehicle at the date in question.

[5] There was evidence before the jury, not seriously contested, tending to establish the following material facts:

(i) the vehicle had travelled along a straight stretch of road for about 2 klms before coming to a sweeping left hand bend immediately before the driver lost control of the motor vehicle;
(ii) when the driver lost control the vehicle slewed sideways and then rolled a number of times before landing on its wheels;
(iii) immediately before the incident the vehicle had been travelling between 127 and 137 klms; the speed limit was 100 klph;
(iv) the deceased and Parsons were conversing immediately before the incident;
(v) when the vehicle started drifting to the incorrect side of the road the appellant said, "watch out". At that point Parsons "grabbed the wheel and pulled the wheel". It was after that that the vehicle started rolling;
(vi) shortly after the incident the appellant said to Parsons that she should say that he was driving and Rachel was in the passenger seat. Subsequently at the scene the appellant said to an ambulance officer and a police officer that he was the driver;
(vii) later at the hospital the appellant told the police the truth that Rachel was driving.

[6] After the incident the appellant moved or attempted to move the deceased from the driver's seat. That could have been because he wanted to assist in giving her any necessary medical attention or, as was the prosecution case, to indicate that she was not the driver of the vehicle.

[7] The appellant was visiting Rockhampton from interstate at the material time. There were apparently a number of young people living in the house where he was temporarily staying. Because of that he had met the deceased shortly before the incident, but he only met Parsons on the night in question. It was generally assumed at the trial that the girls were interested in obtaining some cannabis but had no money. They "sweet talked" the appellant into assisting them in their endeavours to obtain some of that substance. That appears generally to have been the background to the drive from Rockhampton to Mt Morgan and back on the night in question.

[8] The evidence was to the effect that the appellant drove out of Rockhampton and along the highway leading to Mt Morgan. It seems that each girl, though unlicensed, asked to be allowed to drive the motor vehicle. Ultimately it appears that the appellant allowed Parsons to drive most of the way from the bottom of the range up to Mt Morgan. The group spent sometime in Mt Morgan and then commenced the return journey. At this point it appears that the deceased put pressure on the appellant to allow her to drive, but he refused to let her do so, apparently on the basis that she was too inexperienced. Parsons drove a substantial way down the range. At the foot of the range the appellant permitted the deceased to drive and she drove for quite some distance before the incident occurred.

[9] From submissions made in the absence of the jury when dealing with the admissibility of evidence it appears that the appellant was not charged with any offence immediately following the incident. In consequence he left the Rockhampton district and returned interstate. A coronial inquest began in about September 1997 into the death of the deceased. It was apparently delayed because the appellant could not be located. It was consequent upon the conclusion of that inquest that the appellant was charged. A warrant was issued for his arrest but the appellant was not located until sometime in 2000. That explains the delay between the date of the incident and the date of trial. There was no suggestion in the material that the appellant was deliberately avoiding the authorities during that period.

[10] The above outline of facts clearly demonstrates that this was not an ordinary motor vehicle manslaughter case. At the outset of the trial the defence requested particulars. That was initially resisted by the prosecution on the basis that authorities indicated that the prosecution was entitled to rely on all the circumstances of the accident in order to establish the offence. The authorities in question relate to the more usual situation where the person charged was the driver of a motor vehicle involved in a fatal accident. The learned trial judge recognised that this was not such a case and there was significant argument about the particulars on which the prosecution case would go to the jury. At one point in the course of argument the learned trial judge said that he assumed "that the act relied upon by the Crown as constituting the criminal negligence is permitting the girl to take control of the vehicle." The crown prosecutor accepted that but indicated he wanted to go further. He is recorded as making the following submission:

> "Your Honour, in relation to particulars then, I'll particularise the Crown case in this way. Firstly, he's allowed an inexperienced juvenile driver to drive when he's clearly concerned about her ability to do so. Secondly, he's allowed – he hasn't intervened, he's allowed her to drive at night at excessive speed. Thirdly, he's allowed an inexperienced juvenile driver, again when clearly

> concerned about her ability to drive, while not keeping a proper lookout."

[11] Both the learned trial judge and counsel for the defence raised issues with that formulation. The argument then sidetracked into the possible relevance of the blood alcohol reading of the deceased driver; the prosecution sought to rely on that evidence on the basis that the appellant knew or ought to have been aware at the time he permitted the deceased to drive that she had been drinking. The defence objected to the admissibility of that evidence. Ultimately, the learned trial judge ruled that the prosecution could not lead evidence that the deceased had a blood alcohol reading of .07 because there was insufficient evidence to establish that the appellant knew or ought to have been aware that she had been drinking.

[12] As I read the transcript of argument with respect to particulars, and this was essentially confirmed by both counsel on the hearing of the appeal, there was no formal ruling made by the learned trial judge as to the precise particulars on which the case would proceed. But it seems clear, and again this was accepted by both counsel on the hearing of the appeal, that the only particular ultimately relied on was permitting the young unlicensed and inexperienced girl to take control of the vehicle. That is borne out by the summing-up. The first relevant passage therein is the following:

> "Now the failure relied on by the Crown is that he allowed the deceased to drive in circumstances where the Crown says you would be satisfied that he knew she was unlicensed and inexperienced."

[13] Later the learned trial judge expanded on that by instructing the jury as follows:

> "Now, of course, it is not necessarily improper to allow an unlicensed driver to drive. We all learn to drive at some stage before getting our licenses. An unlicensed person may be competent, even though unlicensed. The defence says that Mr Thomas was exercising care in allowing the deceased to drive on the flat, better section of the road, but that is but one matter you consider when weighing up all the evidence. . . . The question for you is whether, in this case, allowing the deceased to drive the vehicle from the foot of the range, with whatever knowledge of her capacity to drive you find the accused had, amounts to such gross negligence as to amount to a crime against the State. That is really the question you have to decide in this case."

[14] After initially retiring the jury asked for redirections. In the course of redirecting the jury the learned trial judge read s 289 of the *Criminal Code* to them and in the course of expanding on that provision he said:

> "And then it goes on to say that a person is held to have caused the consequences which result to the life or health of any person by reason of any omission to perform that duty. So if you are in charge of a dangerous object you have a duty to exercise reasonable care to ensure that nobody is harmed by it and if somebody is harmed by it then you are held to have caused the consequences."

[15] That is a passage to which I will return subsequently. Towards the end of the redirections he said:

> "You have to decide whether the negligence in this case, which the Crown says is allowing the deceased to drive the vehicle was such a gross breach of duty as to amount to a crime and I do not think I can put it any more simply than that."

[16] Given all of that it is abundantly clear that the jury were instructed that the only particular of negligence alleged against the appellant was in permitting the girl to drive, that is conduct which specifically occurred some considerable time prior to the incident. As already noted, in a case such as this particulars are of critical importance. In circumstances such as existed here it could well be argued that there was negligence in the vehicle owner in failing to supervise the driving (that is, failing to counsel to drive at moderate speed and if that was not done to withdraw the permission to drive), and in permitting an unlicensed and inexperienced person to sit alongside the unlicensed and inexperienced driver (a factor of significance if that passenger grabbed the steering wheel). That is not necessarily an exhaustive statement of possible particulars of negligence open on the facts of this case. However, this appeal must be resolved given the way the prosecution case was presented to the jury.

[17] The jury were informed by defence counsel at the outset of the trial that "the defence admits that Rachel Sherie Allan died as a result of head injuries sustained in a road traffic crash near Gracemere in the State of Queensland on the 13th day of July 1996." Immediately thereafter the learned trial judge is recorded as saying to the jury that "the effect of that admission is that you don't have to concern yourself with the fact of the death or the cause of the death although making that admission of course doesn't mean that the accused is admitting that he's guilty of the offence." In the course of his summing-up the learned trial judge again referred to that admission and went on:

> "You will recall that at the commencement of the trial the accused's counsel . . . admitted the death of Miss Allan and that she died of a head injury as a result of a car accident. That admission is sufficient proof of the matters to which it is directed. It is not of course, as I said to you when it was made yesterday, an admission of guilt of the offence of manslaughter."

[18] By the Notice of Appeal the appellant contended that the conviction was unsafe and unsatisfactory. At the outset of the hearing this Court gave leave to amend so that the grounds of appeal became as follows:

> "A. The conviction is unreasonable, or cannot be supported having regard to the evidence, in that:
>
> (i) there was no evidence to support the conclusion that the appellant was in charge or control of the motor vehicle such that manslaughter by criminal negligence was open;
>
> (ii) there was no evidence to support the conclusion that the appellant was criminally negligent in allowing the deceased to drive;
>
> (iii) there was no evidence to support the conclusion that the appellant's conduct if criminally negligent, caused the death of Rachel Sherie Allan;

(iv) there was no evidence that the death of Rachel Sherie Allan was a reasonably foreseeable consequence of the appellant's conduct.

B. The learned trial judge erred in failing to direct the jury that they had to be satisfied beyond a reasonable doubt that the appellant was in charge or control of the motor vehicle at the time of death before criminal liability under s.289 Code arose.

C. (i) the learned trial judge erred in removing from the jury's consideration the question whether, as a matter of fact, the appellant's conduct caused the death of Rachel Sherie Allan, alternatively

(ii) the learned trial judge erred in failing to direct the jury to consider whether the appellant's conduct caused the death of Allan.

D. the learned trial judge erred in failing to direct the jury as to whether the death of Allan was a foreseeable consequence of the appellant's negligence.

E. The learned trial judge erred in failing to summarise the defence case for the jury."

[19] It is unfortunate that defence counsel at trial did not seek redirections with respect to matters now relied on by counsel for the appellant. But as questions of law are involved the omission to seek redirections can be put to one-side.

[20] I have come to the conclusion that there were errors in the summing-up necessitating the quashing of the conviction; indeed counsel for the respondent virtually conceded there were deficiencies in the summing-up which justified this Court taking that step.

[21] The major error was with respect to the issue of causation. The jury were never instructed that before convicting they had to be satisfied beyond reasonable doubt that the conduct of the appellant constituting negligence contributed significantly to the death of the deceased. The expression "contributed significantly" or its equivalent was not used in his summing-up. It is clear that the proven negligence need not be the sole cause of the death. But, of course, if a jury on the facts were satisfied that the sole cause of death was something independent of the accused's negligence then a verdict of not-guilty would have to be returned even though theoretically the accused's negligence was established.

[22] The passages quoted above from the summing-up in this case could well have created in the minds of the jurors the proposition that if they were satisfied that by allowing the deceased to drive the appellant was guilty of criminal negligence it followed, without more, that he was guilty of manslaughter. Particularly where it was not contended that the appellant was negligent in allowing an unlicensed and inexperienced person to sit alongside the unlicensed and inexperienced driver, it was at least open to a jury properly instructed on the issue of causation to conclude that the sole cause of the driver's death was the negligence of the passenger in grabbing and pulling on the steering wheel, something for which the appellant was not responsible.

[23] The jurors when deliberating on their verdict may well have recalled the learned trial judge's earlier remark on explaining the admission of death that they did not have to concern themselves with "the cause of the death".

[24] The rulings of the learned trial judge and the summing-up almost appear to be premised on the following reasoning; if the motor vehicle was a dangerous thing within s 289 of the Code, and negligence with respect to its control was established and held to satisfy the criminal test, the appellant was liable for the death without the jury having to be satisfied beyond reasonable doubt that the criminal negligence as found caused, that is contributed significantly, to the death. As already stated, on the facts of this case, the jury was not instructed that if they concluded the conduct of Parsons in pulling the steering wheel was the sole cause of the death a verdict of not guilty would have to be returned.

[25] I would also observe (though this matter was not canvassed in argument on the hearing of the appeal) that if there had been more focus on the immediate cause of the incident greater significance may have been attached to the fact that the driver had a blood alcohol reading of .07. Though there was insufficient evidence to support a conclusion that the appellant should have been aware the deceased had been drinking, her blood/alcohol reading was potentially relevant to the cause of the incident. By concentrating attention on the appellant's decision to permit the deceased to drive (a decision taken some material time before the crash) not enough attention was focused on the immediate cause of the crash.

[26] Counsel for the appellant also argued that there was no evidence that the appellant was in charge or control of the motor vehicle at the precise time of death. That submission was based on observations found in *R v Stott* and *Van Embden* [2001] QCA 313 and *R v Kidd* [2001] QCA 536. The statements relied on were made in the context of the particular and peculiar facts of each of those cases. What amounts to being in charge of or having control of a motor vehicle (or other thing) will vary greatly according to the circumstances of each case. A person may be in charge of or have control of a motor vehicle (or other thing) though the person does not have actual physical possession of it at all material times. The owner of a motor vehicle may, particularly when in the vehicle, have charge or control of it though someone else is driving. The issue of being in charge or control will always be a question of fact for the jury to determine on the facts of each particular case. It would be open on the facts here for a jury properly instructed to find that the appellant had charge or control of the vehicle at all material times.

[27] I do not in the circumstances find it necessary to discuss the other grounds of appeal.

[28] The appellant was sentenced to 2 years imprisonment to be suspended after 3 months for an operational period of 3 years. He was granted bail pending appeal after serving 16 days imprisonment.

[29] In all the circumstances the question of a retrial must ultimately be the responsibility of the Director of Public Prosecutions. The somewhat unusual circumstances of the case, the way in which the prosecution conducted its case at the first trial, the delay since the incident occurred and the fact that some short period of punishment has been served are all factors relevant to the exercise of that discretion, but it is not for this Court to usurp the function of the Director.

[30] In consequence a retrial should be ordered.

[31] The orders of the court will therefore be:
Appeal allowed, conviction quashed, retrial ordered.

[32] **DOUGLAS J:** I agree with the judgment of Williams JA and with his reasons.