A

NG BENG KOK v. PP

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
AHMADI ASNAWI JCA
ZABARIAH MOHD YUSOF JCA
B [CRIMINAL APPEAL NO: P-09-128-04-2016]
8 MARCH 2017

ROAD TRAFFIC: *Dangerous driving – Causing death by reckless or dangerous driving – Road Transport Act 1987, s. 41(1), third limb – Whether 'speeding' or 'recklessness' constitute elements or form an offence of dangerous driving – Whether*
C *'speed' or 'recklessness' ought to be considered as circumstances in determining offence of dangerous driving – Whether manner of driving encompasses all matters connected with management of vehicle by driver – Whether 'speed' or 'recklessness' constitutes manner of driving which may cause serious risk of physical injury to other road users – Whether accused created situation which posed risks to public – Whether there*
D *were three distinct limbs for offence under s. 41(1) of Road Transport Act 1987 – Whether there was failure to distinguish different ingredients in the three limbs – Whether accused unfairly burdened with disproving three separate elements of offence – Whether accused prejudiced by investigation conducted*

WORDS & PHRASES: *'including' – Section 41(1) of Road Transport Act 1987,*
E *third limb – Introducing the word 'including' immediately after words 'in a manner which, having regard to all the circumstances' – Whether Legislature expanded meaning of expression 'circumstances' – Whether 'include/including' used to enlarge meaning of phrases in body of statute – Whether 'speed' or 'reckless' considered as elements in determining offence of dangerous driving*

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The appellant was charged for causing death by reckless driving under s. 41(1) Road Transport Act 1987 ('RTA'), third limb, in the Magistrate's Court. After a full trial, the appellant was found guilty and was, *inter alia*, sentenced to two years' imprisonment. The appellant appealed to the High
G Court, whereby the appeal was dismissed. Dissatisfied, the appellant appealed to this court. The appellant contended that the Magistrate fell into serious error when he took into account the element of 'speeding' (an offence under the second limb) which was not a circumstance of the charge preferred against the accused (an offence under the third limb). According to the appellant, the Judicial Commissioner ('JC') committed another error in holding that the
H appellant was 'reckless' (an offence under the first limb) in driving his motorcar which resulted in the collision with the deceased's motorcycle. The appellant posited that there were three distinct limbs for an offence under s. 41(1) of the RTA and each limb had its own ingredients to be proven. The appellant submitted that the Magistrate and JC fell into serious error in failing
I to distinguish the different ingredients for each of the limbs under s. 41(1) of the RTA. This was, according to the appellant, prejudicial to the appellant

as the appellant had been unfairly burdened with disproving three separate elements of the offence. The central issue that arose for determination was whether 'speeding' and/or 'recklessness' constitute elements/ingredients or form an offence of dangerous driving, when the first and second limb of the said section had already specified 'reckless' and 'speeding' as separate offences from the third limb.

Held (dismissing appeal; affirming conviction and sentence)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) The 'test' to be applied was whether an ordinary or reasonable person would have thought that the defendant was driving dangerously having regard to all the circumstances of the case including the nature, condition and use of the road, and the amount of traffic which was actually at the time, or which might reasonably be expected to be, on the road in question. Driving dangerously may involve speeding or reckless driving and the danger caused by the driving to the public may be either real or potential. To drive dangerously must involve some 'fault' on the part of the defendant which caused the dangerous situation. 'Fault' involves a failure, a falling below the care or skill of a competent experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case. (para 31)

(2) Section 41(1), third limb of the RTA, *inter alia*, speaks of the manner of driving which is dangerous to the public. The manner of driving encompasses all matters connected with the management of the car by a driver when it was being driven. The speed of the appellant's motor vehicle was a relevant circumstance to the issue whether he was driving dangerously. 'Reckless' also constitutes manner of driving. Reckless driving is driving with a wilful disregard for the safety of other road users and a wilful disregard of the consequences of such driving. (paras 32-34)

(3) The third limb to s. 41(1) of the RTA uses the word 'including.' By introducing the word 'including' immediately after the words 'in a manner which, having regard to all the circumstances,' the Legislature had expanded the meaning of the expressions 'circumstances' for the purposes of the Act. The word 'include/including' is generally used to enlarge the meaning of the words or phrases occurring in the body of statute. There was no rhyme nor reason to say that 'speed' and/or 'reckless' could not be considered as one of the circumstances or elements in determining the offence of 'dangerous driving' under the third limb of s. 41(1) of the RTA because 'speeding' or 'recklessness' constitutes manner of driving. (para 35)

(4) There is no legal definition of driving which is dangerous to the public. The plain question in proving an offence under the third limb of s. 41(1) of the RTA was simply this: was the appellant driving a motor vehicle

A on a road dangerously *ie*, dangerous towards other persons who might reasonably be expected to be on or near the road having regard to all circumstances. And, if he was, did he thereby cause the death of another person. Therefore, the circumstances that constitute dangerous driving is fairly wide. It involves the manner of driving (which includes B recklessness and speeding) which create a dangerous situation to the public *ie*, which may cause a serious risk of causing physical injury to some other person who may happen to be using the road, or doing substantial damage to property. (para 37)

(5) The Magistrate had also taken into consideration the silent evidence *ie*, C the damages to the car and the motorcycle of the deceased which indicated that the impact between the two vehicles were of such force implying that the vehicle was driven at high speed. The Magistrate found that the silent evidence supported the evidence of witnesses, PW4 and PW5, who testified that the vehicle driven by the appellant was at a high D speed and this negated the evidence of the appellant that he was driving at a speed of 50-60km/hour. The appellant had not slowed down to evade a pothole on the road and had encroached onto the opposite coming lane, which caused the collision. The deceased who was on the opposite lane could not have anticipated the presence of the appellant's E car that had emerged suddenly onto his side of the road at that moment. The appellant was found to have created a situation which posed risks to other road users *ie*, the deceased. (paras 40-52)

(6) The appellant had not been prejudiced in any way by the investigation that was conducted. The Magistrate had evaluated correctly the F prosecution's witnesses' evidence and found them to be credible. The JC had further assessed the Magistrate's evaluation of the evidence and findings and had no reason to disturb the Magistrate's conclusion. The JC had not erred in affirming the decision of the Magistrate in convicting the appellant under s. 41(1) of the RTA. There were thus no merits in the appeal. (paras 54-57)

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Bahasa Malaysia *Headnotes*

Perayu dituduh menyebabkan kematian dengan memandu secara berbahaya bawah s. 41(1) Akta Pengangkutan Jalan ('APJ'), cabang ketiga, di Mahkamah Majistret. Selepas perbicaraan penuh, perayu didapati bersalah H dan antara lain, dihukum penjara dua tahun. Perayu merayu ke Mahkamah Tinggi, tetapi rayuan tersebut ditolak. Tidak berpuas hati, perayu merayu ke mahkamah ini. Perayu menghujahkan bahawa Majistret terkhilaf apabila mengambil kira elemen 'speeding' (satu kesalahan bawah cabang kedua) yang bukan keadaan dalam pertuduhan terhadap tertuduh (kesalahan bawah cabang I ketiga). Menurut perayu, Pesuruhjaya Kehakiman ('PK') melakukan lagi satu kekhilafan apabila memutuskan bahawa perayu adalah 'reckless' (kesalahan bawah cabang pertama) dalam memandu kenderaannya yang menyebabkan

pelanggaran dengan motosikal si mati. Perayu menganjurkan bahawa terdapat tiga cabang berbeza untuk kesalahan bawah s. 41(1) APJ dan setiap cabang mempunyai elemen tersendiri untuk dibuktikan. Perayu menghujahkan bahawa Majistret dan PK tersilap langkah kerana gagal membezakan elemen-elemen untuk setiap cabang bawah s. 41(1) APJ. Menurut perayu, ini memprejudiskan perayu kerana perayu dibebani dengan tidak adil atas keperluan membantah tiga elemen berbeza kesalahan. Isu utama yang dibangkitkan untuk pertimbangan adalah sama ada 'speeding' dan/atau 'recklessness' membentuk elemen-elemen atau mewujudkan satu kesalahan memandu secara berbahaya, apabila cabang pertama dan kedua seksyen tersebut telah menetapkan 'recklessness' dan 'speeding' sebagai kesalahan berbeza dari cabang ketiga.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)
Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) 'Ujian' yang harus diguna pakai adalah sama ada seseorang yang biasa atau munasabah akan berpendapat bahawa defendan telah memandu secara berbahaya mengambil kira keadaan kes termasuk sifat, keadaan dan penggunaan jalan, dan keadaan kesesakan lalu lintas pada waktu tersebut, atau yang mungkin dijangka munasabah, atas jalan yang dipertikaikan. Memandu secara berbahaya mungkin melibatkan memandu secara terlalu laju atau tidak berhati-hati dan bahaya yang diakibatkan oleh cara memandu seperti itu pada pihak awam mungkin nyata atau berpotensi. Memandu secara berbahaya harus melibatkan 'kesilapan' pihak defendan yang menyebabkan keadaan berbahaya. 'Kesilapan' melibatkan merangkumi tahap berjaga-jaga dan kemahiran yang kurang daripada pemandu berpengalaman yang kompetan dan berpengalaman, berhubungan cara memandu dan keadaan-keadaan relevan kes.

(2) Seksyen 41(1), cabang ketiga APJ, antara lain, menyentuh cara memandu yang membahayakan pihak awam. Cara memandu merangkumi semua perkara berhubungan dengan pengurusan kereta oleh pemandu apabila ia dipandu. Kelajuan kenderaan perayu adalah keadaan relevan pada isu sama ada dia memandu secara berbahaya. 'Recklessness' juga membentukkan cara memandu. Memandu secara tidak berhati-hati adalah memandu dengan sengaja tidak menghiraukan keselamatan pengguna jalan raya yang lain dan dengan sengaja tidak mengendahkan akibat pemanduan sedemikian.

(3) Cabang ketiga s. 41(1) APJ menggunakan perkataan 'including'. Dengan memperkenalkan perkataan 'including' selepas perkataan 'in a manner which, having regard to all the circumstances,' badan perundangan telah memperluaskan maksud ungkapan 'circumstances' bagi tujuan Akta. Perkataan 'include/including' secara am digunakan untuk memperluaskan

perkataan-perkataan atau frasa-frasa dalam badan statut. Tiada sebab untuk menyatakan bahawa 'speeding' dan/atau 'recklessness' tidak boleh diambil kira sebagai salah satu keadaan atau elemen dalam memutuskan kesalahan memandu secara berbahaya bawah cabang ketiga s. 41(1) APJ kerana 'speeding' dan 'recklessness' membentukkan cara memandu.

(4) Tiada tafsiran undang-undang berkenaan memandu yang membahayakan pihak awam. Soalan biasa dalam membuktikan kesalahan bawah cabang ketiga s. 41(1) APJ adalah: adakah perayu memandu kenderaan atas jalan raya secara berbahaya iaitu membahayakan orang lain yang mungkin dijangka munasabah berada berdekatan jalan raya dengan mengambil kira semua keadaan. Dan, jika ya, adakah dia menyebabkan kematian orang lain. Oleh itu, keadaan yang membentukkan memandu secara berbahaya adalah luas. Ia melibatkan cara memandu (yang termasuk tidak berhati-hati dan terlalu laju) yang mewujudkan keadaan yang membahayakan pihak awam iaitu boleh menyebabkan risiko serius kecederaan fizikal terhadap orang lain yang menggunakan jalan itu, atau melakukan kerosakan besar ke atas hartanah.

(5) Majistret juga mengambil kira keterangan senyap iaitu kerosakan kereta dan motosikal si mati yang menunjukkan bahawa impak antara kedua-dua kenderaan itu amat kuat mengimplikasikan kenderaan tersebut dipandu pada kelajuan tinggi. Majistret mendapati keterangan senyap itu menyokong keterangan saksi-saksi, PW4 dan PW5, yang memberi keterangan bahawa kenderaan yang dipandu oleh perayu berada pada kelajuan tinggi dan ini menafikan keterangan perayu bahawa dia memandu pada kelajuan 50-60 km/j. Perayu tidak memperlahankan kereta untuk mengelakkan lubang di jalan raya dan telah masuk ke lorong yang bertentangan, menyebabkan perlanggaran. Si mati yang berada di lorong bertentangan tidak mungkin menjangkakan kehadiran kereta perayu yang muncul secara tiba-tiba pada bahagian jalannya pada waktu tersebut. Perayu didapati mewujudkan keadaan yang menimbulkan risiko kepada pengguna-pengguna jalan lain iaitu si mati dalam kes ini.

(6) Perayu tidak diprejudiskan dalam apa cara pun oleh siasatan yang dijalankan. Majistret telah menilai keterangan saksi-saksi pendakwaan dengan betul dan mendapati bahawa mereka boleh dipercayai. PK juga telah selanjutnya mentaksirkan penilaian Majistret ke atas keterangan dan dapatan-dapatan dan tidak mempunyai alasan untuk mengganggu kesimpulan yang dicapai oleh Majistret. PK tidak terkhilaf dalam mengesahkan keputusan Majistret untuk mensabitkan perayu bawah s. 41(1) APJ. Oleh itu, tiada merit dalam rayuan ini.

Case(s) referred to:
Bracegirdle v. Oxley [1947] 1 KB 349 ***(refd)***
Commr of Customs v. Caryaire Equipment India (P) Ltd (2012) 4 SCC 645 ***(refd)***
Gunasegaran Singaravelu v. PP [2009] 7 CLJ 613 HC ***(refd)***
Lau Lim Peng v. PP [1968] 1 LNS 63 HC ***(refd)***
Poleon Ajan v. PP [2010] 10 CLJ 420 HC ***(refd)***
PP v. Cheong Kam [1946] 1 LNS 41 ***(refd)***
PP v. Low Yong Ping [1961] 1 LNS 91 HC ***(refd)***
PP v. Mat Zali Lahman [2010] 3 CLJ 354 HC ***(refd)***
PP v. Ong Kia Chan [2006] 4 CLJ 334 HC ***(refd)***
R v. Ball & Loughlin [1966] 50 Cr App R 266 ***(refd)***
R v. Boswell, Elliott, Daley & Rafferty [1984] 79 Cr App R 277 ***(refd)***
R v. Clarke [1990] 91 Cr App R 69 ***(refd)***
R v. Evans [1962] 3 All ER 1086 ***(refd)***
R v. Gosney [1971] 55 Cr App R 502 ***(refd)***
R v. Guilfoyle [1973] 2 All ER 844 ***(refd)***
R v. Lawrence [1981] 73 Cr App R 1 ***(refd)***
Ramiah v. PP [1972] 1 LNS 120 FC ***(refd)***
Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC ***(refd)***
UP Power Corpn Ltd v. NTPC Ltd [2014] 1 SCC 371 ***(refd)***

Legislation referred to:
Road Transport Act 1987, s. 41(1)

For the appellant - M Manoharan & Lily Chua; M/s M Manoharan & Co
For the respondent - Muhammad Azmi Mashud; DPP

[Editor's note: For High Court judgment, please see Ng Beng Kok v. PP [2015] 1 LNS 986 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zabariah Mohd Yusof JCA:

Introduction

[1] The appellant was charged in the Magistrate's Court, Jawi, Pulau Pinang under s. 41(1) of the Road Transport Act 1987 (RTA) as follows:

> Bahawa kamu pada 25.1.2013, jam lebih kurang 1700 hrs di Jalan Sungai Baung, di dalam Daerah Seberang Perai Selatan di dalam Negeri Pulau Pinang sebagai pemandu Motokar No: BJR 9880 di dapati telah memandu kenderaan tersebut di atas jalan raya secara merbahaya tanpa mengendahkan suasana dalam keadaan (bentuk-bentuk, kegunaan jalan dan juga kesibukan di atas jalan raya yang boleh dijangkakan) sehingga menyebabkan kematian ke atas penunggang m/sikal No PGA 4389 bernama Mustafa bin Hasan (No KP 530314-02-5429). Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 41(1) Akta Pengangkutan Jalan 1987.

[2] After a full trial, the learned Magistrate found the appellant guilty as charged and imposed an imprisonment sentence of two years from the date of judgment and a fine of RM5,000 in default three months imprisonment. His driving license was ordered to be suspended for two years and licence endorsed accordingly.

[3] The appellant appealed to the High Court whereby the appeal was dismissed and the decision of the learned Magistrate was affirmed.

[4] The appellant being dissatisfied with the decision of the High Court, appealed to this court. Pending appeal, the sentence was stayed.

[5] After hearing submissions from both parties and perusing material on record, we find no merit in the appeal and the same is dismissed. We now give the detailed reasons for our decision.

Issue Before The Court

[6] The appellant was charged for the offence of dangerous driving under s. 41(1) of the RTA, third limb. The central issue is whether "speeding" and/or "recklessness" constitute elements/ingredients or form an offence of dangerous driving, when the first and the second limb of the said section had already specified "reckless" and "speeding" as separate offences from the third limb.

Submission By The Appellant

[7] The reasoning of the learned Magistrate in finding the appellant guilty of offence as charged is as follows:

> … OKT telah memandu di dalam keadaan yang merbahaya apabila m/kar OKT dipandu dengan laju, tidak memperlahankan m/kar untuk mengelak lubang dan dengan laju masuk ke laluan simati sehingga menyebabkan kemalangan.

[8] Learned counsel for the appellant contended that the learned Magistrate fell into serious error when he took into account the element of "speeding" (an offence under the second limb) which was not a circumstance of the charge preferred against the accused (an offence under the third limb). This means that the learned Magistrate had erred when she lumped the two offences together ie, the second limb and the third limb together to convict the appellant under the third limb of s. 41(1) of the RTA.

[9] The learned Judicial Commissioner (JC) did not detect the error committed by the learned Magistrate but affirmed it and thereby perpetuated the error. To make matters worse, the learned JC committed another error in holding that the appellant was "reckless" (an offence under the first limb) in driving his motorcar which resulted in the collision with the deceased's motorcycle.

[10] Learned counsel for the appellant posited that there are three distinct limbs for an offence under s. 41(1) of the RTA, and each limb has its own ingredients to be proven. He further asserted that case laws have decided that the ingredients of each distinct limb differ from each other. Therefore, both the learned Magistrate and the learned JC fell into serious error in failing to distinguish the different ingredients for each of the limbs under s. 41(1) of the RTA.

[11] As with the instant appeal, it is concerned with the third limb of the offence, ie, "dangerous driving", under s. 41(1) of the RTA. Learned counsel for the appellant submitted that, one cannot incorporate the element of "recklessness" (offence under the first limb) or "speeding" (offence under the second limb) to convict the appellant for the offence of "dangerous driving" (offence under the third limb). Each limb under s. 41(1) of the RTA must be read disjunctively as it involves three distinct offences. Failing to distinguish the three distinct limbs under the said section, would lead to a failure to appreciate the essential elements/ingredients required to be proved by the prosecution for the offence of which the appellant was being charged with. This is prejudicial to the appellant as the appellant had been unfairly burdened with disproving three separate ingredients/elements of the offence (See *Poleon Ajan v. PP* [2010] 10 CLJ 420; [2010] 6 MLJ 136 at p. 142).

[12] In support of his submission that there are three distinct limbs under s. 41(1) of the RTA, learned counsel for the appellant placed heavy reliance on the case of *PP v. Mat Zali Lahman* [2010] 3 CLJ 354; [2010] 8 MLJ 403 wherein the learned High Court Judge expressed his view that s. 41(1) of the RTA has three distinct offences because of the use of the word "or" which is disjunctive ie:

(i) driving a motor vehicle recklessly (first limb);

(ii) driving motor vehicle at a speed (second limb); or

(iii) driving a motor vehicle in a manner which having regards to all circumstances (including nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public (third limb).

[13] Learned counsel for the appellant emphasised that it is well established by case laws that the ingredients of each limb differ from the other. For this, learned counsel referred us to the often quoted passage of the judgment of Lawton LJ in the English Court of Appeal in *R v. Guilfoyle* [1973] 2 All ER 844 which involved a lorry driver who was convicted of causing death by dangerous driving, with particular reference to p. 845 of the report:

> Cases of this kind fall into 2 broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment, and secondly those in which the accused has driven in a manner which has shown selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness.

A However, a scrutiny of the case of *R v. Guilfoyle (supra)* shows that the issue central therein was the principles of sentencing under a charge of dangerous driving when the court divided the cases charged under dangerous driving into two broad categories, of which different category deserved to be treated differently when determining the sentences to be imposed, whether custodial
B or a mere fine. It does not support what counsel for the appellant was trying to impress upon us ie, that the different limbs of offences under s. 41(1) of the RTA should be treated distinctly, and that they cannot be lumped together.

[14] The other bone of contention raised by learned counsel for the
C appellant is whether the appellant was driving at a speed which can be termed as excessive. Learned counsel submitted that both the learned Magistrate and JC erred in accepting the evidence of PW4 and PW5 that the appellant was driving at an excessive speed without any judicial evaluation of the facts and failed to carefully scrutinise PW4's evidence which in actual fact corroborated
D the appellant's version.

[15] Learned counsel further submitted that the learned Magistrate did not proffer any ground to justify her finding as to why she preferred PW4's version of the appellant driving at an excessive speed of 60-70km/hour over the appellant's version of 50-60km/hour. Nor did she state in no uncertain
E terms as to what was her finding as to the actual speed that constitutes "excessive" and merely relies entirely on the opinion evidence of PW4 and PW5.

Our Findings

F **[16]** Section 41(1) of the RTA 1987 under which the appellant was convicted provides that:

> Any person who, by the driving of a motor vehicle on a **road recklessly** or **at a speed** or **in a manner which having regard to all the circumstances** (including the nature, condition and size of the road, and the amount of
G traffic which is or might be expected to be on the road) is dangerous to the public, causes the death of any person shall be guilty of an offence and shall on conviction be punished with imprisonment for a term of not less than two years and not more than ten years and to a fine not less than five thousand ringgit and not more than twenty thousand ringgit.
>
> (emphasis added)

H **[17]** The above section, in our view, creates three distinct offences, namely:

(a) driving a motor vehicle recklessly;

(b) driving a motor vehicle at speed; or

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(c) driving a motor vehicle in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of the traffic, which is or might be expected to be on the road) is dangerous.

(see *R v. Evans* [1962] 3 All ER 1086).

Driving Recklessly

[18] *Black's Law Dictionary*, Deluxe 9th edn defined "reckless" in the adjectival sense as:

> characterised by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk;

"Reckless driving" is defined as:

> The criminal offence of operating a motor vehicle in a manner that shows conscious indifference to the safety of others.

From the abovementioned, the word "reckless" connotes the deliberate taking of an unjustified risk. It implies an element of foresight. Thus, on a charge of reckless driving, proof of some actual foresight by the accused of the likelihood of certain consequences is necessary. The test is, therefore, subjective and consequently *mens rea* is necessary of the offence.

[19] Further clarification as to what could be regarded as "reckless" can be distilled from the various cases, one of which is the case of *R v. Lawrence* [1981] 73 Cr App R 1; [1982] AC 510; [1981] 1 All ER 974; [1981] 2 WLR 524; [1981] RTR 217; [1981] Crim LR 409] wherein Lord Diplock, with whom Lords Fraser, Roskill & Bridge concurred, held at pp. 11 & 526 respectively:

> In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things: First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and secondly, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognized that there was some risk involved had nonetheless gone on to take it. It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard of the ordinary prudent motorist as represented by themselves. ['Objective Test'] If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives as to his state of mind which may displace the inference. (emphasis added) [words in brackets added]

[20] After referring to the abovementioned statement, Lord Lane CJ in delivering the judgment of the court in *R v. Boswell, Elliott, Daley & Rafferty* [1984] 79 Cr App R 277; [1984] 3 All ER 353; [1984] 1 WLR 1047; [1984] RTR 315; [1984] Crim LR 502 stated at p. 281:

> To be guilty the defendant must have created an obvious and serious risk of injury to person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it, although he had seen it.

[21] In *R v. Clarke* [1990] 91 Cr App R 69 Russell LJ, delivering the judgment of the court, stated at p. 73:

> Our understanding of the *Lawrence* direction is as follows. The jury first have to make their findings as to what happened. Once they have done that they ask themselves whether those findings disclose that the vehicle, with the defendant at the wheel, created, adopting reasonable standards, an obvious and serious risk of injury to some other person who might happen to be using the road or of doing substantial damage to property. That is the first limb of the Lawrence direction and we are satisfied, contrary to the submissions of Mr. Elias, that it does not involve any consideration of the reason why the defendant was driving so as to create such a risk (save perhaps in those cases where the defendant is not "driving" at all by reason of some physical incapacity, not self – induced, but rendering him incapable of physical control of the vehicle).
>
> […]
>
> If, but only if, the jury answer the first limb in the affirmative, they must then go on to consider the second limb, and it is here in our judgment that the jury may, if they think fit, take into account the effect of drink upon the driver provided always that they are sure that the effect was a real one. The consumption of drink may have so disinhibited the driver that he does not give any thought to the possibility of there being any risk, or he may have taken the risk when he would not have done so had he not been affected by alcohol.
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> We do not accept that unless and until the consumption of alcohol plays a part in the driving, to the knowledge of the defendant, the jury should eliminate it from their deliberations.

Speeding

[22] Speeding is an offence under the second limb of s. 41(1) of the RTA. Speeding is an act of driving in excess of speed limit in a particular area.

[23] Apart from it being an offence on its own under the said provision, excessive speed alone may not constitute as dangerous driving. This was illuminated by Humphreys J in *Bracegirdle v. Oxley* [1947] 1 KB 349, at p. 357 where he stated:

> What I wanted to convey was at the manner in which the driver was driving becomes immaterial. He may be convicted because he is driving too fast and only because he is driving too fast, but, of course, there must be taken into consideration all the circumstances of the case, because a speed which is too fast on the road in certain circumstances may not be dangerous at all when driving on another road in other circumstances.

In other words, it all depends on the circumstances of the road at the material time. But what is important to take note is that speeding was regarded as the manner of driving which may be dangerous depending on the circumstances.

Dangerous Driving

[24] There is no definition of "dangerous driving" under the RTA. It is open to the court to determine what amounts to "dangerous driving". Reported cases serve as a guide and illustrations.

[25] Over the years, our courts have considered what can be categorised as "dangerous driving". Raja Azlan Shah J (as His Majesty then was) had the occasion to consider what constitutes "dangerous driving" in *Ramiah v. PP* [1972] 1 LNS 120; [1972] 2 MLJ 258. Therein, the accused was charged under s. 34A(1) of the Road Traffic Ordinance 1958 (the predecessor of s. 41(1) of the RTA 1987). It was held that in proving that there was "dangerous driving", it must be shown that:

i) there must be a situation created by the accused which, viewed objectively, is dangerous;

ii) that when creating such a situation the accused was at fault. Fault here involves a failure; a falling below the care and skill of a competent and experienced driver in relation to the manner of driving and the relevant circumstances.

[26] In *PP v. Low Yong Ping* [1961] 1 LNS 91; [1961] MLJ 306 at p. 307, Ong J held that leaving one's own proper side of the road and getting into the path of an oncoming vehicle is considered an act which has potentially fatal consequences and it definitely falls within the definition of "dangerous driving".

[27] In *Lau Lim Peng v. PP* [1968] 1 LNS 63; [1968] 2 MLJ 14 at pp. 14-25, Chang Min Tat J held that, in the absence of any explanation to the contrary, a driver who drives in a speed limit area with such a speed and in such a manner as to be unable to avoid overturning at a bend which is known to be dangerous, and running from behind into another vehicle, is guilty of driving in a manner which is dangerous to the public.

[28] In *PP v. Cheong Kam* [1946] 1 LNS 41; [1946] MLJ 12, it was held that to overtake a cyclist who is far from steady at the moment when a heavy lorry is approaching from the opposite direction is to take an unjustifiable risk and constitutes dangerous driving.

[29] In *R v. Gosney* [1971] 55 Cr App R 502; [1971] 2 QB 674; [1971] 3 All ER 220], Megaw LJ, delivering the judgment of the Court of Criminal Appeal, stated at pp. 508 and 680 respectively:

> In order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some fault on the part of the driver, causing that situation. 'Fault' certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame. Thus there is fault if an inexperienced or a naturally poor driver, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver.
>
> Fault involves a failure, a falling below the care or skill of a competent experienced driver, in relation to the manner of the driving and to the elevant circumstances of the case. A fault in that sense, even though it be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient. The fault need not be the sole cause of the dangerous driving. It is enough if it is, looked at sensibly, a cause. Such a fault will often be sufficiently proved as an inference from the very facts of the situation. But if the driver seeks to avoid that inference by proving some special fact, relevant to the question of fault in this sense, he may not be precluded from seeking so to do. (emphasis added)

[30] In *R v. Ball & Loughlin* [1966] 50 Cr App R 266 Lord Parker LJ, delivering the judgment of the court, stated at p. 270:

> It is, in the opinion of this court, perfectly clear that what is meant by "driving in a manner dangerous" is the manner of the actual driving […]. […] The case of *EVANS* [(1962) 47 Cr App R 62; [1963] 1 QB 42] now set out quite clearly that the rest is a purely objective one and that it matters not why the dangerous situation was caused of the dangerous manoeuvre executed.

[31] It appears to us from the decisions of the above cases that the important consideration in determining whether an accused was driving "dangerously" are as follows:

(i) the test to be applied is an "objective" one and not "subjective". Therefore, the opinion of the accused whether he was driving dangerously is immaterial;

(ii) the 'test' to be applied is whether an ordinary or reasonable person would have thought that the defendant was driving dangerously having regard to all the circumstances of the case including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road in question;

(iii) driving dangerously may involve speeding or reckless driving.

(iv) the danger caused by the driving to the public may be either real or potential;

(v) to drive dangerously must involve some 'fault' on the part of the defendant which caused the dangerous situation;

(vi) that 'fault' of the defendant does not need to involve either: [i] deliberate conduct or [ii] intentionally driving dangerously; and

(vii) 'Fault 'involves a failure, a falling below the care or skill of a competent experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case.

[32] Section 41(1), third limb of the RTA, *inter alia*, speaks of the manner of driving which is dangerous to the public. The manner of driving encompasses all matters connected with the management of the car by a driver when it was being driven. In our view, the speed of the appellant's motor vehicle is a relevant circumstance to the issue whether he was driving dangerously. If one speeds in an area where there are school children or on a narrow busy road, surely that could amount to "dangerous manner of driving" which creates a serious risk of causing physical injury to some other person who might happen to be using the road, or doing substantial damage to property.

[33] Of course, not all speed creates a danger to the public. It depends on the prevailing circumstances at the material time.

[34] "Reckless" also constitutes manner of driving. Reckless driving is driving with a wilful disregard for safety of other road users and a wilful disregard of the consequences of such driving.

[35] It is pertinent to note that the third limb to s. 41(1) of RTA uses the word "including". By introducing the word "including" immediately after the words "in a manner which, having regard to all the circumstances", the Legislature has expanded the meaning of the expressions "circumstances" for the purposes of the Act. The word "include/including" is generally used to enlarge the meaning of the words or phrases occurring in the body of statute. When it is so used, those words or phrases must be construed as comprehending not only such things, such as they signify according to their natural impart, but also those things which the interpretation clause declares that they shall include. In other words, when the words "include/including" is used in the definition or section, the Legislature does not intend to restrict the definition; it makes the definition enumerative but not exhaustive.

(see *Commr. of Customs v. Caryaire Equipment India (P) Ltd* (2012) 4 SCC 645; *U.P. Power Corpn Ltd v. NTPC Ltd* [2014] 1 SCC 371).

[36] In our view, there is no rhyme nor reason to say that "speed" and/or "reckless" cannot be considered as one of the circumstances or elements in determining the offence of "dangerous driving" under the third limb of s. 41(1) of the RTA because "speeding" or "recklessness" constitutes manner of driving.

[37] There is no legal definition of driving which is dangerous to the public. The plain question in proving an offence under the third limb of s. 41(1) of the RTA is simply this: Was the appellant driving a motor vehicle on a road dangerously, ie, dangerous towards other persons who might reasonably be expected to be on or near the road having regard to all circumstances (including the nature, condition and size of the road, and the amount of traffic which or might be expected to be on the road). And, if he was, did he thereby cause the death of another person. Therefore, premised on the above, the circumstances that constitute dangerous driving is fairly wide. Taken cumulatively, it involves the manner of driving (which includes, recklessness and speeding) which create a dangerous situation to the public, ie, which may cause a serious risk of causing physical injury to some other person who may happen to be using the road, or doing substantial damage to property.

[38] In the grounds of judgment, the learned Magistrate referred to the case of *Gunasegaran Singaravelu v. PP* [2009] 7 CLJ 613 wherein it was held that: in dealing with such a case, the whole situation leading to the accident must be viewed objectively to determine whether it can be considered reckless or dangerous driving.

[39] In arriving at her conclusion, the learned Magistrate focused on four aspects of the evidence of PW4 and PW5, (refer to p. 17 of the appeal record vol. 2) which are:

(i) PW4 and the appellant were on the same lane before the accident happened and that the appellant had overtaken PW4 on the right lane;

(ii) PW5 was operating a "goreng pisang" stall in the area where the accident happened and he had witnessed the accident. The existence of the "goreng pisang stall" was acknowledged by the investigating officer, PW7;

(iii) there was in existence a pothole on the lane of the appellant; and

(iv) due to the impact, the deceased was flung from his motorcycle onto the road.

[40] Apart from relying on the evidence of PW4 and PW5, the learned Magistrate also took into consideration the silent evidence ie, the damages to the car and the motorcycle of the deceased which indicate that the impact between the two vehicles was of such force implying that the vehicle was driven at high speed. The learned Magistrate found that the silent evidence

supported the evidence of PW4 and PW5 who testified that the vehicle driven by the appellant was at high speed and this negates the evidence of the appellant that he was driving at a speed of 50-60km/hour.

[41] It was in the evidence of PW4 who said that the appellant was speeding when the appellant overtook his car. PW5 saw the appellant encroaching into the deceased's lane on the other side which caused the collision.

[42] The learned Magistrate found that the evidence of PW4 with regards to the presence of the pothole on the road was supported by the evidence of the investigating officer, PW7, who found the existence of the pothole, near the site of the accident. This further lends support to the evidence of PW4 who said that the appellant was trying to avoid this pothole when he encroached onto the lane of the deceased.

[43] The learned JC had considered the evidence of PW4 and PW5 and the findings of the learned Magistrate and his judgment where he said that:

> [29] … in re examination clarified that he saw the Appellant's motorcar encroach onto the oncoming lane after the Appellant overtook him and after that he heard sound of the crash. I am satisfied therefore that the learned Magistrate had not erred in placing reliance upon the evidence of SP4.

[44] Therefore, apart from the evidence of PW4 and PW5, the learned Magistrate also premised her findings on the evidence of the investigating officer, PW7, and the extent of the damage to the vehicles. Hence, the submission by learned counsel for the appellant that the learned Magistrate placed heavy reliance on the evidence of PW4 and PW5 that the appellant was driving at excessive speed in arriving at his decision to convict the appellant and failed to address his mind on whether the appellant was driving at a speed reckoned to be excessive and to have regard to all circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road), was misconceived.

[45] This is clear from the learned Magistrate's finding that:

> … saya mendapati OKT telah memandu di dalam keadaan yang merbahaya apabila m/kar OKT di pandu dengan laju, tidak memperlahankan m/kar untuk mengelak lubang dan dengan laju masuk ke laluan si mati sehingga menyebabkan kemalangan. Si mati di laluan bertentangan tidak akan dapat menjangka bahawa akan ada kenderaan lain yang akan masuk ke laluannya secara tiba-tiba. Dalam situasi ini, simati tidak dapat mengelak daripada kemalangan tersebut.

[46] In the course of her findings, the learned Magistrate was guided by the principles enunciated in *PP v. Ong Kia Chan* [2006] 4 CLJ 334, as to the ingredient that the prosecution must establish to prove an offence under the s. 41(1) of the RTA ie,:

A the prosecution must establish that: (1) a situation created by the accused is dangerous eg, turning right into the side road without stopping to give way to through traffic; and (2) when creating a situation the accused was at fault. Fault involves a failure; a falling below the care and skill of a competent and experienced driver in relation to the manner of driving and the relevant circumstances.

B

[47] Clearly, the learned Magistrate did not rely solely on speed alone and neither did she rely solely on the evidence of PW4 to determine on the issue of speed, to form a conviction on the appellant.

[48] Learned counsel for the appellant further submitted that in the absence C of evidence as to speed limit, the court has a duty to discover the scale speed which is considered to be dangerous to the public. We are of the view that, not only is it impossible, but also impractical for the court to do so. Much depends on the situation and nature of the road, and even weather conditions. On a less busy and straight wide road, driving above 80km/hour may be D considered not dangerous. But, it would be otherwise on a busy narrow road filled with pedestrian. Hence, we are in no position to impose a scale speed that can be categorised as "dangerous driving".

[49] The learned Magistrate also considered the evidence of the appellant who denied that he was speeding when the collision happened (refer to p. 21 E of the appeal records). The evidence of the appellant that he was not speeding had been considered by the learned Magistrate with the totality of evidence of the case and the learned Magistrate did not accept such averment. Her reasons are as stated in her grounds, which are:

F Walau bagaimanapun, keterangan OKT ini adalah tidak selari dengan keterangan-keterangan senyap dan eksibit-eksibit yang dikemukakan. Kerosakan yang teruk pada kedua-dua kenderaan dan fakta bahawa si mati tercampak jauh akibat kemalangan yang mana tidak dinafikan, menunjukkan bahawa impak yang sangat kuat telah berlaku. Impak yang kuat hanya akan terjadi akibat kenderaan yang dipandu laju sepertimana keterangan SP7.

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(Refer to p. 21 of the appeal records vol. 2)

[50] Further, there has been direct evidence from witnesses to the collision, ie, PW4 and PW5 and the learned Magistrate found that they were credible witnesses and their evidence have been accepted. The learned Magistrate had H also considered the fact raised by the appellant that PW4 and PW5 knew the deceased before the collision (which inferred biasness on the part of the witnesses), and the learned Magistrate was of the view that the credibility of PW4 and PW5 was intact, and hence, accepted it.

[51] On the failure to lodge police report by the prosecution witnesses, in our I view, that by itself, is not a ground to reject their evidence. The learned Magistrate accepted the fact that PW5 was a man of 61 years of age who was ignorant of procedure and the necessity to lodge a police report on what he

saw of the accident. PW5's explanation was accepted by the Magistrate on such failure to make a report. We are not about to disturb such finding as it was not plainly wrong.

[52] The learned Magistrate made a finding on the manner of driving by the appellant at p. 22 of the appeal records vol. 2 whereby she found that the appellant was driving in a dangerous manner when he drove at high speed, did not slow down to evade the pothole and also at high speed had encroached onto the opposite oncoming lane, which caused the collision. The deceased who was on the opposite lane could not have anticipated the presence of the appellant's car that had emerged suddenly onto his side of the road at that moment. Faced with the exigency of the situation the deceased could not have avoided the collision. The appellant was found to have created a situation which posed risks to other road users ie, the deceased in this case (refer to pp. 12 and 13 of the appeal records vol. 2).

[53] On the credibility of the evidence PW4 and PW5, these are findings of fact made by the learned Magistrate and he has the audio-visual advantage of such hearing and evaluating such evidence. We do not find any compelling reason to disagree with such findings. The Federal Court in *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236 had emphasised on this point and held that:

> [29] It is an established principle of law that when dealing with finding of facts, the trial judge is more often than not, in a better position to decide. The appellate court must be reluctant to interfere with such findings, unless the facts obviously disclose the courts below had wrongly evaluated the facts.

[54] The appellant also raised the issue of biasness of the investigating officer as he was the arresting officer and also the complainant in the present case. We do agree that, that would be a preferable and ideal situation however, the appellant has not shown how was the investigating officer biased in his investigation and it has not been shown that the appellant had been prejudiced in any way by the investigation that was conducted.

[55] In our view, the learned Magistrate had evaluated correctly the prosecution witnesses' evidence and found them to be credible. The learned JC had further assessed the learned Magistrate's evaluation of the evidence and findings and had no reason to disturb the learned Magistrate's conclusion.

[56] On the issue raised by the appellant that the learned JC had made a finding that the appellant was 'reckless' when the learned Magistrate did not make such finding; it is to be observed that the learned Magistrate in her grounds at p. 23 of the appeal records vol. 2, stated that:

> OKT sebagai pemandu m/kar telah didapati memandu secara merbahaya **tanpa mengendahkan suasana dalam keadaan** sehingga menyebabkan kematian si mati, penunggang motorsikal di dalam kes ini. (emphasis added)

A It is to be noted that the definition of "reckless driving" as aforementioned is "the criminal offence of operating a motor vehicle in a manner that shows conscious indifference to the safety of others". Clearly, the learned Magistrate mentioned the manner of driving by the appellant ie, "… tanpa mengendahkan suasana dalam keadaan ..." which essentially means a disregard or indifferent
B to the surrounding circumstances, which constitutes "reckless driving" as defined, although she failed to mention expressly the word "reckless driving." Therefore, it is misconceived to say that the learned Magistrate did not consider the element of "recklessness" when convicting the appellant under the third limb of s. 41(1) of the RTA. It is our view that the learned
C Magistrate did find that the appellant was reckless, in the manner of driving.

Even assuming for a moment, that the learned Magistrate did not consider "recklessness" when convicting the appellant under the third limb of s. 41(1) of the RTA, and subsequently, the JC consider "recklessness" to convict the appellant, this is not fatal to the charge.

D In any event, as we have alluded to earlier, the word "reckless" used by the learned JC referred to the manner of driving of the appellant which constitutes an element of dangerous driving, ie, a disregard to the safety of other road users.

E **[57]** For the foregoing reasons, we are of the view that the learned JC had not erred in affirming the decision of the learned Magistrate in convicting the appellant under s. 41(1) of the RTA. Accordingly, we find no merits in the appeal. We dismissed the appeal and affirmed the conviction and sentence. So ordered.

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