In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2016: No. 14

JAHQUILLE STOWE

Appellant

- and –

THE QUEEN

Respondent

JUDGMENT

(in Court)[1]

Appeal against conviction-driving without due care-Road Traffic Act 1947 section 37-jurisdiction to set aside factual findings on appeal-sufficiency of reasons for decision-Summary Jurisdiction Act 1930 section 21-discretion to permit 'McKenzie friend' to address the Court and/or assist a litigant in person

Date of hearing: April 4, 2016

Date of Judgment: April 11, 2016

Mr J. Audley Quallo as McKenzie friend for the Appellant
Ms Jaleesa Simons, Office of the Director of Public Prosecutions, for the Crown

[1] The present Judgment was handed down without a formal hearing.

Introductory

1. The Appellant in this matter was convicted in the Magistrates' Court (the Worshipful Khamisi Tokunbo) on the 7th December 2015 of the offence of driving without due care and attention contrary to section 37 of the Road Traffic Act 1947[2] following a trial. He received a fine of $1000 and 12 demerit points. He appeals against his conviction.

2. At first blush this appeal seemed like an unmeritorious attempt to invite this Court to challenge factual findings which it was open to the Learned Magistrate to make. However, two unexpected developments at the hearing disrupted this initial view and complicated what I had assumed to be a simple picture. Firstly Mr Quallo, a law student, persuaded the Court to exercise its discretion in favour of permitting him to address the Court as the Appellant's McKenzie friend. And secondly, the Appellant through Mr Quallo applied to supplement the record through an informal transcript prepared from the recording of the trial, an application which Ms Simons very properly did not oppose. As a result the merits of the appeal, by the end of the hearing, were far more evenly balanced that had appeared to be the case at the outset.

Involvement of a "McKenzie friend": applicable legal principles

3. Mr Quallo submitted, without placing any authorities before the Court, that the Court possessed a broad discretion to permit persons who were not legally qualified to assist litigants in person as a so-called McKenzie friend. In the absence of any discernible opposition from Ms Simons, I acceded to this preliminary application. Having considered the matter further, I am satisfied that the basis of the application was fundamentally sound although it seems that it is the exception rather than the rule that a "McKenzie friend" is permitted to not simply assist but also address the Court. In *Moulder-v-Cox Hallett Wilkinson (a firm) et al* [2011] Bda LR 40 (Court of Appeal for Bermuda, at paragraph 10), Auld JA stated without any elaboration:

> "*Ms Judith Chambers, Mr. Moulder's former wife, has clearly been much involved in the direction and preparation of his extensive litigation in this matter, including both actions and this appeal. The Court gave her leave to address the Court on his behalf –a role not normally accorded to a McKenzie Friend -...*"

4. What are the principles which inform the exercise of this judicial discretion? These principles may be self-evident from an informed English law perspective but they have never seemingly been formally articulated in published local case law. English cases on this topic suggest that the provision of assistance by 'professional' McKenzie friends has been problematic but that the main consideration in acceding to requests

[2] Section 37 provides as follows: "*Any person who drives a vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or public place, commits an offence.*"

for assistance is giving effect to the litigant's fair hearing rights. In *R-v- Bow County Court ex parte Pelling* [1999] 4 All ER 751; [1999] EWCA Civ J0728-15, Lord Woolf opined as follows:

> "*5. The title 'McKenzie Friend' draws its name from the decision of the Court of Appeal in McKenzie v McKenzie [1971] P 33 . The role of a McKenzie friend was first recognised in Collier v Hicks [1831] 2 B & Ad.663. Lord Tenterden CJ in that case said (at p.669):*
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> > *'Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no-one can demand to take part in the proceedings as an advocate, contrary to the regulations of the Court as settled by the discretion of the Justices.'…*
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> 10. *10. In R v Leicester City Justices, ex parte Barrow [1991] 2 QB 260 the Court of Appeal on an appeal from the Divisional Court considered the position of a McKenzie friend as a result of a decision before Justices in relation to a hearing in respect of Community Charges. Lord Donaldson MR in his judgment indicated that he was approaching the issue as to the status of a McKenzie friend on the basis of principle and the dicta in a few cases to which they had been referred. He drew attention to the fact that there are many basic rules covering the administration of justice by the courts but pointed out that they can be summed up 'by saying that it must be administered fairly and unless the interests of justice otherwise require, it must be administered openly and its administration must not only be fair but seen to be fair'. He went on to indicate that in that case the proceedings were being held in the absence of the public because of the risk of public disorder.*
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> *They were circumstances in which the McKenzie friend had no legitimate grievance and personally had no rights. He however indicated that the applicants were in a different position. They had the right to be heard. He added:*
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> > *'Fairness, which is fundamental to all court proceedings, dictated that they should be given all reasonable facilities for exercising this right and, in cases of doubt, they should be given the benefit of that doubt for the courts must not only act fairly, but be seen to act fairly. The real issue in this appeal is whether the Leicester City Justices acted fairly and were seen to act fairly in the circumstances of this case. That they sought to do so in a difficult situation is not in doubt, but they may not have succeeded. References to "McKenzie friends" and still more*

to a "right to a McKenzie friend" mislead, because they suggest that someone who seeks to assist a litigant in person has a special status akin to, if less than, that of one who has a right of audience or a right to conduct litigation. The "McKenzie friend" does not exist at all as such and has neither status nor rights. The only right is that of the litigant and his right is to reasonable assistance, which can take many forms. If he is blind, he may need someone to read documents to him, if he is hard of hearing, he may need someone sitting next to him who can make a note so he can read what he cannot hear. The possibilities, if not endless are at least extensive.'

11. Lord Donaldson then considered the authorities, including the authorities to which we have already referred. He then stated:

'A party to proceedings has a right to present his own case and in so doing to arm himself with such assistance as he thinks appropriate, subject to the right of the court to intervene. Thus he can bring books and papers with him, pens, pencils, spectacles, a hearing aid and any other form of material which he thinks appropriate. Subject to them not being of extraordinary volume and an unusual nature there is no need for the matter to be mentioned to the justices or the clerk. If he wishes to have an adviser, as contrasted with an advocate, it is convenient that he should mention this fact to the justices or to their clerk in order that he may know why the person concerned is sitting next to the defendant, rather than in the space reserved for the general public. Furthermore, the justices or their clerk may reasonably wish to know whether this adviser is likely to be called as a witness and should not hear the evidence of other witnesses if exclusion from court whilst that evidence is being given is usual in that class of case. They may reasonably also wish to know that the adviser is not claiming rights of audience or proposing to exercise them on behalf of the party and that he is not a party to another case or a member of the public who has lost his way. But if a party arms himself with assistance in order the better himself to present his case, it is not a question of seeking the leave of the court. It is a question of the court objecting and restricting him in the use of this assistance, if it is clearly unreasonable in nature or degree or if it becomes apparent that the "assistance" is not being provided bona fide, but for an improper purpose or is being provided in a way which is inimical to the proper and efficient administration of justice, for example, causing a party to waste time, advising the introduction of irrelevant issues or the asking of irrelevant or repetitious questions.'

12. Lord Donaldson ended his judgment by pointing out that if a McKenzie friend could be shown by evidence to be likely to abuse the occasion or if he

had begun to abuse the occasion the court could rule that he could no longer assist and that he should leave the court.

13. Lord Justice Staughton in his judgment stated:

> *'In my opinion there are in general no grounds for objecting to a litigant in person being accompanied by an assistant, who will sit beside him, take notes and advise sotto voce on the conduct of his case. If the court is open to the public, the assistant is entitled to be present in his own right provided that there is room; and if the litigant wishes him as an assistant he should be accorded priority over the public in general."*'

5. The English practice strongly suggests that only in exceptional circumstances should an unqualified McKenzie friend be permitted to address the Court. As Brooke LJ observed in *Noueri-v-Paragon Finance plc*, The Times Law Reports October 4, 2001:

> "*The discretion to grant rights of audience to individuals who did not meet the stringent requirements of the 1990 Act should only be exercised in exceptional circumstances, and courts should pause long before granting rights to individuals who made a practice of seeking to represent otherwise unrepresented litigants: see D v S (Rights of Audience) (The Times January 1, 1997; (1997) 1 FLR 724, 725-726).*"

6. The restrictive approach to permitting unqualified McKenzie friends to address the Court commended by the above authorities suggests that in similar future comparatively uncomplicated cases, the same approach I adopted here might not be followed again. That said, Mr Quallo assisted both the Appellant and the Court through his well-researched and persuasive submissions in a case where the Appellant assumed the onerous burden of undermining essentially factual findings made at trial.

The decision of the Magistrates' Court

7. The Prosecution case was that the Appellant was careless in colliding with a van driven by the Complainant which had exited the Ducking Stool park area and turned west onto North Shore Road near the junction with Blackwatch Pass before parking on the side of the road. Ms Simons, who appeared for the Prosecution below, apparently presented the case with a combination of clarity and simplicity. Irrespective of any carelessness on the Complainant's part in parking on a yellow line, in the absence of any explanation from the Appellant (who did not give evidence), it was obvious that the he had to some material extent been careless himself in failing to avoid the collision.

8. The Defendant's case relied on the evidence of WPC Wilkinson that the Complainant admitted moving his car after the collision and the evidence of an independent eyewitness who was travelling behind the Appellant and who testified that the van suddenly appeared in the road and that the Appellant was driving in an appropriate manner before the collision occurred.

9. The decision of the Learned Magistrate was as follows:

> "*There is no evidence of vehicle stopping abruptly. The Defendant maintains that the Complainant was careless. But there is no evidence to support that. This was a straight stretch of road with a stopped vehicle.*
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> *Independent witness damage/straight road. She was of no real help to the defence. The only reasonable conclusion /inference I can draw as to how the Defendant came to strike the van is that the Defendant's manner of driving fell below that of a careful and competent driver. Defendant is guilty of driving without due care and attention.*"

The grounds of appeal

10. The Appellant's attack on the conviction had three main planks:

    (1) the Learned Magistrate's finding that the Defendant's witness' evidence supported the Prosecution case and did not assist the Defence case showed that he had misapprehended material facts. This was an inferential finding which should not be supported by this Court: *Benmax-v-Austin Motor Co. Ltd.* [1955] A.C. 370; *Mon Tresor Ltd.-v- Ministry of Housing and Lands (Mauritius)* [2008] UKPC 31;

    (2) the Learned Magistrate erred in failing to resolve the conflict between two accounts, one favourable to the Crown and the other to the Defence, in favour of the Appellant: *Cabral-v-Peter Duffy (Police Inspector)* [1994] Bda LR 40. Credible evidence was adduced by an independent witness that the Appellant was driving carefully. The relevant point in time for assessing his driving was immediately before the accident: *Thompson-v-Angela Cox (Police Constable)* [2008] Bda LR 48;

    (3) the Learned Magistrate failed to record adequately the findings that he reached on issues such as credibility in breach of section 83(5) of the Criminal Jurisdiction and Procedure Act 2015, a provision similar to section 21 of the Summary Jurisdiction Act 1930.

Ground 1

11. It is well recognised that an appellate court can draw its own inferences from facts found by the trial judge but can very rarely substitute its own primary findings based on the evidence of witnesses whose credibility the appellate court cannot properly assess. Mr Quallo referred the Court to two cases which illustrated these uncontroversial general propositions. In *Benmax-v-Austin Motor Co. Ltd.* [1955] AC 370 at 373, there is a statement which is both illustrative of these principles and the additional question (raised in Ground 3) as to what findings a trial judge ought to record. Viscount Simonds stated:

> "*This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact , and I would say it would be difficult to for it to do so where the finding turned solely on the credibility of a witness But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here it must first be determined what the defendant in fact did and, secondly, whether what he did amounted in the circumstances (which must also so far as relevant be found as specific facts) to negligence….A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent*. …"

12. Express reliance was placed by Mr Quallo on the following passage in the judgment of Lord Scott in *Mon Tresor and Mon Desert Limited-v- Ministry of Housing and Lands* [2008] UKPC 31 where, after approving *Benmax,* he stated:

> "*2… An appellate tribunal ought to be slow to reject a finding of specific fact by a lower court or tribunal, especially one founded on the credibility or bearing of a witness. It can, however, form an independent opinion on the inferences to be drawn from or evaluation to be made of specific or primary facts so found, though it will naturally attach importance to the judgment of the trial judge or tribunal…*"

13. The latter passage both helps and hurts the Appellant as far as this ground of appeal is concerned. Appellate courts can indeed draw their own inferences from the facts found at trial, but should be slow to second-guess the judgment of the trial judge as far as drawing inferences from the proven facts is concerned. As Ms Simons pointed out, the independent witnesses' account did not offer any explicit explanation as to

why it was that the Appellant was not able to avoid the collision. She seemingly did not even see the van entering the North Shore Road. Had she herself taken her eye of the road in the moments before the collision?

14. Depending on the view the Learned Magistrate took of the evidence as a whole, in my judgment it was properly open to him to find that the independent witness' evidence did not materially assist the Defence case and did in a general sense support the Prosecution case that a rear-end collision occurred. Subject to considering Ground 3 and the adequacy of the findings made, this ground of appeal fails.

Ground 2

15. The authorities relied upon in support of Ground 2 did not in practical terms support the argument that the Learned Magistrate was faced with two possible inferences, one against and one in favour of the Appellant, and should have resolved the conflict in the Appellant's favour. It is true that the manner of driving at the time relevant to the trial is what the court should focus on as Simmons J held in *Thompson-v-Cox* [2008] Bda LR 48, a case where no such evidence was led and the charge was driving without due consideration. Here, however, depending on the view the Magistrates' Court took of the evidence led by both the Prosecution and the Defence, there was both inferential and direct evidence of careless driving. Nor was this a case based solely on circumstantial evidence in the sense of *Cabral-v-Peter Duffy (Police Inspector)* [1994] Bda LR 40 where L.A. Ward CJ (as he then was) accurately stated the principle on inferences (at page 5) as follows:

> "*One facet of the rule relating to inferences is that if from one set of facts the tribunal is able to draw two reasonable inferences-one in favour of the of the defendant and one against the defendant –then in such case the tribunal must always draw the inference in favour of the defendant.*
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> *The onus of proof is on the prosecution. It is not for the appellant to prove her innocence.*"

16. There is a difference between identifying and articulating this principle and establishing that a trier of fact has failed to correctly apply it in the circumstances of a particular case. Here, again, depending on the view the Magistrates' Court took of the evidence led by both the Prosecution and the Defence, it was open to the Learned Magistrate to find that the only reasonable inference was that the Appellant had driven without due care and attention in failing to avoid colliding with the Complainant's parked van. Subject to considering Ground 3 and the adequacy of the findings made, this ground of appeal also fails.

Ground 3

17. This is, so far as I am aware, the first appeal where reliance has been placed on section 83(5) of the Criminal Jurisdiction and Procedure Act 2015 ("the 2015 CJP Act"). The 2015 CJP Act apparently repealed the Summary Jurisdiction Act 1930 with effect from December 15, 2015 (section 92 and Schedule 3). The present trial took place on December 7, 2015. I find that that the Summary Jurisdiction Act 1930 still applied at trial and should accordingly govern the present appeal. The two provisions are in substance very similar and nothing turns on applying the older provision rather than its new replacement.

18. Section 21 provides as follows:

> "*21. When the case on both sides is closed the magistrate composing the court shall record his judgment in writing; and every such judgment shall contain the point or points for determination, the decision therein and the reasons for the decision, and shall be dated and signed by the magistrate at the time of pronouncing it.*"

19. Mr Quallo relied upon my application of this section in *Cabral-v-The Queen* [2015] SC (Bda) 86 App (4 December 2015). In that case I stated:

> "*16. The crux of the present case, it seems to me, lies in the fact that you had two conflicting eye witness accounts of an incident which was advanced by witnesses who were not explicitly recorded by the Learned Magistrate as being anything less than generally credible. In those circumstances, it seems to me the Appellant is entitled to understand clearly why it is, bearing in mind the criminal burden and standard of proof on the Prosecution, that her evidence was rejected, as it clearly was. This was not in my judgment the sort of case where it is self-evident precisely why it is that a defendant's evidence was rejected. Typically when a defendant's evidence is rejected there is some explanation, even a brief one, as to why it is that the defendant has not raised a reasonable doubt.*"

20. The Learned Magistrate in the present case recorded two factual findings which were not supported by the evidence:

    (a) "*There is <u>no evidence</u> of vehicle stopping abruptly*"; and

    (b) "*The Defendant maintains that the Complainant was careless. But there is <u>no evidence</u> to support that*". [Emphasis added]

21. It is entirely possible that in stating that there was "no evidence" on these two issues central to the Appellant's case that the Learned Magistrate meant to say "no credible evidence". However, it was clearly open to the Magistrates' Court to find that:

    (a) the Complainant stopped suddenly after entering the main road. This could have been inferred from the facts that:

        (i) the Complainant himself testified that he realised that the driver's side door was open as he entered the main road and parked to close it, hearing a loud bang as soon as he pulled over,

        (ii) the Complainant was arguably untruthful when he denied moving the car after the collision as the second Prosecution witness, a Police Officer, said he admitted at the scene he had done,

        (iii) physical evidence photographed at the accident scene potentially supported a finding that the van had parked in the middle of the road rather than at the side as the Complainant testified,

        (iv) the evidence of the independent witness called by the Appellant (combined with the evidence summarised in sub-paragraphs (i) to (iii) above), potentially supported a finding that the Complainant stopped abruptly in the middle of the road;

    (b) all of the evidence summarised in paragraph (a), together with the agreed fact that the Complainant admitted parking on a yellow line clearly was capable of supporting a finding that the Complainant himself had been careless.

22. A conviction would indeed have been inevitable had there been "no evidence" capable of supporting the defence that the Complainant stopped unexpectedly in the middle of the road substantially causing the collision which the Appellant, despite riding at a safe speed and apparently in an appropriate manner, could not avoid. In those circumstances there would have been no need to explain why "non-existent" evidence was rejected. Regretfully, the mistaken finding that there was no evidence capable of supporting the Appellant's defence not only suggests that the Learned Magistrate failed to record sufficient findings as to why he rejected the Defence case. It also raises doubts as to whether or not he fully appreciated the main thrust Appellant's case and fairly assessed it, in circumstances where:

(a) the Appellant was representing himself;

(b) the Appellant surprisingly elected not to give evidence in support of what at first blush may well have appeared to be a somewhat unlikely defence.

23. Furthermore, the key finding made was merely a conclusory one: "*The only reasonable conclusion /inference I can draw as to how the Defendant came to strike the van is that the Defendant's manner of driving fell below that of a careful and competent driver*". No primary findings were recorded on the central issues in controversy, namely whether the Complainant was solely responsible for the collision by stopping abruptly in the middle of the road or whether the Appellant was careless by either driving too fast or failing to keep a proper lookout. Viscount Simonds' remarks about the proper judicial approach to recording findings of negligence in the civil context apply with equal force to a charge of careless driving. In *Benmax-v-Austin Motor Co. Ltd.* [1955] AC 370 at 373, he stated:

> "*A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent*."

24. The sort of primary findings which could have supported the conclusory finding that the Appellant was driving without due care and attention include the following:

(a) a finding that the Appellant failed to keep a proper look out;

(b) a finding that the independent witness' evidence that the Appellant was driving carefully was unreliable; and

(c) a finding that even if the Complainant parked suddenly in the middle of the road, if the Appellant had been exercising due care and attention, he ought to have been able to avoid the collision which occurred. Alternatively, a finding that the Court accepted the Complainant's evidence that he parked at the side of the road in a safe manner and rejected the evidence of the Police Officer that the van driver admitted moving his vehicle after the collision.

25. Ground 3 accordingly succeeds. Can the conviction be upheld on the grounds that this complaint is only a technical one? The proviso to section 18(1) of the Criminal Appeal Act 1952 provides as follows:

> "*Provided that the Supreme Court, notwithstanding that it is of opinion that any point raised in the appeal might be decided in favour of the*

appellant, may dismiss the appeal if it appears to the Court that no substantial miscarriage of justice in fact occurred in connection with the criminal proceedings before the court of summary jurisdiction."

26. It is impossible for this Court to properly be satisfied that no substantial miscarriage of justice occurred in circumstances where the basis on which the Defence case was rejected by the trial judge is neither self-evident nor sufficiently explained.

Conclusion

27. For these reasons the appeal against conviction is allowed and the conviction and sentence imposed in the Magistrates' Court are set aside.

Dated this 11th day of April, 2016 _____

IAN R.C. KAWALEY CJ