The Court of Appeal for Bermuda

CRIMINAL APPEALS Nos. 21 & 23 of 2013

Between:

TRACEY PITT

Appellant

-v-

THE QUEEN

Respondent/Appellant

-v-

TRACEY PITT

Respondent

Before: **Zacca, President**
Evans, JA
Baker, JA

Appearances: Ms. Elizabeth Christopher for the Appellant, Ms. Pitt
Ms. Takiyah Burgess and Ms. Nicole Smith for the Crown

Date of Hearing & Decision: **19 March 2014**

Date of Reasons: **27 May 2014**

REASONS FOR DECISION

Baker, JA:

1. Tracey Pitt was tried in the Supreme Court before Wolffe AJ and a jury on an indictment containing six counts. On 10 September 2013 she was acquitted of counts 1 and 3, causing grievous bodily harm when driving a vehicle whilst impaired by alcohol and count 5 driving a vehicle while under the influence of alcohol. She was convicted of counts 2 and 4, reckless driving contrary to section 320 of the Criminal Code and count 6, failing or refusing to provide a specimen of breath contrary to section 35C(7) of the

Road Traffic Act 1947. She was sentenced to 3 months imprisonment concurrent on each count and on count 6 was also disqualified for 18 months with 8 demerit points.

2. On 19 March 2014 we allowed her appeal against conviction on counts 2 and 4 and dismissed her appeal against conviction on count 6. We allowed her appeal against sentence on count 6 to the extent of varying her sentence by vacating the 3 month sentence of imprisonment and reducing the disqualification from 18 to 12 months. We now give our reasons.

Facts

3. On Sunday, 29 January 2012, about 2:30 a.m, the appellant was driving a Toyota Corolla south along Woodlands Road in Pembroke Parish. Just after she passed Canal Road on her left she collided with 36 year old twin brothers, Rudolph Smith and Randolph Smith who were on the tarmac wrestling in the south bound lane. They both received serious injuries. Rudolph sustained a fractured skull, lung contusions and his mental state was affected. Randolph had a fractured left ankle, a fractured dislocation of his left tibia and fibula, multiple lumber and pelvic fractures plus injuries to the face and head. No other vehicle was involved.

4. The appellant called 911. When the police arrived she showed signs of having consumed alcohol and was arrested. On being cautioned for driving whilst impaired she said "I'm sorry. I was driving my vehicle and I felt like I hit something." There was no evidence that she was driving at excessive speed. Police reconstruction concluded that the brothers had been dragged some 13.26 meters from impact. There were no brake marks but a witness said the appellant's brake lights came on followed by a short screech and impact.

5. She was taken to Hamilton Police Station and indeed admitted to having consumed two glasses of red wine. She was asked to provide a specimen of breath and at first agreed. But after she had been given the opportunity of

speaking to a lawyer on the telephone and having been unable to contact one she refused on the ground that she had not spoken to one.

Reckless Driving

6. The first four grounds of appeal can be taken together. The first ground of appeal is that counts 2 and 4 should not have been left to the jury as the driving complained of was identical to that in counts 1 and 3 namely driving whilst impaired through drink. The second ground of appeal is that having been found not guilty of counts 1, 3 and 5 the verdicts on counts 2 and 4 were inconsistent. The third and fourth grounds of appeal are that the judge erred in directing the jury as to the standard of recklessness required for an offence under section 320 of the Criminal Code. Counts 2 and 4 charged the appellant with reckless driving contrary to section 320 of the Criminal Code. Initially the conduct complained of was reckless driving, or other wilful misconduct, or wilful neglect but following representations by the defence the words "or other wilful misconduct or wilful neglect" were deleted and the case proceeded on the basis of reckless driving alone. At the heart of this appeal lies the meaning of reckless driving in this section.

7. Section 320 of the Criminal Code is headed "Reckless etc driving of vehicles." It provides:

> "Any person who, having the charge of any vehicle, however propelled, does or causes to be done, by reckless, wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, any bodily harm to any person, is guilty of a misdemeanour, and is liable on summary conviction to imprisonment for 2 years and on conviction on indictment to imprisonment for 4 years."

The first point to note is that the section refers to causing "any bodily harm" whereas the Crown has alleged in the indictment she caused "grievous bodily harm". In the event, both the Smith brothers sustained grievous bodily harm and the fact that the Crown has taken upon itself the burden of proving more than is required by section 320 of the Code seems to us to be neither here nor there in the context of this appeal. Counts 1 and 3

correctly charged causing grievous bodily harm whilst the appellant's ability to drive was impaired by alcohol contrary to section 35(3A) of the Road Traffic Act 1947, so one can see how the error occurred.

8. The history of section 320 of the Code is interesting and of some relevance. Its origin appears to lie in section 35 of the Offences Against the Person Act 1861 which provides:

> "Whosoever, having the charge of any carriage or vehicle, shall, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of an offence…"

The commission of the prohibited conduct in each of the two sections is described in identical terms but with one additional word in section 320 of the Code. The identical words are:

> "by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect."

The additional word in section 320 is "reckless" which precedes "wanton".

9. In *R v Okosi* [1997] RTR 450 The English Court of Appeal (Criminal Division) considered section 35 of the 1861 Act and assumed, without having to decide the point, that the correct approach to that section was that the offence involved recklessness namely foresight of harm, but of a subjective not objective character.

10. Now section 320 has specifically imported the concept of recklessness into the section. "Reckless" is a word that has caused persistent difficulty in the English criminal law. See for example *R v Caldwell* [1982] AC 341; *R v Lawrence* [1982] AC 510; *R v Reid* [1993] 1 WLR 793 and, more recently, *R v G & Anr* [2003] UKHL 50. Happily, the word "reckless", has now been banned from the lexicon of driving offences in England and Wales (see Lord Bingham of Cornhill in *R v G* at paragraph 28). It remains, however, in section 320 of the Bermudian Criminal Code and its meaning in that section in what has to be determined in the present case.

11. Ms Christopher, who has appeared for the appellant, submits that subjective foresight of harm is required. The DPP, on the other hand, submits that all that is necessary is what has come to be known as *Lawrence* recklessness namely that the appellant was driving in such a manner as to create an obvious and serious risk of causing a physical harm to someone using the road or of doing substantial damage to property and that he did so without having given any thought to the possibility of there being such risk, or having recognised that there was being some risk involved had nonetheless gone on to take it.

12. In our judgment the structure of section 320 is such that Ms Christopher's submission is correct. That the word "other" precedes "wilful misconduct" makes it plain that the draftsman classifies reckless, wanton, and furious driving as species not just of misconduct but of wilful misconduct. The addition of wilful neglect means that the draftsman is incorporating wilful acts of omission as well as wilful acts of commission.

13. We also reiterate a point made by the President during argument that this is an offence charged under the Criminal Code rather than under the Road Traffic Act 1947 and that it is therefore not surprising to find a higher element of mens rea required to constitute the offence that is the case in many road traffic offences.

14. The judge in his summation directed the jury that *Lawrence* recklessness applied. This in our judgment was a misdirection. The judge directed the jury that momentary laps of attention on the part of the driver, if resulting in an obvious and serious risk of causing harm or injury are not outside the ambit of reckless driving merely because they are brief or momentarily. The problem in the present case arose because of the interrelationship on the facts between counts 1 and 2 and between counts 3 and 4. The Crown pinned its case on the appellant's ability to drive being impaired through drink. If the appellant's ability to drive had been impaired through drink this would have provided the obvious explanation why she drove into the Smith brothers without having seen them until at least a very late stage. It

would have justified a finding of reckless driving. A driver should drive in such a manner that he can pull up within the distance he can see to be clear. The facts of this accident, absent any evidence of culpability (and there was none except impairment through drink which was rejected by the jury) prior to not looking carefully enough to see the men in the road, whilst plainly enough to establish careless driving would not in our judgment establish reckless driving. The element of wilful misconduct necessary to establish recklessness would, in our view, have come from driving whilst impaired through drink. Indeed this is how the Crown put the case on the facts although on the basis of *Lawrence* recklessness rather than wilful misconduct.

15. The judge did not direct the jury about any circumstances in which they might convict the appellant of reckless driving if they concluded she was not impaired through drink. In reality there was no other basis on which they could convict. The judge's direction to the jury that momentary lapses of attention if resulting in an obvious and serious risk of harm were not outside the ambit of reckless driving merely because they are brief or momentary could have misled the jury into believing that they could, as they did, convict the appellant even though they were not satisfied she was driving whilst impaired though drink.

16. The problem that has to be faced by the Crown is that by their verdict the jury found that the appellant was not impaired through drink. The DPP sought to argue that on the appellant's own admission she had consumed two glasses of wine before driving but in our view, given the jury's finding that she was not driving whilst impaired through alcohol, this cannot found the wilful misconduct element required to establish recklessness in section 320.

17. Counts 2 and 4 were alternative to counts 1 and 3 and the judge correctly directed the jury that they could not convict the appellant of both counts 1 and 2 and of counts 3 and 4. In fact he should have directed them that if they found the appellant not guilty of the impairment charges counts 1 and

3 they must find her not guilty of the reckless driving charges counts 2 and 4 because driving whilst impaired was an essential element of the reckless driving in this case. In our view there is substance in each of the first four grounds of appeal which seem to us to be different ways of identifying the same problem namely that absent impairment through drink there was nothing in the evidence to elevate the appellant's failure to see the men fighting in the road in sufficient time to stop from serious carelessness to recklessness.

18. Given the acquittal by the jury of counts 1 and 3 one is left with an accident that would appear to have been caused by careless driving but with nothing on the evidence to elevate it to reckless driving within the meaning of section 320 of the Code, However, it was not open to the jury to convict of the lesser offence of careless driving It is true that there was some conflict in the evidence about the quality of street lighting and whether a driver travelling in the opposite direction had his lights dipped or on full beam, but these issues have no bearing on the question of recklessness under section 320.

19. Accordingly, the convictions on counts 2 and 4 for reckless driving could not stand and were quashed.

Ground 5: Failing to Provide a Breath Sample

20. Section 35(C)(7) of the Road Traffic Act 1947 provides that any person who, without reasonable excuse, fails or refuses to comply with a demand made to him by a police officer under the section commits an offence.

21. At the scene the appellant agreed to provide a sample of breath and at the police station she admitted to having consumed two glasses of red wine prior to driving. She said she asked Sgt. Samaroo for a lawyer when he said he was going to breath test her. He said he wanted to finish his paperwork. He then did allow her to call a lawyer, albeit another officer, PC Mills, was reluctant to allow her to as it would delay the breathalyzer process. In the event, she was allowed to call Ms Pearman but there was no reply. She was

then taken to the Alco-Analyzer room and she again asked if she could contact a lawyer but was told not until after the breath test. Her evidence was that she wanted to speak to a lawyer but wanted to take the breath test. She disputed saying "I am not providing any samples." The judge correctly directed the jury as to the effect of section 35(C)(7). He pointed out that where there is an accident and death or grievous bodily harm results, a police officer can demand a breath test from the accused without delay or as soon as practical and that the implication of this was that the police officer need not wait for a defendant actually to get hold of a lawyer or for a lawyer to give advice or come to the police station before the sample could be taken. Furthermore, a concession to allow a defendant to try and contact a lawyer could be ended if it was creating a too great a delay and a mistaken belief of entitlement to contact a lawyer could not amount to a reasonable excuse.

22. In our judgment this direction is plainly correct. Were the position otherwise the breath test procedure could be rendered completely nugatory. The fact that the appellant was allowed to try and contact Ms Pearman was a concession that need not have be made by Sgt. Samaroo. Furthermore, one asks rhetorically, what advice could have been given if the appellant had succeeded in contacting a lawyer. If she refused to provide a sample without reasonable excuse she committed an offence and no reasonable excuse had been suggested other than not being allowed to speak to a lawyer.

23. We were referred to authority in support of the judge's direction to the jury namely *Young v McClean* Criminal Appeal 14 of 1993 in which Roberts P said: "There may well be circumstances that would amount to a reasonable excuse. A wish to see a lawyer is not one of them."

24. Ms Christopher made a valiant effort to persuade us that there is a right to legal advice under the Bermuda Constitution and/or the Criminal Code and referred us to the Canadian case of *R v Prosper* [1994] 3 SCR 236 but we remained unpersuaded that there is anything in the laws applicable to

Bermuda that trumps a police officer's right to demand a breath test in the circumstance of this case.

25. Accordingly the appeal against conviction on count 6 was dismissed.

Sentence

26. The respondent lodged an appeal against sentence on the ground that the sentence was manifestly inadequate but did not pursue it. In any event the reckless driving convictions were set aside.

27. As to the appellant's appeal against sentence, the disqualification on count 6 was reduced to 12 months which is the minimum and mandatory period. The demerit points were appropriate at 8 and ordered to remain. The offence did not warrant imprisonment and the 10 days in custody was vacated.

Signed

Baker, JA

Signed

Zacca, P

Signed

Evans, JA