Neutral Citation Number: [2021] CA (Bda) 9 Crim

Case No: Civ/2021/01

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS APPELLATE JURISDICTION
THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2019: No. 031

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 24 June 2021

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
JUSTICE OF APPEAL GEOFFREY BELL

- -

Between:

LEVINCE ROBERTS

Appellant

- and -

THE QUEEN **Respondent**

Mr. Michael Scott of Browne Scott for the Appellant

Ms Cindy Clarke and Ms Shaunte Simmons on behalf of the Director of Public Prosecutions for the Crown

Date of Hearing: 15 June 2021

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JUDGMENT

BELL JA:

Introduction

1. This appeal turns on a very simple point. The Appellant in this case, Levince Roberts, was involved in a traffic accident during the early evening of Monday, 18 June 2018, when the motor car he was driving in a westerly direction crossed the centre line and struck a motor cycle ridden by Jahron Wilson, travelling in the opposite direction, so the accident happened on the wrong side of the road so far as Mr Roberts was concerned. Mr Wilson sustained a fractured left tibia and a fracture dislocation of the right hip, which left him hospitalised for five days, and Mr Roberts was charged with causing grievous bodily harm by driving without due care and attention contrary to section 37A of the Road Traffic Act 1947 ("the Act"). Following trial before the Wor Craig Attridge on 23 September 2019, Mr Roberts was convicted on 8 October 2019. He appealed against his conviction to the Supreme Court, which appeal was heard by Subair Williams J, who dismissed his appeal on 29 December 2020.

2. The simple point concerns the fact that in the period leading up to the accident, Mr Roberts had had very little sleep, and not much food. He had recognised that he was starting to fall asleep as he was driving westerly through Paget, but nevertheless continued to drive, having made, as the learned magistrate described it, "a conscious decision" to keep on driving to a parking area further west, at Warwick Long Bay, where he intended to stop the car and rest. Mr Roberts' case is, broadly speaking, that he was entitled to make that judgment, and that the subjective nature of his decision to keep driving could be justified. For the reasons set out in this judgment, I am of the view that he was wrong on both counts.

Background Facts

3. Mr Roberts had returned to Bermuda on a flight from Miami on Sunday evening, 17 June 2018. After disembarking, he then drove the length of the Island to his home in Sandys Parish, before turning right around and going out to work, from which he returned home at about 5 am. He said that he then had 2 hours rest, following which he left his home at 7 am to drive to a security job, again travelling the length of the Island, to St David's. In all he said that he had had 5 hours sleep including the flight from Miami, and the 2 hours he had slept at home before leaving it to drive to his security job. He said in his evidence that the food which had been set aside for security personnel had been eaten by others, and by way of sustenance during the day he had only one granola bar, before leaving St David's at about 7 pm to drive home. So in a period of just over 36 hours he had, on his evidence, had only 5 hours sleep, and in just under 24 hours he had had only 2 hours rest; added to this lack of sleep was the fact that during the day he had eaten just one granola bar. Unsurprisingly, he felt tired as he was driving home in a westerly direction. He said that he started to feel *"like drowsy tired"* as he got close to Paget, and as he got to the Astwood Park stretch in Warwick, he *"started to nod off for a whole sleep"* and was *"nodding in and out"*, with the sensation of falling asleep. At that point his evidence was that he *"made the conscious decision to make my way to Warwick Long Bay and rest"*. His reason for not stopping immediately was that he was worried that if he just pulled over by the side of the road he might be hassled by the police. In making the conscious decision to go to Warwick Long Bay, Mr Roberts conceded that he drove past parking spaces which were private, for local residents.

4. The learned magistrate set out the relevant facts and mentioned some of the authorities to which he had been referred. At paragraph 21 of his judgment, the magistrate said that *"the test for what constitutes careless driving is an objective one"*, referring to section 37B (1) of the Act, which sets out the requisite test, namely that a person shall be regarded as driving without due care and attention if the way he drives falls below what would be expected of a competent and careful driver. He said in terms (paragraph 22) that where a driver falls asleep, a trier of fact is entitled to infer from the fact that the driver fell asleep, that prior to falling asleep, he or she was aware of so doing and ignored the obvious dangers of continuing to drive. In this case, as the magistrate pointed out, Mr Roberts' own evidence made it clear that he was indeed aware of the obvious dangers in continuing to drive, even when he had a clear opportunity to stop. Accordingly, the magistrate found Mr Roberts guilty of the offence charged.

The Appeal to the Supreme Court

5. Mr Roberts appealed to the Supreme Court on three grounds, which are as follows:

> *"1. The Learned Magistrate erred and misapplied the relevant law based on settled legal principle established in 1992 case law including case law established in Bermuda decided case of the Queen v Calin Maybury Reported 2015 in favour of following principles of law decided in an earlier decided case of Hill and Baxter decided in 1952 which was a material misdirection.*
>
> *2. The Learned Magistrate erred in law and that his finding of guilt was against the weight of the evidence, in that the prosecution had not established on the facts that the Appellants [sic] driving was objectively either careless or dangerous, which was a material further misdirection.*
>
> *3. The Learned Magistrate finding that the Appellant decision to drive was careless having regard to the insufficient sleep was contrary to the weight of the evidence including the time spent in sleep on the plane journey and the several hours of sleep at home took insufficient account of a) the distance driven without incident and b) the relevant period of driving just prior to impact."*

6. The learned judge dismissed the appeal, and in doing so referred to one matter which I think it would be helpful to deal with at the outset, since it may have been responsible for the Appellant's misplaced belief that his subjective view that he could safely continue to drive after having experienced the first signs of sleep deprivation ("nodding off") could in some way be justified. It could not be, and I do not believe that the judge intended that it should. The confusion in the Appellant's mind may arise from paragraph 18 of the judgment dismissing the appeal, in which she said, quoting from her judgment in the case of *Fiona Miller v Dennis Webb* [2019] SC (App) No.47:

> *"In assessing whether an accused person's manner of driving fell below the standards of a competent and careful driver, the Court will consider the question both (i) subjectively from the standpoint of what the accused person knew and (ii)*

objectively so to consider the circumstances which reasonably ought to have been known by the accused."

7. There are, obviously, occasions when a driver's driving is affected by some external factor which leads to an accident, but which does not involve fault on the part of the driver. In his judgment in *Hill v Baxter* [1958] 1 QB 277, Lord Goddard CJ referred (page 282) to an earlier case in which examples were given of such cases, as where a driver had been struck by a stone, overcome by a sudden illness, or attacked by a swarm of bees. In such circumstances, he said, there would be no question of that person being made liable at criminal law. And while subsequent cases have questioned some parts of Lord Goddard's judgment, his words on a driver's obligation when he finds that he is getting sleepy, namely that *"If a driver finds that he is getting sleepy he must stop"* seem to me to be incapable of challenge. With respect to the learned judge, it is, I think, unhelpful to refer to there being a subjective element in relation to an accused's standard of driving, although I do appreciate that the judge was referring to the driver's knowledge, not to his opinion as to whether he could continue driving safely. Section 37B of the Act makes it clear that in considering a charge of driving without due care and attention, the standard of driving is to be considered against the standard of driving expected of the competent and careful driver. That is not to exclude matters of which the driver had knowledge, but any relevant knowledge which an accused person may have is to be measured against how the competent and careful driver with the same knowledge would drive. So the test remains an objective one, and where, for instance, extraneous factors lead to an accident, as in the examples given by Lord Goddard, they are perhaps better described as involuntary acts on the part of the driver, rather than acts with a subjective element.

8. The judge analysed the cases to which she was referred with great care and then went through the grounds of appeal which had been advanced before her. She concluded that the magistrate had not been in error and had applied the correct legal principles, and that the magistrate had been correct to reject the Appellant's defence. She observed in particular (paragraph 54), as the magistrate had noted, that the Appellant had had ample opportunity to bring his car to a safe and parked position in Paget, instead of which he made an obviously dangerous gamble to keep driving well into Warwick, even though he had again felt that he was falling asleep as he reached Astwood Park. In concluding her judgment, the judge commented that the more appropriate charge for a person who knowingly drives while in a state of sleepiness, before falling asleep, will be dangerous driving, and that this defendant could more suitably have been charged under section 34 of the Act, causing grievous bodily harm … by dangerous driving.

The Appeal to this Court

9. The grounds of appeal maintain that the learned judge had (i) applied the wrong test for careless driving by ignoring the Scottish case of *Dunn* 2016 HCJAC 3, (ii) misdirected herself by applying a "strict liability" test taken from *Hill v Baxter*, (iii) misdirected herself with regard to those defences available to a drowsy motorist, citing *Dennis v Watt* 1943 SR (NSW) and *Kroon* 1991 521 A Crim R, (iv) (this ground duplicates ground (i)), (v) misapplied the law to the facts, emphasising the Appellant's expressed intention to stop at a safe point, and (vi) had misdirected herself in relation to the Five Step test by which a sleepy driver should govern his approach to driving while sleepy, set out in paragraph 44 of the judgment. Curiously, this ground referred to the driver's "sudden onset of sleepiness" in Warwick and his decision to drive on to a safe point,

ignoring the fact that the Appellant had first felt "drowsy" as he got close to Paget, and had actually started to fall asleep as he got to Astwood Park in Warwick, the latter of which matters should have caused him to stop immediately. Mr Scott also filed submissions which included a further ground of appeal, ground 1A, which criticised the judge for not having found in terms that the magistrate erred in law by finding that the test for careless driving was an objective one. The ground refers to dangerous driving, but the relevant passage in the magistrate's judgment used the word "careless".

The Relevant Law

10. While I am not sure that it is necessary to go into the law in great detail, I will refer to those cases from which the principles to be applied in assessing the standard of driving to be expected from a driver who continues to drive after first having felt that he was in danger of falling asleep at the wheel are to be found.

11. First is *Hill v Baxter*, referred to in paragraph 7 above, with its reference to the need, put in the imperative, for a driver who finds that he is getting sleepy to stop driving. Next is the case of *R v Gosney* [1971] 2 QB 674, which explained the reference in the earlier case where Lord Goddard had said (282) that no question of *mens rea* entered into the offence. As Megaw LJ explained in *Gosney* (679), that means no more than that the prosecution does not have to prove an intention to drive badly. It does not mean that the offence (of dangerous driving in that case) can be committed without fault on the part of the driver. And at 680, again with reference to dangerous driving, Megaw LJ said "It is not an absolute offence. 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." (emphasis added). Since Mr Scott raised the question during his submissions, I pause to note that the authorities make it clear that in this jurisdiction driving without due care and attention should not be regarded as an absolute offence. And the objective nature of the test applies to cases of careless driving as it does to cases of dangerous driving.

12. I next turn to the Australian case of *Jiminez v R* [1992] 173 CLR 572, which was relied on below by Mr Scott, and which the learned judge dealt with very fully, no doubt because of the criticism of Lord Goddard's statement regarding the need for a driver who is "getting sleepy" to stop driving. The Australian judges cautioned that it does not necessarily follow that because a driver falls asleep he has had sufficient warning to enable him to stop. But that potential difference of view is entirely academic in the case of Mr Roberts. Not only had he had very little sleep for the 36 hours or so before his accident, but he had received a sufficient warning as to his level of tiredness on at least two occasions, first when he felt drowsy in Paget, and secondly, and much more seriously, when he reached the Astwood Park section of Warwick when he was "nodding in and out" and experienced "the sensation of falling asleep", despite which he continued to drive, in the misplaced belief that he could safely reach the parking place he had in mind at Warwick Long Bay. He had already driven a considerable distance from the point in Paget at which he had first started to feel drowsy. And the Australian judges also referred to the objective nature of the test, and I would refer to this passage, which is unquestionably apposite when considering Mr Roberts' driving: "And, of course, it will be necessary to consider how tired the driver was. If there was a warning as to the onset of sleep that may be some evidence as to the degree of his tiredness. And the period

of driving before the accident and the amount of sleep that he had earlier had will also bear on the degree of his tiredness." Those matters are of particular importance when considering the driving of Mr Roberts, and are no doubt the reason the learned magistrate had held that the *Jiminez* case was "clearly distinguishable on its facts".

13. Finally, I would refer to the Scottish case of *Alexander v Dunn* [2016] HCJAC 3, where the court referred to *Jiminez* for the purpose of distinguishing between a case where the driver claimed to have no warning of the onset of sleep and one where, as here, there had been such a warning. Quite apart from the history of Mr Roberts' previous 36 hours, there were at least two occasions when he had very clear warnings, which he chose to ignore. So, as the magistrate found, the *Jiminez* defence was not available to Mr Roberts.

Conclusion

14. Mr Roberts' decision to keep driving in the circumstances outlined in the grounds of appeal also ignored the severe lack of sleep which he had had up to the point at which he began his journey home. The fact that he should then have fallen asleep while driving should not have come as any surprise to him, and indeed he appears to have recognised this when he said towards the end of his cross-examination *"I felt I could make it to Warwick Long Bay. Decision was wrong."* His decision to keep driving after the increasing effect of his tiredness had twice become apparent to him demonstrates very clearly in my view the considerable difference between the standard of Mr Roberts' driving and the standard to be expected of the careful and competent driver.

15. To my mind, this is as clear a case as there could be where a driver who had every reason to feel tired, given his lack of sleep over the preceding 36 hours or so, chose to ignore the warning signs he received while driving, and instead continued driving, with the obvious consequence that he fell asleep and caused an accident with serious injuries sustained by the other party. Mr Roberts' belief that he could safely continue driving some further distance after the second warning signal of the extent of his tiredness was wholly misplaced, and I would dismiss this appeal. For the avoidance of doubt I would agree with the magistrate that the test for the standard of driving governing the offence of driving without due care and attention under the Act is indeed an objective one, and references to a subjective test are, I think, unhelpful. And I would add that I endorse the comments made by the judge in relation to the severity of the charge which Mr Roberts faced. In the circumstances of this case, Mr Roberts can consider himself lucky not to have been charged with and convicted of dangerous driving.

KAY JA:

16. I agree.

CLARKE P:

17. I also agree. The appeal is, accordingly, dismissed.