



In The Supreme Court of Bermuda

APPELLATE JURISDICTION 2022: 11

PATRICK FRANCIS

Appellant

-v-

FIONA MILLER
(Police Sergeant)

Respondent

JUDGMENT

*Appeal against Conviction in the Magistrates' Court
Exception to Hearsay Rule in rebuttal of allegation of Recent Fabrication
Burden of Proof – Counsel's failure to establish Good Character Evidence*

Date of Hearing: 08 November 2022

Date of Judgment: 15 November 2022

Appellant Mr. Mark Diel (Marshall Diel & Myers Limited)

Respondent Mr. Paul Wilson for the Director of Public Prosecutions

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. The Appellant, Mr. Patrick Francis, was tried and convicted in the Magistrates' Court by Magistrate, Ms. Maxanne Anderson (now the Senior Magistrate), on Information 19TR05895 for the offence of causing grievous bodily harm by driving without due care and attention, contrary to section 37A of the Road Traffic Act 1947 (RTA). Having been convicted on 29 March 2022, he was sentenced on that same day to an 18 month period of disqualification in respect of a specified class of vehicles in addition to a fine of \$1,500.00, subject to a 90 day period of imprisonment in default of payment.
2. By an appeal to this Court, the Appellant now seeks an order quashing his conviction on the grounds of appeal set out in an Amended Notice of Appeal filed on 5 April 2022. Those grounds were argued before me by Counsel appearing at the hearing of 8 November 2022. At the close of that hearing I reserved judgment, which I now deliver with the reasons outlined further below.

The Evidence at Trial

The Crown's Case

3. The Crown's case was that on Friday 1 February 2019 at approximately 8:45am, the Complainant, Ms. Kristy Woods, was the rider of motorcycle registration # CK719, a black and silver Honda Scoopy. She was traveling in an easterly direction along Middle Road in Southampton Parish approaching the area of Pine Tree Avenue. At that point in time, the Appellant was also traveling in the same area along Middle Road but was traveling in the opposite direction in the westbound lane. He was driving a small white van, registration # L3023.
4. The Complainant's evidence at trial was that the road was clear of any other vehicles and that she had an unobstructed view of the Appellant's van which had come to a stop and was positioned to make the right turn onto Pine Tree Avenue. The Complainant told the trial magistrate that she thought the Appellant saw her approaching as she was traveling in the center of the eastbound lane. She said that the Appellant's hesitation before making the turn led her to think he had seen her. Nonetheless, the Appellant proceeded to make the turn before the Complainant could avoid the collision which ensued.
5. The Complainant stated that the Appellant's vehicle was in the middle of her lane, the eastbound lane, when the two vehicles collided. She said that the accident happened quickly but that it was not the result of any high speed traveling.

6. The prosecution tendered photographs of the aftermath of the accident. The Complainant, in referring to the photograph evidence, said that her motor cycle landed under the front of the Appellant's van. She said that she could not say for sure where the Appellant's vehicle hit her motor cycle.
7. Describing her reaction and injuries, the Complainant said that she tried to get off her bike and stand up but was unable to do so as she had sustained injury to her knee, which on the medical evidence proved to be a fracture. The Complainant said she stumbled her way into the westbound lane in the middle of the road in attempt to get to the side of the road on the curb. However, she just laid in the middle of the westbound lane.
8. The Complainant also stated to the Court that the Appellant told her that he was scared as he thought she was under the van where her motor cycle had been hitched. Her evidence was that he seemed panicked and that he said he was sorry. It was also the Complainant's evidence that after the police arrived, the Appellant was telling his side of the story. The Crown called Acting Sergeant Melissa Butler, who attended the scene after the collision. A/Sgt Butler described the positioning of the vehicles as she found them and stated that she spoke to the Appellant for less than a minute and that the Appellant told her that he had crossed her lane. A/Sgt Butler said she also spoke to another witness in addition to a lady in the ambulance who was not the Complainant.

The Defence Case

9. The Appellant gave evidence in his own defence. He said that he was heading in a westerly direction and that just before he reached the junction where Middle Road meets Pine Tree Avenue, he slowed down and used his indicator. He said he noticed a car coming in the opposite direction, which stopped just before Heron's Nest Drive (which is the side road immediately before Pine Tree Avenue if traveling easterly). The Appellant said that the car gave way to him and signalled for him, the Appellant, to turn onto Pine Tree Avenue. He said that as he started to make the right turn, the Complainant overtook the same car which had stopped to give way to him. In doing so, the Complainant went from the eastbound lane into the westbound lane, which were divided by a yellow line. The Appellant said that he brought his vehicle to a complete stop but that Ms. Woods seemed panicked and raised up on her motorcycle as she applied brakes. On the Defence case, she consequently slid out as the roads were wet, hitting the front passenger side of his van.
10. The Appellant accepted in his evidence in chief that he told the Complainant that he was sorry but explained that he said this out of concern for her as he was in a van and she was on a motor cycle.

11. The Senior Magistrate's note of the Appellant's evidence of his post-accident conversation with A/Sgt Butler at the scene is as follows:

"Office Butler came. She asked me what happened. I told her that Ms. Woods was overtaking and that she slammed brakes, slide out and hit my van. Ms. Butler mentioned to me that since I crossed into the east bound lane it would be my fault. My co-worker arrived as well. H. Carter-Stevens. He said even when you are overtaking on a yellow line? Ms. Butler indicated she'll check cameras around the corner to figure out who was the car that stopped...Eventually the car that stopped was letting me in, turned around and left. The conversation with Ms Butler went on for about 10-15 minutes. She even mentioned dash cams for our vehicles as well. At any accident scene you would need more than 1 minute to know what happened from each witness."

12. A/Sgt Butler did not accept that the Appellant told her that the Complainant had overtaken a car before colliding with the Appellant. When the Appellant's trial Counsel, Mr. Richard Horseman of Wakefield Quin Limited, put it to the officer that Mr. Henry Carter Stevens asked her; *"How could Mr. Francis be at fault if she was crossing the yellow line?"* A/Sgt Butler said that she would not have had a conversation like that at the scene. Mr. Horseman also questioned A/Sgt Butler about the presence of a white scrape mark in the eastbound lane which extended into the westbound lane. It was the case for the Defence that this evidence supported its claim that the Complainant had trespassed the westbound lane immediately prior to the collision.
13. The Defence also complained that the accident had not been properly investigated. To that end, it was highlighted that an accident scene investigator never attended the aftermath of the accident on the day of the collision. Instead a traffic scene investigator went to the accident site some four months later only to take various measurements.

The Magistrate's Judgment

14. The Senior Magistrate in the material parts of her judgment, stated:

"14. Mr. Hardley Stevens-Carty gave evidence that on 1 February 2019 he was working on Pinetree Avenue at about 8:45am when he got a call from his colleague, Patrick Francis, stating that he was in a road traffic accident. He went to the accident to see what happened and observed the van, a bike under the van and a stopped car. He never really saw the person but the car was a small, hatch back. When he got there, there was traffic on both sides of the road. The fire and police showed up. The traffic started turning around so he did not see where the car went."

15. Mr. Stevens-Carty went on to say that his colleague was having a conversation with a female police officer which lasted 10-15 minutes. He asked the officer would the accident be Mr. Francis' fault even though someone was overtaking on a yellow line and the officer replied that she would have to take a look at the cameras. They also had a conversation about getting dash-cams in their vans.

Decision

16. I have heard all that has been said by the witnesses and submissions made by Ms. Trott and Mr. Horseman. I find Ms. Woods and Acting Sgt. Butler to be credible and reliable witnesses and I prefer their evidence over the evidence of Mr. Francis and Mr. Stevens-Carty. In this regard, I accept the evidence of Ms. Woods and Acting Sgt Butler and find as a fact that:

- i. Ms. Woods was traveling in the east bound lane at about 8:45 on 1st February 2019, when she saw the Defendant's white van headed in the west bound lane.
- ii. The roads were clear and there were no obstructions.
- iii. The Defendant crossed into Ms Woods' path while turning into Pinetree Avenue, therefore colliding with Ms. Woods' motorcycle.
- iv. Ms. Woods tried to get off her bike and stand up but due to her injury she stumbled into the west bound lane.
- v. Ms. Woods' motorcycle was hitched up under the Defendant's van and therefore the van had to be moved back some.
- vi. Due to the accident traffic built up on both sides of Middle Road.
- vii. Ms. Woods was taken to KEMH where she had to have emergency surgery on her injured knee which was fractured. She has also had a second surgery to remove the plate instilled during her first surgery.
- viii. Acting Sgt Butler had a conversation with the Defendant at the scene lasting less than a minute, she did not engage in a conversation with Mr. Stevens-Carty at the scene.

17. In respect of the evidence of Mr. Stevens-Carty, he admits that he did not witness the accident but arrived on the scene after the collision. He also admitted that any information he offered about the collision was from overhearing his colleagues explain what happened.

18. In regards to the Defendant's evidence, I do not accept his defence and find that the Defendant's driving on 1st February 2019 fell below what would be expected of a competent and careful driver.

Conclusion

In consideration of the above paragraphs, I find that the prosecution have beyond a reasonable doubt proven that the defendant, on 1st February 2019, in Southampton Parish, caused grievous bodily harm to Kristy Woods by driving motor vehicle registered number L3023 on Middle Road without due care and attention for other persons using the road. I therefore find the Defendant GUILTY of the offence charged."

Decision and Reasons

15. It is complained on the Appellant's grounds of appeal that had the learned magistrate considered all of the evidence before her, she would have found reason to doubt the strength of the Crown's case. The Appellant pointed out that the Senior Magistrate made no visible or adequate assessment of the Defence case, which was that the Complainant was overtaking a car immediately prior to the collision and that in doing so, she trespassed into the west bound lane. The Defence contended that this was supported by the evidence of the white scrape mark in the road which transcended into the west bound lane. The existence of this scrape mark is visible in the photographic evidence which was put to A/Sgt Butler during her evidence under cross-examination and left unexplained and unchallenged by the Crown.
16. The Appellant complains that the Senior Magistrate in her judgment never referred to the evidence of the scrape mark and never explained why she rejected Mr. Francis' evidence that the Complainant was overtaking a car which had stopped to allow him, Mr. Francis to make the right turn onto Pine Tree Avenue. Mr. Diel argued that the Senior Magistrate did not provide any reasons for accepting the Crown's evidence which was starkly contrasted by the evidence called for the Defence. In furtherance of this complaint, Mr. Diel submitted that it was insufficient for the Senior Magistrate to simply state that she preferred the Crown's evidence over that of the Defence. In doing so, the Appellant says that the Senior Magistrate misapplied the burden and standard of proof.
17. Adding to the Appellant's list of grievances, Mr. Diel criticised the Senior Magistrate's approach to Mr. Stevens-Carty's evidence. Instead of dismissing his evidence as hearsay evidence, the Senior Magistrate ought to have treated Mr. Stevens-Carty's evidence as a rebuttal to the Crown's attempt to impugn Mr. Francis' version of the accident as a recent fabrication. The Appellant contends that the purpose and value of Stevens-Carty's evidence was entirely overlooked by the learned Senior Magistrate who did not acknowledge or understand that Mr. Stevens-Carty's evidence was proof that Mr. Francis did not belatedly invent his sworn account of the accident. Mr. Stevens-Carty told the Court that in the immediate aftermath of the accident, Mr. Francis was telling the officer at the scene about a car stopping to let him out. The Appellant says that this evidence qualified as an exception

to the hearsay rule as it was statement rebutting an allegation of recent fabrication. On that basis, the Appellant's Counsel complained that the Senior Magistrate wrongly ignored Mr. Stevens-Carty's testimony, as if it was inadmissible hearsay evidence. To that end, Mr. Diel relied on the legal principle stated in the below extract from Archbold Criminal Pleading Evidence and Practice 2023 [8-254]:

“ If, in cross-examination, a witness's account of some incident or set of facts is challenged as being a recent invention, thus presenting a clear issue as to whether at some previous time he said or thought what he has been saying at trial, he may support himself by evidence of earlier statements by him to the same effect. Plainly the rule that sets up the exception cannot be formulated with any great precision, since its application will depend on the nature of the challenge offered by the course of cross-examination and the relative cogency of the evidence tendered to repel it ” : Fox v General Medical Council [1960] 1 W.L.R. 1017 at 1025, PC.

In Oyesiku (1972) 56 Cr. App. R. 240, the Court of Appeal approved the following statement of principle (at p. 246): “ If the credit of a witness is impugned as to some material fact to which he deposes upon the ground that his account is a late invention or has been lately devised or reconstructed, even though not with conscious dishonesty, that makes admissible a statement to the same effect as the account he gave as a witness, if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction ”. The judge must exercise great care in deciding that-

- (a) The evidence has been attacked on the ground of recent invention or reconstruction or that a foundation for such an attack has been laid,*
- (b) The contents of the statement are to the like effect as the testimony, and*
- (c) Having regard to the time and circumstances in which the statement was made, it rationally tends to answer the attack.”*

18. It is not entirely clear on the face of the Senior Magistrate's judgment whether she believed the Defendant to be mistaken or whether she found that he was being untruthful in his evidence. If the learned magistrate found that Mr. Francis' version of the event was a product of a recent fabrication, her judgment should have expressly stated as much. Of course, had she found that the Appellant's evidence was indeed a recent fabrication, the learned Senior Magistrate would have been obliged to provide her reasons for rejecting Mr. Francis' and Mr. Stevens-Carty's evidence as untruthful, whether on the basis of concoction or for other reasons. The learned magistrate would have also had to contend with the Complainant's evidence that the Appellant was telling his side of the story to the police at the accident scene.

19. The learned Senior Magistrate was statutorily bound to provide her reasons for rejecting the case advanced by the Defence, particularly on the points of facts which were in contention. Section 83(5) of the Criminal Jurisdiction and Procedure Act 2015 provides as follows:

“(5) The record of proceedings must include the magistrates’ court’s final judgment in writing, which will include—

- (a) the point or points for determination;*
- (b) the decision made on such points; and*
- (c) the reasons for the decisions.”*

20. So, the Senior Magistrate’s findings on the disputed material facts, which were advanced by the Defence, ought to have been outlined and explained in the Senior Magistrate’s judgment. For example, the learned magistrate did not state whether she found the evidence of the scratch mark in the west bound lane to be supportive of the Defence case or incapable of injecting doubt into the case for the prosecution and why. On another example relied on by the Appellant, the Senior Magistrate did not disclose any reasons for rejecting Mr. Francis’ evidence about his verbal exchange with the on-scene officer after the accident had occurred. In the absence of a finding that the Appellant was being untruthful or was lacking in credibility as a witness, the question as to why the magistrate wholly rejected the evidence called by the Defence remains unanswered.

21. In the course of this analysis, I was much assisted by the remarks of the Hon. Chief Justice, Mr. Ian Kawaley (as he then was) from his *ex tempore* ruling in *Cabral v R* [2015] Bda LR 111 [15-20]:

“15. In this case the crucial question is whether or not the Court can be satisfied that not only was the correct legal test applied, which is not in issue, but whether the Learned Magistrate did in the statutory sense of section 21 of the Summary Jurisdiction Act... adequately record findings on the issues in controversy.

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.

17. In this case the Appellant gave a coherent account which, if accepted, would have entitled her to be acquitted and which, on its face, was capable of raising at least a reasonable doubt. And the decision that was rendered does not to my mind adequately explain why it is that her evidence was rejected out of hand. There was for example the very significant point that the Appellant's defence involved an admission that she actually saw the Complainant at some time at some distance and took appropriate evasive action. The finding to the effect that she was careless because she failed to see the complainant does not adequately explain why it is that her account on this crucial issue was rejected.

18. I accept entirely that the summary courts are supposed to deal with things more briefly than courts of superior jurisdiction, but nevertheless these matters are very important to the litigants concerned. And in this case, very narrowly, I am bound to find that the Learned Magistrate failed to give adequate reasons for his decision and, in particular, failed to set out explicitly sufficient findings for the crucial matters in controversy.

19. Mr Ricketts invited the Court to find that, if there was any defect, in fact no substantial miscarriage of justice had occurred. That alternative finding in my judgment isn't open in a case of this nature where the evidence is very evenly balanced and the central complaint that is made is that it is impossible to understand clearly why it is that a finding of guilt has been entered. 20. And so in these circumstances I find that the conviction and sentence should be quashed. The appeal is allowed."

22. In this case, it was particularly important for the learned trial magistrate to outline the reasons for the conclusions she drew because, on the material facts, the Crown's case starkly contrasted the Defence case, which, if not rejected, would have likely resulted in an acquittal. However, in simply stating that Ms. Woods and Acting Sgt. Butler were credible and reliable witnesses and that their evidence was preferred over the evidence of Mr. Francis and Mr. McCarty, the Senior Magistrate's judgment was exposed to the other parts of the criticism which followed: that she erred in departing from the criminal standard of proof. The question for determination was not whether one side of the case was preferred over the other, but whether the Crown's case was believed beyond reasonable doubt after having assessed all of the relevant evidence for both sides. So, the Senior Magistrate's

concluding statement that the prosecution proved the charge beyond reasonable doubt could not and did not cure the defective approach used to assess the evidence.

23. On these grounds, I find that the appeal should be allowed.

24. I now turn to the final ground of appeal which is hinged to the affidavit evidence of Mr. Horseman conceding that he inadvertently failed to tender evidence of good character or to seek a good character direction from the trial Court. I necessarily reject Crown Counsel Mr. Paul Wilson's submissions that the danger of this omission is somehow mitigated by the penalty system outlined in the Traffic Offences (Penalties) Act 1976. That legislation is unconnected to the approach required by a trier of fact in following a direction on good character evidence as it relates to credibility and propensity.

25. In my judgment, the case asserted by the Defence would only likely be rejected by the trier of fact if it was to be found that the Defendant was not a credible or truthful witness. This makes the Defendant's entitlement to a good character direction on the issue of credibility particularly crucial in this type of case. (See *Formanchuk v R* [2004] Bda L.R. 24; *R v Aziz et al* [1995] 2 Cr App R 478 and *John Arthur Vye, Frederick James Wise, Macolm Stephenson* (1993) 97 Cr App R 134.)

26. Of course, the Senior Magistrate cannot be faulted for not having directed herself on the Appellant's good character because the unfortunate error was made by the Appellant's trial Counsel. That said, the omission was a grave one and in this case rendered the conviction unsafe.

Conclusion

27. For these reasons the appeal is allowed.

Dated this 15th day of November 2022



THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE