In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2015: 16

JULIA CABRAL

V

THE QUEEN

EX TEMPORE RULING

(in Court)

Date of hearing: December 4, 2015

Mr. Richard Horseman, Wakefield Quin Limited, for the Plaintiff
Mr. Loxly Ricketts, Department of Public Prosecutions, for the Defendant

Introductory

1. In this matter the Appellant appeals against a conviction on May 18, 2015 in the Magistrates Court (Wor. Khamisi Tokunbo) for driving without due care and attention contrary to section 37 of the Road Traffic Act.

2. The Grounds of Appeal are set out in the notice are various but the essence of the complaint, that was made in oral argument and supported by written submissions filed by Mr Horseman, was that the Learned Magistrate failed to comply with the requirements of section 21 of the Summary Jurisdiction Act.

3. The Judgment that was recorded was very short and Mr. Rickets broadly argued that, having regard to the simplicity of the case and the fact that the Learned Magistrate

clearly had in mind all the evidence that had been given and the submissions made, the findings that he recorded were satisfactory.

The evidence at trial

4. The case involved a conflict between the evidence of the Appellant and the Complainant, who described traveling along Middle Road Warwick on his bike at around 3:30pm on the 11th of November 2014. He was traveling on what he described as a long clear path of road heading east and as he was traveling near the junction of Longford Road he saw the car driven by the Appellant turn suddenly without warning right across his path heading towards Harbour Road. He says that after the collision which resulted in him falling from his bike the appellant was quite frantic and said "*Oh my God, I didn't see you, you came out of nowhere*". To which he replied "*You didn't even look*".

5. The Appellant's case was in direct contrast to that version of events. She says that she was traveling behind a line of traffic with her seven year old daughter when she came to a complete stop at the junction with Longford Road. The coast was clear and, as she proceeded to turn, she saw Mr. Flood the Complainant travelling at a very fast speed. Her response was to stop immediately to allow him to continue on his journey. She said significantly in her evidence: "*I saw him from a distance, he panicked and lost control of his motorbike, he was wobbling all over the place he was trying to slow down, he was carrying some items a fishing rod and a bag. I remained were I was being he was wobbling everywhere, he rode directly into me and smashed me dead on*". Under cross examination by Mr. Horseman at trial the Complainant admitted: "*I did get confused as to whether to go right or left, yes I thought she was going to go right, I disagree the accident was completely my fault.*"

The issues for determination at trial

6. The case was summarized by both counsel whose submissions were recorded by the Learned Magistrate.

7. Mr Ricketts for the Crown submitted that the fact that the Complainant was carrying articles was not relevant to whether or not the Appellant was driving without due care because she was crossing over she had a greater duty of care and he further submitted, rightly it seems to me, that even if the Complainant contributed to the accident, that does not negate the duties of the Appellant. He summarized the issues and clearly relied on the Complainant's evidence.

8. Mr. Horseman referred to the burden of proof and argued that the only explanation for what happened is that Mr Flood was coming at a high speed and that he had three-quarters of the road to avoid her. He summed up his submissions by saying that the Appellant had "*exercised all the care in the world*".

9. There was photographic evidence which indicates that the Appellant's vehicle had crossed the middle line with the offside front of the vehicle where the impact occurred being approximately a third of the way into the lane[1]. The wheels were turning back towards the centre line, suggesting some form of evasive action. And it was, I think, common ground that it ought to have been possible for the Appellant to have seen the Complainant at a good distance, as she herself admitted that she had.

The Judgment

10. The '*Finding*' which was set out on page 22 of the Record stated as follows;

> "*Having just heard the evidence, in particular:*
>
> *1) Where the vehicles came to a rest;*
>
> *2) The fact that the Defendant's vehicle is supposed to have stopped, indicated/signalled to turn;*
>
> *3) That the vehicles ahead of the Defendant had moved on;*
>
> *4) That the Defendant was higher up (seeing over) than the vehicles in front of her; and*
>
> *5) The viewable distance ahead of her was approximately some 75 meters.*
>
> *I am satisfied that the Defendant's manner of driving fell below that expected of a competent and careful driver by failing to see the Complainant and turning into his path and lane, I therefore find that the Defendant is guilty of driving without due care and attention as charged.*"

The arguments on appeal

11. The central complaint made by Mr Horseman is that it is unclear from the Record precisely how the Learned Magistrate resolved the crucial conflicts in the evidence. And in opposition to that submission Mr. Ricketts says that it is implicitly clear that he did except the evidence of the Complainant and rejected the evidence of the Appellant.

12. Mr. Horseman relied on one authority, '*Wilkinson Road Traffic Offences*', 24th edition Volume 1, paragraph 5.51, which says in relevant part as follows:

[1] I.e the wrong lane.

"*However, if an explanation, other than a fanciful explanation, is given by the defendant it is for the prosecution to disprove it and unless it is disproved the defendant is entitled to the benefit of the doubt*…"

13. Mr. Ricketts placed before the Court a variety of authorities which broadly supported his submission that the Court should be satisfied with the adequacy of the reasons expressed. One authority was the Trinidad Court of Appeal case of *Acqui-v-Pooran Maharaj* (1983) 34 WIR 282. In this case the central finding was that even in the absence of statutory requirement to give reasons, it was in fact necessary to give reasons. However, in the course of the judgment of the Court (which was delivered by Bernard JA) at page 289, the following statement appears

> "*In insisting upon reasons to be of a proper quality, once given, if they are to be of assistance to an appellate tribunal Sir Hugh Wooding CJ speaking for the Court of Appeal in Sylvan v Ragoonath (1966) 11 WIR at page 36 (a case in which reasons had in fact been given by the magistrate) observed per incuriam:*
>
> > *'We cannot too strongly insist that reasons should show an awareness of the salient issues, an assessment of the material evidence and an appreciation of the relevant law.* "'

14. That statement, Mr. Ricketts fairly conceded, together with the Judgment as a whole, could be used to support the Appellant's case, although he argued that, having regard to the simplicity of the case and its shortness, the necessary standard was met. He referred as well to a Privy Council decision of *Selvanayagam-v-University of West Indies* [1983] 1 All ER 824. Passages in this decision did more strongly support the Respondent's case. In particular, at page 826 (d-e), Lord Scarman said this

> "*The question is: was there evidence on which the trial judge could properly reach the conclusion which he did? And the answer must be: abundant evidence, if he chose to accept it. And it is plain from his finding that he did accept it*."

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[2] adequately record findings on the issues in controversy.

[2] The Summary Jurisdiction Act 1930 provides:
"*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.*"

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.

Dated this 4th day of December, 2015 _____

IAN RC KAWALEY CJ