



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

APPELLATE JURISDICTION

2021 No. 9

**BETWEEN:**

**BRIAN S ALKON**

**Appellant**

**-and-**

**THE QUEEN**

**Respondent**

**Before:**

**Hon. Assistant Justice Mark Diel**

**Appearances:**

**Mr Michael Scott of Browne Scott Barristers & Attorneys for the  
Appellant**

**Ms Nicole Smith of the Department of Public Prosecutions  
for the Respondent**

**Date of Hearing:**

**30 June 2022**

**Date of Judgment:**

**23 October 2023**

## JUDGMENT

1. This is an appeal from conviction from a decision of Acting Magistrate, Marc Daniels dated 27 January 2021.
2. The decision of the Learned Acting Magistrate was, in my opinion, thorough and carefully set out and I can do no better than to rely upon the evidence as set out in his decision:

### **The Complainant's Evidence**

3. The Crown called the Complainant, Mr. Charles Craig Attridge as its first witness.
4. Mr Attridge testified that he is employed as a Magistrate. Mr. Attridge also testified that he resides at 12 Secretary Lane, in St. George's Parish, together with his wife and subsequently his children, for the past 16-17 years.
5. Mr. Attridge also testified that for a number of weeks leading up to Sunday, 21 April 2019, he, together with his wife and their son, Thomas, had been training on their pedal cycles to participate in the *"End-to-End Race"*.
6. Mr. Attridge further testified that at approximately 9:15 am, on Sunday, 21 April 2019, he, his wife and their son left their residence and rode out of St. George's Parish, by travelling down the hill by their home to the old Club House on the golf course; past Tobacco Bay; then past Fort St. Catherine, eventually thorough to Barry Road. Thereafter, they travelled past Cut Road, through the Town of St. George's and then on to Mullet Bay Road. They rode past the swing bridge on to Kindley Field Road and eventually through Blue Hole Hill where they eventually travelled to and around Harrington Sound before retracing their course back to the old Club House in St. George's Parish.

7. Mr. Attridge further testified that it was a lovely morning; and that at all material times, the weather was good with clear blue skies with a fairly strong breeze coming out of the South-South-West.
8. Mr. Attridge then explained that he was the first of his family to reach the summit of Queen Street (near the old Club House) where he waited for his wife and son, who were on foot, pushing their pedal cycles up Queen Street to his location.
9. Mr. Attridge explained that once his wife and son had arrived at his location, Thomas mounted his cycle and started to descend down Secretary Road towards the junction of Bourne Drive.
10. A few moments later, Mrs. Attridge also mounted her pedal cycle and followed a short distance behind Thomas.
11. Having witnessed his son and wife embark down the hill, Mr. Attridge then followed their same path, traveling a short distance behind Mrs. Attridge.
12. To provide further context, Mr. Attridge explained that as he commenced his descent down Secretary Road, his wife was no more than half way down Secretary Road and Thomas was already riding through the junction of Secretary Road and Bourne Drive.
13. On his descent, Mr. Attridge observed a grey station wagon type car pulling up to the stop sign near junction of Bourne Drive and Secretary Road.
16. Mr. Attridge also noted that this grey station wagon had stopped at the junction. Mr. Attridge further noted that a motorcycle had also pulled up behind the station wagon at that same junction.
17. As Mr. Attridge continued down Secretary Road, he further observed that the motor cycle honked its horn; and thereafter, the motorcycle pulled out from behind the grey station wagon, overtaking it from the inside of Bourne Drive (to the left of the car).
18. Mr. Attridge observed this motorcycle proceed through the junction and turn east in his direction.

19. As Mr. Attridge was about half way, or more, down the hill, he observed his wife passing through the junction and she started to ride up Secretary Road, on the other side of the junction with Bourne Drive.
20. Mr. Attridge then explained that once he reached where Secretary Road "*bottoms out*" he observed the grey station wagon that was stationary at the junction, inexplicably and "*without warning*" pull out in front of his path and proceeded to travel up the hill in front of him in the same direction that he and his family were travelling.
21. Mr. Attridge explained that the motor car driver' manner of driving forced him to try to take evasive action to avoid a collision with the rear of the motor car.
22. While Mr. Attridge was on Secretary Road, he saw that a red car was parked in a 'cut' to his left, which prevented him from veering into the gully/trees to avoid a collision. Therefore, within a split second, Mr. Attridge decided to veer to the right of the car whilst simultaneously slamming on his brakes.
23. In taking this action, Mr. Attridge recalls being thrown over the handle bars of his pedal cycle, albeit he was not sure if he truly jackknifed, or not. He simply knows that he was in the air for a moment and then he slammed down to the ground, where he ended up laying face up in the road.
24. Mr. Attridge described immediately feeling "*a shooting pain*" from the top of his right shoulder to his right buttock; as well as pain in his left elbow and left knee.
25. Mr. Attridge was clear to say that his body did not make contact with the grey station wagon; however, he heard a "*thud*" type sound, which led him to reasonably infer that his bike must have made some contact with the car.
26. Mr. Attridge also described that when he lifted his head up, he could see that he was about 1-2 feet from the rear of the grey station wagon, which stopped to his left.

27. Mr. Attridge further testified that the car was on *"the wrong side of the road facing the wrong way up the hill"*.
28. Mr. Attridge also testified that the car should have been on the left hand side of the road, but the car had *"swing necked around"* to end up on the right hand side of the road, which limited his options to avoid the collision.
29. Mr. Attridge continued to testify that, very shortly after he hit the ground, he noticed a person standing over him, who identified himself as the driver of the vehicle (Mr. Alkon).
30. Mr. Attridge admitted that he used expletives towards Mr. Alkon asking him whether or not he saw him, to which Mr. Attridge further testified that Mr. Alkon stated: "no", he did not see him.
31. Mr. Attridge later identified another male, Mr. Kevin Bean-Walls, who attended the scene and was standing to his right. Mr. Attridge also heard a female's voice, who seemed to know him by the manner in which she spoke of him on the ground.
32. Mr. Attridge testified that: "if [Mr. Alkon] was looking, he must have been able to see me". Mr. Attridge explained to the Court that from where the grey station wagon was positioned, there was a clear line of sight Secretary Road to where he and his family had commenced their descent by the summit of the hill.
33. Moreover, Mr. Attridge explained that he was riding a bright orange bike and that he was wearing a bright green t-shirt; and hence, was easily identifiable on a clear day, with no obstructions, such as other traffic on the road.
34. The Crown produced a photograph into evidence, which Mr. Attridge confirmed depicts the bike that he rode on 21 April 2019 (Exhibit 7). The frame of the pedal bike is bright orange, and the wheels and handlebars are black.

35. The Crown also produced a photograph of Mr. Attridge, which Mr. Attridge confirmed in evidence was taken on the 21 April 2019, which depicts him wearing a green shirt with black shorts and black sneakers (Exhibit 8).
36. Mr. Attridge also explained that there was no other traffic, or pedestrians, on the road at the time that he approached the junction, which may have impeded the driver of the grey station wagon's line of sight.
37. Mr. Attridge continued to testify stating that he noticed that Mr. Alkon return to his car and drive it across Secretary Road to the left, or correct, side of the road (in the westbound carriageway). Mr. Attridge further testified that he shouted out twice to Mr. Alkon to not move the vehicle; however, Mr. Alkon did not listen and proceeded to move his car.
38. Mr. Attridge described how his wife returned to the scene and spoke with him. He also recounted his experience dealing with the EMTs.
39. Mr. Attridge confirmed that he was taken to the hospital via ambulance and that he suffered a minimally displaced fracture to his right clavicle. He also suffered a puncture wound on the back of his right shoulder. He also suffered road rash from the top of his right shoulder across his back to his right buttock. Finally, he suffered road rash to his left knee and left elbow.
40. As a result of these injuries, Mr. Attridge testified that he was required to wear a sling for approximately 6 weeks and he could not return to work for approximately one week, as he could not even properly dress himself without assistance. Finally, Mr. Attridge testified that he was required to attend the fracture clinic and he continues to suffer pain.
41. Mr. Attridge confirmed that some months later, whilst he was in the company of his wife and walking their dog, he saw Mr. Alkon drive up next to him, in the same grey station wagon, on Secretary Road, as they were walking toward the old Club House.

42. Mr. Attridge testified that Mr. Alkon pulled up beside them and Mr. Alkon asked whether Mr. Attridge was *"the person that he had knocked off of their bike"* to which Mr. Attridge replied: *"yes"*. Then Mr. Alkon looked at Mrs. Attridge and said: *"I remember you"*. Finally, Mr. Attridge testified that Mr. Alkon stated: *"I'm sorry" or "/ apologize"* before he drove off.
43. Mr. Attridge also described that his pedal cycle was damaged during the accident, and that his tires and handle bars required replacement.
44. Thereafter, Mr. Attridge was cross-examined extensively by Mr. Scott mostly about distances and their complainant and defendant's respective positions on the road at the time that Mr. Alkon exited Bourne Drive. Mr. Scott also suggested that Mr. Attridge was at fault for colliding with the rear of his client's car, which Mr. Attridge denied.

#### **Additional Evidence Led by the Crown**

45. The Crown also called evidence from Mrs. Kirsten Attridge, who corroborated much of what Mr. Attridge had given in evidence leading up to and after the collision.
46. Mrs. Attridge confirmed that Mr. Attridge was riding a bright orange bike, whereas she rode a green and black bike. She also confirmed that Mr. Attridge was wearing a green t-shirt.
47. Mrs. Attridge did not see the collision itself, but she did see the grey station wagon as she passed the junction and she subsequently confirmed its position on the road when she returned to the scene after the collision (i.e. it being on the wrong side of the road, facing west).
48. Mrs. Attridge also confirmed that her and her husband had a subsequent encounter with Mr. Alkon, months after the accident, whilst they were walking their dog on Secretary Road wherein Mr. Alkon admitted that he drove the vehicle and did not see Mr. Attridge as he pulled out of the junction but he said words to the effect that he was: *"sorry"*.

49. She also confirmed that she did not see Mr. Alkon with a cell phone at any time when she returned to the scene.
50. PC 2373 Simons confirmed that when she arrived on the scene, she noted a grey station wagon on the left (or correct) side of the road and that she spoke with the driver of that vehicle who confirmed that: he *"did not see the cycle when he pulled out of Bourne Drive on to Secretary Road"*.
51. PC Simons also supported the civilian's evidence that it was daylight and the visibility was good.

### **The Defendant's Evidence**

58. Mr. Alkon was sworn and provided evidence stating that on 21 April 2019, he had visited a colleague's residence, at the end of Boume Drive.
59. Mr. Alkon also testified that he drove his grey Peugeot station wagon on Bourne Drive to the junction with Secretary Road.
60. Mr. Alkon confirmed that whilst he was at the stop sign, before the junction, he observed three people at the top of the hill to his left. He said that they "were all stationary".
61. Mr. Alkon testified that he stopped at the stop sign and then, a few seconds later, he noticed a "chap on a motorcycle who was behind" him.
62. He therefore "had to contend with a motorcyclist behind him". Mr. Alkon continued to testify that "after about a minute", the motorcycle rider drove around him, to the right side of his vehicle (not the left as contended by the complainant), entered Secretary Road and proceeded to ride in an easterly direction up park Hill.
63. Then, Mr. Alkon moved up to the junction where he looked right and left.
64. Mr. Alkon said that he saw: "a pedal bike rider at the top of the hill", where he had *"originally seen three pedal bike riders"*.



65. Thereafter, Mr. Alkon drove to the edge of the junction to look in both directions for oncoming traffic.
66. Being that the pedal cycle rider was at the top of the hill, he made another "quick glance" to his right to see if there was any oncoming traffic. He said that no cars were coming, so he took a right on to Secretary Road, in the westbound carriage, which would place him on "*the proper side of the road*".
67. He then saw a pedal cyclist in his rear view mirror who was wearing "*a red shirt and who was perfectly erect with two hands on the handle bars*".
68. Mr. Alkon then heard a bang and the cyclist was gone. Mr. Alkon then stopped his vehicle to check the scene where he observed a man's head at the same level as his bumper and the man's feet pointing down Secretary Road.
69. Mr. Alkon immediately lent assistance to this man by taking the green pedal cycle off of him and moving it to the gulley to the side of the road.
70. Mr. Alkon testified that he then called 911. He also testified that when Mrs. Attridge arrived he told her that he had called 911 already.
71. Mr. Alkon denied the suggestion that his words were slurred and he denied any suggestion that he was intoxicated at the time of the collision.
72. Mr. Alkon accepted the Crown's suggestion that Exhibit 7 (Mr. Attridge's orange bike) may be described as "*bright*"; however, he maintained his position that Mr. Attridge was riding a green bike and wore a red shirt.
73. Mr. Alkon explained that he did move his motor car, but he only did that because he needed to make space for the emergency vehicles when they eventually arrived. Mr. Alkon denied that he moved his vehicle to make it difficult for any road traffic collision investigator to do their work.

74. Under cross-examination, Mr. Alkon explained that whilst he was at the junction, he could recall seeing Mrs. Attridge pass the red car in front of him (on her pedal cycle).
75. Mr. Alkon admitted that he did not see a boy; but he stressed that his failure to observe a young boy on a pedal cycle was not evidence that he was inattentive to his surroundings.
76. Mr. Alkon also confirmed that when he saw Mrs. Attridge pass by the red car, Mr. Attridge was at the top of the hill — "*scratching his head*" (and not half way down the hill as Mr. Attridge testified).
77. Mr. Alkon denied that he cut off Mr. Attridge and that this collision is Mr. Attridge's fault since Mr. Attridge hit him from behind.
78. Mr. Alkon also denied that he looked back in his rear view mirror because he knew he had cut in front of Mr. Attridge.
79. Mr. Alkon accepted that either Mr. Attridge, or his pedal cycle, struck his car and that as a result of that motion Mr. Attridge fell to the ground where he came to rest approximately 2 feet behind his vehicle.
80. Mr. Alkon accepted that he felt sorry for the pedal cycle rider, but not because he was at fault, or for anything that he did. He maintained that he did not cause Mr. Attridge to "*jackknife*".
81. Mr. Alkon maintained that he called the police and that he tended to Mr. Attridge until the ambulance EMTs and police officers arrived at the scene.
82. Mr. Alkon also accepted seeing Mr. Attridge and his wife some months later and approaching them on Secretary Road. He accepted that he told them sorry because he is a decent person and that's what good people do, but again, that was not intended to be an admission of guilt or anything like that because he did nothing wrong; rather, he was being courteous.
83. Mr. Alkon also said that he did not recall Mr. Bean-Walls being at the scene.

84. On his final day of giving evidence, the Crown relied upon Mr. Alkon's witness statement to extensively cross-examine him. Mr. Alkon accepted that he also saw someone, "*peripherally*", with blondish hair. He could not say if that was Mr. Attridge's son. He also had no mention of seeing a lady (Mrs. Attridge) in his statement.
85. Mr. Alkon defended the lack of specificity in his initial police witness statement because he did not consider it necessary to give all of the facts at that time.

#### **Additional Evidence called by the Defence**

86. Mr. Scott compelled Mr. Bean-Walls to attend Court to give evidence in support of his client's case.
87. Mr. Bean-Walls confirmed that he is a resident of St. George's Parish and that he is familiar with the junction of Bourne Drive and Secretary Road.
88. However, Mr. Bean-Walls' evidence concerning the more substantive questions asked of him was neither clear, nor concise; and he appeared ill prepared to give evidence, as he did not appear to recall details well.
89. For example, Mrs. Bean-Walls made it clear that he did not witness the accident.
90. Further, and contrary to both the Crown and the Defence cases, he put Mr. Alkon's car as facing south, suggesting that it had not yet turned on to Secretary Road.
91. However, Mr. Bean-Walls confirmed that Mr. Alkon moved his car to "*the other side of the road*" after the collision had occurred, but prior to the arrival of the ambulance personnel, or police officers.
92. Mr. Bean-Walls also confirmed that there was no other traffic in the road and that he felt that the vehicle should have remained in situ following the accident.

93. He did confirm that his wife was in the car with him (which may add further credence to Mr. Attridge's evidence about hearing a female voice in the background at the time that Mr. Alkon moved his vehicle).
94. Mr. Bean-Walls also said that he called 911 and the operator did not communicate to him that anyone else had called 911.
95. Mr. Bean-Walls stated that he did not see Mr. Alkon with a cellphone in his hand at any time that he was at the collision locus.
96. Mr. Bean-Walls also confirmed that when one is travelling on Bourne Drive and approaches the junction with Secretary Road, that individual would have a clear line of sight from the junction of Bourne Drive, looking east on Secretary Road to the top of the hill (also referred to as 'Park Hill').
97. He also confirmed that this is a "busy intersection" and that one would need to take extra caution when making a right turn, in anticipation of vehicles coming from the west, travelling east on Secretary Road.”
98. This is, by any view, a fact intensive case and despite the number of authorities deployed at first instance boils down to an analysis of s.37A of the Road Traffic Act 1947 and two fundamental questions.
- (1) Did the Appellant drive his vehicle without due care and attention?
  - (2) Did this conduct cause the injuries to the Complainant so as to amount to grievous bodily harm?
99. Mr Attridge’s evidence, as found by the Learned Magistrate, was concise and consistent and in the end was simply that the Appellant pulled out from a minor road (Bourne Drive) into a major road (Secretary Lane) in front of Mr Attridge who tried to take avoiding action(s) and as a result fell off his pedal cycle suffering the injuries he did.

100. The Appellant's evidence appeared to me, certainly from the Record, to be less clear but as I can ascertain seemed to be that he was at the junction of Bourne Drive and Secretary Lane when to the east he saw three cyclists towards the top of the hill. This was at the junction of Queen Street and Secretary Lane. His evidence appears less clear after that but he states he clearly remembers seeing subsequently only one cyclist (which must have been Mr Attridge) still at the top of the hill before he quickly looked to his right and pulled out whereupon the accident occurred slightly to the west of the junction of Bourne Drive and Secretary Lane. Mr Scott for the Appellant submits it was in the range of 30 feet from the junction. I certainly accept that it must be some short distance to the west of the junction.
101. I find a number of problems with the Appellant's version of events. As a result of reading the Record I used Google Maps to calculate the distance from Secretary Lane to Bourne Drive. I am grateful to both Counsel to allow this to be used. The calculation shows that the distance is some 110 meters. If Mr Attridge was on a bike stationary at the top of the hill immediately before the Appellant pulled out onto Secretary Lane (an exercise that would take only two to three seconds to accomplish) then the question must be asked as to how could Mr Attridge have travelled over 110 meters in such a short time? Put another way, on the Appellant's version of events, Mr Alkon would have to travel about 120 meters in the time it took the Appellant to travel, only some 10 meters (or about 30 feet). Added to the above is the Appellant's admission immediately after the accident that he did not see Mr Attridge prior to the collision and then some months later apologizing to Mr Attridge for "knocking him off his bike".
102. I note that it was not put to Mr Attridge that he was at the top of the hill, some 110 meters away, immediately before the Appellant pulled out. This leads to the next question, assuming Mr Attridge was (about) 100 meters away when the Appellant pulled out, why would Mr Attridge have to brake so hard as he would have been some considerable distance away? Or as counsel for the Crown succinctly put it:

“If events had occurred on the facts as stated by the Appellant there would have been no accident at all.”

103. Mr Scott further sought to undermine the Crown’s case by asserting with authorities that this case would have and should have benefitted from accident investigation evidence. Despite Mr Scott’s valiant efforts, I am not persuaded that, on the facts of this case, such evidence may have assisted. The versions are markedly different and, as stated above, the Appellant’s version simply does not stand up to close scrutiny. There is no evidence (as accepted by Mr Scott) that Mr Attridge was travelling at an excessive speed. Speed in any event is not in of itself negligence, nor, I would venture, is it driving without due care. There simply is no evidence that Mr Attridge caused or even contributed to the accident.
104. On the basis of the above, I find nothing in the Appeal that causes me to question or interfere with the findings of the Learned Acting Magistrate (who, I remind myself, saw and judged the veracity of the witnesses). I accordingly agree with his findings as set out in paragraphs 154 to 178 inclusive of his judgment. The appeal is dismissed and I will hear, as invited, the parties on the issue of sentencing.

Dated this 23<sup>rd</sup> day of October 2023



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MARK DIEL  
ASSISTANT JUSTICE