In The Supreme Court of Bermuda

APPELLATE JURISDICTION
Case No. 9 of 2023

BETWEEN:

SHELDON MCKENZIE-SIMONS

-and-

FIONA MILLER (POL. SGT.

Before: **The Hon. Justice Elizabeth Christopher, Acting Puisne Judge**

Appearances: Ms. Victoria Greening for the Appellant
Ms. Shaunté Simons-Fox for the Respondent

Dates of Hearing: 2nd May 2024
Date of Ruling: 25th June 2024

RULING

Criminal Appeal

1. This is an appeal from the decision of his Worshipful Attridge, wherein the Appellant was convicted of driving without due care and attention or reasonable consideration for other persons using the road, and causing the Complainant bodily harm in so doing, contrary to section 37A of The Road Traffic Act 1947. The Act states:

> *37A Any person who causes the death of, or grievous bodily harm to, another person by driving a vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or public place, commits an offence.*

2. This is the sole offence with which he is charged. As in the court below, counsel for the Appellant accepted that the Complainant suffered grievous harm. Therefore, the only live issue is whether the Appellant was driving without due care and attention and whether his driving fell below that expected of a competent and careful driver. The Crown called nine witnesses including the motorist in front of the Appellant, their expert witness and the Appellant's watch sergeant. The Defence called 2 witnesses, the Appellant and his expert witness.

3. The Appellant's grounds of appeal were as follows:

    a. The Learned Magistrate failed to properly consider or at all the Appellant's case
    b. The weight of the evidence was against the conviction.
    c. The Learned Magistrate erred when he shifted the burden onto the Defendant when he said that the Appellant had failed to establish that his mistaken belief was reasonable.
    d. The Learned Magistrate erred when he shifted the burden onto the Appellant when he said that the Appellant had failed to establish to the Court's satisfaction that he took all reasonable steps to avoid the collision.

4. In a thirty page judgment, the Learned Magistrate convicted the Appellant based on findings of fact enumerated in paragraph 118 of his ruling. Inter alia, although he found that the Complainant's motorcycle was not illuminated, he ruled that there was sufficient light for the motorcycle of the Complainant to be seen by the driver of the vehicle in front of the Appellant ("RS") as she rounded the left-hand bend and entered the straight way. He considered that had the Appellant been keeping a proper lookout, he would have seen the motorcycle.

5. He found that the Appellant was travelling at an excessive speed while the Complainant's speed, though incalculable, was not excessive based on the observations of RS and the Crown expert. The evidence of the watch sergeant tended to suggest the Appellant was running late for his shift and therefore speeding at the time of the collision.

6. He found that the Complainant was riding his motorcycle in his own lane, whilst the Appellant approached the site of the collision in the Complainant's lane while travelling at speed. It was the Magistrate's finding that the Appellant was rounding a left-hand bend while his view of the Complainant was partially obstructed by the car in front of him and, erroneously believing that the road was clear (having failed to keep a proper lookout) he attempted his overtaking manoeuvre.

7. This correlated with the opinion of the expert who, based on the point of impact, stated that the failure to exercise due care commenced with the Appellant crossing over into the westbound name before the road straightened, and whilst he was unable to see around the offside of RS's car along the street to ensure it was clear.

8. This was contrary to the Appellant's assertion that he moved closer to the center line having reached the straight way. He stated that he then, with a clear line of sight along the straight way and having assured himself that the road was clear, commenced his overtaking manoeuvre and crossed into the westbound lane.

9. When the Complainant saw the Appellant's car it was too late to avoid a collision. The Magistrate found that had the Appellant been keeping a proper lookout it was inconceivable that he would have failed to see the Complainant as RS did, notwithstanding that the light on the motorcycle was not on.

Ground One

10. The first ground of appeal has no merit and remains just a bold assertion. There were 56 paragraphs wherein the Learned Magistrate considered the defence case from various perspectives and analyzed various permutations. There were matters that he felt worthy of consideration and he considered them. He reminded himself about how to deal with discrepancies, that he may accept part of the whole of the witness's evidence and the limits of the rule in Browne and Dunn. The Learned Magistrate spent 31 paragraphs dealing with the evidence of the Appellant's expert alone. It cannot be said that the Magistrate failed to consider the Appellant's case.

Ground Two

11. I will consider the points made in Ground One in the context of Ground Two - that is, that the weight of the evidence was against the conviction. Section 18 (1) (a) of the Criminal Appeals Act 1952 states that:

> *"Subject as hereinafter provided, the Supreme Court in determining an appeal under section 3 by an appellant against his conviction, shall allow the appeal if it appears to the Court—*
> *(a) that the conviction should be set aside on the ground that, upon a weighing up of all the evidence, it ought not to be supported."*

12. This provision was considered in the case of Andrew Robinson v Commissioner of Police [1995] Bda LR 64 which was proffered to the Appellant and Respondent by the Court for comment and which stated:

> *"It is, of course, a cardinal rule that the trial court is the best court to judge the credibility or reliability of witnesses, and the appellate court, even when conducting a rehearing, should not interfere with the trial judge's findings in that respect unless it appears that he 'has not taken proper advantage of his having seen and heard the witnesses.' That may be apparent because the reasons given by the Judge are not satisfactory, or because it unmistakably so appears from the evidence: per Lord Thankerton in Watt or Thomas -v- Thomas ELR [1947] AC at p. 48."*

13. It goes on to state that the appellate court must ensure that the Learned Magistrate has reached his conclusions judicially.

14. The Magistrate explained his reasoning at length with respect to his findings about the issues that form the backbone of the Appellant's appeal. Notably, he dealt with:
    - Firstly, why he formed the conclusion that the appellant was late for work.
    - Secondly, why he felt that the Appellant failed to keep a proper lookout and therefore did not see the Complainant
    - Thirdly, which lane the collision occurred in.
    - Fourthly, why he believed that the Appellant had not yet entered the straightaway when he commenced overtaking

15. It was submitted by the Appellant that the Crown expert agreed that had the Complainant had his headlights on, the Appellant would have seen him, but without them he was inconspicuous. However, what the Crown expert in fact said was "However, had the motorcycle headlight been burning it would have been more conspicuous, which would have given the [Defendant] a better opportunity of seeing it, even on the bend," This was in the context of saying beforehand "There is no evidence to suggest that the [Complainant] did anything to contribute to the collision as he was travelling in his lane at the time of the collision." The Magistrate also stated that while it was twilight at the time of the collision the parties ought to have been able to see clearly.

16. Even considering this appeal as a rehearing, there is nothing stated by the Learned Magistrate with which I would interfere, especially given the ruling that was so thoroughly articulated.

Grounds Three and Four

17. Ground Three of the Appellant's grounds states that the Learned Magistrate erred in shifting the burden onto the Appellant in stating that the Appellant had failed to establish that his mistaken belief was reasonable and at ground four in stating that the Appellant had failed to establish that all reasonable steps were taken to avoid the collision. Both grounds are elicited from paragraph 121 of the ruling which states:

    "Conversely, and whilst the court does not doubt that Mr. McKenzie-Simons would not have attempted to overtake if he had seen the Complainant approaching, the Defendant has failed to establish that his mistaken belief that there was no oncoming traffic in the westbound lane was reasonable, as opposed to a result of his failure to keep a proper lookout or to properly ensure that the westbound lane was clear of traffic, and in those circumstances, the Defendant has failed also to establish to the court satisfaction that he took all reasonable steps to avoid the collision."

18. However, at paragraph 120 of the ruling the court stated:

"That the defendant failed to keep a proper lookout for oncoming traffic travelling in the westbound lane, or to properly ensure that the westbound lane was clear of traffic, is evident from the fact that he failed to see the oncoming motorcycle ridden by Mr. Mouchette and crossed into the westbound lane. I am quite satisfied that at the material time the driving of the defendant Mr. McKenzie-Simons, fell below the standard expected of a competent and careful driver. "

19. Furthermore, the question of reasonable steps as cited in paragraph 121 of the ruling arises out of the consideration of Justice Subair-Williams in the case of Fiona Miller (Police Sergeant) v Dennis Webb, Appellate Jurisdiction 2019 : No. 43 wherein she stated from the Canadian case of R v Shergill[2016] ONCJ 163 from the Ontario Court of Justice:

> *"There is no obligation on the Crown to establish a mens rea element on a careless driving prosecution. Rather, 'the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts, which if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event . . . Therefore, the prosecution need only prove the actus reus of the offence of careless driving. The Defendant stands to be convicted unless he can establish that he took all reasonable care."*

20. The Learned Magistrate referenced this passage from his ruling when asked for his comments under section 13 of the Criminal Appeal Act 1952. He also referenced from Shergill inter alia:

> *"3. Can the fact of an accident alone establish the actus reus of careless driving?*
>
> a. *[23] What rings loudly from the case law is that a contextual analysis must be undertaken in each case. Viewed in that light this issue need not be complex. If, in the circumstances, the only reasonable inference to be drawn from the fact of an accident is that the defendant was operating his or her vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway then the actus reus has been made out. It then falls upon the defendant to establish that he or she reasonably believed in a mistaken set of facts which, if true, would render the act or omission, or that he or she took all reasonable steps to avoid the particular event.*
> b. *[24] R v McIver[1965]2 OR 475 (Ont CA) is still applicable. McIver does not suggest that the fact of an accident is sufficient to establish the actus reus in all cases but simply that it may be sufficient depending on the circumstances. McIver does not purport to establish a new legal presumption in relation to highway traffic law. It simply re-states a venerable proposition applicable to inferences*

being drawn from circumstantial evidence. If the fact of an accident may give rise to reasonable inferences other than the defendant was driving carelessly then it will not establish the actus reus.

21. It ought to be recalled here that the Magistrate stated at paragraph 9 above that had the Appellant been keeping a proper lookout it was inconceivable that he would have failed to see the Complainant as RS did.

22. Bearing in mind the test at paragraph 20 above, the Learned Magistrate was correct to assert paragraph 121 in the way that he did.

23. In all of the circumstances of this case, the appeal against conviction is dismissed.

DATED this 25th day of June 2024

THE HON. JUSTICE ELIZABETH CHRISTOPHER

ACTING PUISNE JUDGE