In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: 14

GARETH FINIGHAN

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

(in Court)[1]

Appeal against conviction-careless driving-failure to fairly consider defence case-adequacy of findings and reasons for decision-implications for fairness of trial of multiple adjournments over several months

Date of hearing: September 26, 2017
Date of Judgment: October 10, 2017

Mr Richard Horseman, Wakefield Quin Limited, for the Appellant
Ms Nicole Smith, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. The Appellant was convicted on April 7, 2016 of driving without due care and attention in Paget on March 15, 2014, in the Magistrates' Court (Wor. Archibald

[1] The present judgment was circulated without a hearing.

Warner) following a trial which commenced on June 3, 2015 (Prosecution case, beginning of Defence case), continued on November 16, 2015 (Defence case), and ended on March 10, 2016 (conclusion of Defence case, submissions, judgment reserved). The charge related to a collision which occurred between a motor car the Appellant was driving and a motor cycle at the Crow Lane roundabout.

2. The Prosecution case was that the Appellant was travelling towards Hamilton along the Lane and approached the roundabout in the nearside lane customarily used to turn left into Hamilton. He went across the roundabout, and in so doing swung into the path of a motor cycle which was also entering the roundabout from the right hand lane colliding with it. The Appellant accepted that he entered the roundabout in the direction of Berry Hill Road, but denied swinging into the path of the motor cycle and insisted that the motor cycle struck him despite having adequate space to safely enter the roundabout. Because at first blush the Prosecution case was a strong one and the Defence case somewhat technical, having decided to allow the appeal, I have attempted to deal with the relevant issues and explain the reasons for this decision as fully as possible.

Grounds of appeal

3. The Appellant's Notice of Appeal contained nine grounds of appeal. The first and seventh grounds (the conviction and central findings were against the weight of the evidence) were clearly unarguable and the last (the Appellant was denied his constitutional right to a fair hearing within a reasonable time) was reduced at the hearing of the appeal to simple unfair hearing complaint. The remaining grounds can fairly be summarised as particulars in support of the broad complaint that the Appellant was deprived of a fair trial. In the lead up to the hearing, an additional complaint was raised that the Learned Magistrate erred by failing to order the Prosecution to disclose a photograph of the scene of the collision which was shown by Crown Counsel to the first Crown witness but not put in evidence because, it seemed, it did not support the Prosecution case. The other complaints were that the Magistrates' Court erred by:

- failing to permit the Defence to recall its witness Ms Lilla Zuill to formally adduce into evidence her own photograph, which purportedly showed the location of the Appellant's vehicle after the collision and which had been put to the Prosecution witnesses;

- failing to properly take into account the physical evidence of damage to the car;

- completely discounting the evidence of Defence Witness Gary Venning;

- failing to properly apply the burden of proof.

The proceedings in the Magistrates' Court

The Prosecution case

4. Mrs Helen Dill testified that at around 9.30am on Saturday March 15, 2014 she was towing her teenaged daughter along the Lane in Paget when she entered the Roundabout in the right hand lane intending to go straight across and enter Berry Hill Road. All of sudden a car that had been in the left lane turned into her colliding with her cycle and striking her left knee. She was flipped into the air and ended up in the roadway used by traffic leaving Hamilton to enter the same roundabout. A man approached her while she was on the ground repeating that he had not seen her, which she took as an apology. Under cross-examination, Mrs Dill:

    - when shown a purportedly picture showing where the car stopped she said it was impossible for her to state where the car stopped as a result of where she was after the collision;

    - denied that her daughter was riding the motor cycle at the time of the collision;

    - denied that her cycle came from behind the car striking it and pushing the mirror forward;

    - insisted that the car turned into her path and struck her ("*yucked and struck me*");

    - insisted that the Defendant repeatedly said he was sorry while she was on the ground;

    - admitted that she did not mention these comments to the Police explaining that she was more concerned about her injuries.

5. Two noteworthy incidents occurred during the course of Mrs Dill's evidence. Firstly, Ms Smith asked her whether a photograph Crown Counsel put to her, which had

purportedly been taken by Mrs Dill's daughter, accurately showed where the Defendant's car was after the collision. Mrs Dill suggested that the car must have been moved. The picture was not put into evidence and further relied upon by the Crown. Mr Horseman invited the Crown to disclose the pictures and provide copies (the Appellant's transcript does not suggest that the Court was asked to order disclosure), and no further mention of the Crown's pictures was made at trial.

6. Secondly, in the middle of the same witness' cross-examination, Ms Smith objected to Mr Horseman putting a Defence photo to Mrs Smith, an objection which the Learned Magistrate overruled , stating (according to the Appellant's transcript):

> "*Court: Why should I let you use yours and not his?*
> *Crown: We didn't use mine did we?*
> *Court "I gave you the opportunity. You're on the same basis….the reason why I was reluctant to use your photographs is because we could not establish the authenticity in all its factors, including whether or not the vehicles that you wanted to identify were moved…he is calling evidence to say that that was the position of the vehicle after the accident…*"

7. Ms Kenika Dill confirmed that she was the passenger on her mother's motor cycle on the day in question, being too young to legally ride the cycle at that time. She testified that: "*As we continued around the roundabout the car to our left continued to come into our lane. The car struck us on our left hand side….After being struck I ended up in front of mother on the ground. She was behind me*". The passenger in the car approached them and apologized saying "*I am sorry, I am sorry*". The Defendant eventually approached her mother and knelt down next to her but she did not hear anything he said because she was on her cell-phone at that juncture. Under cross-examination, Ms Dill:

   - insisted that both car and cycle entered the roundabout together and "*then he came over*";
   - described the collision as being between the driver's door of the car and the front left side of the cycle;
   - denied that she was the rider.

8. Police Constable Courtney Simmons attended the scene of the accident and described the damage to both vehicles. He also prepared a rough sketch of the scene. The back

box of the cycle had been knocked off and there was damage to the handlebars and right side of the cycle. The driver's door of the car was damaged. Under cross-examination the Police Officer:

- agreed that the offside of the car was scratched from the rear door to the front door; and

- agreed that a photo showing the car after the accident indicated that the driver's offside mirror looked "uneven", but denied that it looked like it had been "pushed forward".

The Defence case

9. The Defendant commenced his evidence on June 3, 2015, the same day that the Prosecution case opened and closed. He testified that he always intended to cross the roundabout from the first lane, and when he entered the roundabout there was no traffic either alongside him or coming from Trimingham Hill. On the roundabout he heard a thud, looked behind him and saw a motor cycle with two people on it scraping down the side of his car. He stopped immediately. The cycle continued after the collision for about 20 feet. A person he now knew as Kenika Dill was the rider and the mother the passenger. Under cross-examination on June 3, 2015, the Defendant insisted that he never intended to drive into Hamilton and never changed direction.

10. The case did not resume until November 16, 2015, almost 5 ½ months later. Under renewed cross-examination, the Defendant:

    - insisted it was clear who was riding the bike, stating that the pillion passenger came off first and the rider went further down the road (a detail not mentioned in his Police Statement);

    - denied apologizing to Mrs Dill or saying that he never saw her;

    - denied approaching Mrs Dill at all after the collision; and

    - opined that the left hand lane approaching the roundabout from the Lane was the proper lane for either turning left into Hamilton or going straight over the roundabout to Berry Hill Road.

11. Under re-examination he referred to his Police Statement in which he said (on March 16, 2014, the day after the accident) that "*the older lady appeared to be the pillion passenger*" The Defendant's wife Ms Lilla Zuill then testified. She stated that she and

her two daughters and her mother were the other passengers in the car. She described the cycle as coming from behind their vehicle and striking the car while it was "*hovering around the roundabout*". The younger of the two 'women' was riding. She stayed in the car with her daughters while her mother got out to see if she could assist. Under cross-examination she:

- clarified that she and her daughters were in the back of the car (she was behind the passenger seat) and her mother was in the front passenger seat;

- agreed that the Defendant got out of the car after the accident;

- denied being aware of her husband approaching one of the females on the bike;

- admitted that she and her husband had discussed the incident afterwards and that she was in Court "to support the man she loved". However, she added that she was also there "*to support justice*".

12. The case was then adjourned for the evidence of the Defendant's expert witness Mr Gary Venning, which was received on February 12, 2016, almost three months later. Mr Horseman first applied to recall Ms Zuill to formally produce the photo which had been deployed in cross-examination of at least two Prosecution witnesses on June 3, 2015, over 8 months earlier. The transcript reveals that:

    - the Prosecution instinctively objected to the application without advancing any coherent grounds of objection;

    - the Court was unclear as to how the photo had initially been deployed by the Defence; and

    - the application was eventually refused on relevance grounds.

13. Mr Venning was accepted as an expert witness on road traffic investigations without any objections. His instructions included identifying the location of the accident and being supplied with copies of the witness statements of all of the Prosecution and other Defence witnesses, together with PC Simmons' sketch plan and a selection of photographs. Mr Venning prepared a detailed Report which he referred to while giving his oral evidence, but the Learned Magistrate made it clear that only his oral evidence would be evidence for the purposes of the trial. The Appellant's transcript

makes it clear that the oral evidence which the Defendant's expert gave was somewhat truncated because of the Learned Magistrate's interventions during examination-in-chief. Ideally, those interventions should have occurred after examination-in-chief, cross-examination and re-examination.

14. Nevertheless, the key opinions Mr Venning advanced in his evidence-in-chief were that (a) the Defendant was entitled based on the road signs to use lane 1 to go straight across the roundabout, (b) the photographs showed the car in a similar position to the sketch plan, save that the photo showed the car closer to the left roundabout kerb, (c) the roadway in the roundabout was 22 feet wide, the car was no more than 5 ' 6" wide so that there was plenty of room for the motor cycle to pass the car, and (d) he had conducted a simulation which indicated that a motor cycle rider in the position of Mrs Dill entering the roundabout would perceive that a car entering the roundabout from lane 1 was going away and then coming back towards the cycle (when in fact it was travelling in essentially a straight line). Under cross-examination he:

- explained that he did visit the scene in May 2015;
- insisted that from what he was told and read had occurred (he was present in Court for the Prosecution case) he could make a reasonable assessment about what had occurred;
- admitted that he could not say what speed the vehicles were travelling at or where the motor cycle ended up;
- asserted that it was impossible to say which vehicle had right of way if both were entering the roundabout at the same time in different lanes.

The submissions

15. Submissions immediately followed the close of the Defence case with the Prosecution clearly relying on the evidence of Mrs Dill that the Defendant "*yucked over*" into the roundabout and her evidence that he admitted to not seeing her. The significant point was also made that the usual driving practice at the roundabout in question was to enter Hamilton from lane 1. The notes unhelpfully record two inconsistent Crown submissions on which vehicle had priority entering the roundabout, however: (1) "*Lane 1 should have given way to Lane 2*"; (2) "*We say that there is no priority of entering the roundabout. Both parties should take care when entering the roundabout*". (Ms Smith confirmed that the Prosecution in fact accepted at trial that it was legally permissible to cross the roundabout from lane one). Defence counsel

tendered written submissions, which highlighted the burden and high standard of proof imposed on the Prosecution, pointed out that the Defendant's route was perfectly lawful and argued that the physical damage to the car supported the conclusion that the motor cycle was coming from behind the car and not keeping a proper look out. Any doubts about who was riding the motor cycle and disputed admissions by the Defendant should be resolved in his favour. What actually happened was in any event more important than what was said.

The Judgment of the Magistrates' Court

16. The Judgment unusually starts off by reviewing the Defendant's case before proceeding to consider the Prosecution case and nowhere mentions the burden or standard of proof. The evidence of the Defendant's wife was rejected as unreliable as regards precisely how the accident occurred and who was riding the cycle. This was unsurprising, based on (a) where this witness was seated in the car and (b) her admission of the obvious post-accidents discussions she had about the accident with her husband. Nevertheless, it is clear that the witness did her best to recount her own independent recollection of the accident and the Learned Magistrate noted that some of her testimony was inconsistent with the Defendant's.

17. However, the Learned Magistrate also recorded the following findings: "*I have carefully considered Venning's evidence. His evidence does not contribute to the issues in this case. Venning's evidence is largely based on what he was told by the Defendant*". In considering the issue of whether or not the Defendant admitted careless driving by saying "*I did not see you*" to Mrs Dill, the Learned Magistrate rejected the Defendant's evidence altogether. He found Mrs Dill to be credible and supported partially by her daughter who says she saw the Defendant kneeling down next to her. The crucial findings were that:

> "*Having accepted that the Defendant did say to Helen Dill 'I did not see you' I find that this is an admission that Defendant while leaving the Lane and entering the roundabout failed to keep a proper or any lookout for traffic to his right… in crossing in front of* [the] *cycle and striking the left hand side of the cycle and the left legs of the cyclists the Defendant …failed to keep a proper lookout for other road users.*"

18. This finding was clearly potentially available to the Learned Magistrate to reach having regard to the evidence which was adduced before him and essentially reflected his acceptance of the Prosecution case. The main issue raised by the present appeal is whether the Court fairly considered the Defence case and properly applied the burden of proof.

Merits of the appeal

Failure to order disclosure of unused Prosecution pictures

19. Because of a dispute at the hearing between counsel as to whether or not disclosure had in fact occurred, I am left in doubt as to whether disclosure was or was not actually made. Be that as it may I find that this point lacks substance for two principal reasons:

    (1) the Appellant's own transcript does not support the suggestion that his counsel explicitly sought a disclosure order from the Court and no complaint about the supposed non-disclosure was made at the end of the Crown's case or at the end of the trial in closing submissions; and

    (2) no material prejudice flowed from the alleged non-disclosure in any event, because the Appellant had his own photo showing where he said the car stopped after the collision, and this was put to Mrs Dill and PC Simmons in cross-examination. To my mind this explains most plausibly why after asking Ms Smith to disclose copies of the pictures she had shown to the first Prosecution witness, Mr Horseman did not bother to pursue deploying the Prosecution's pictures at trial.

Failure to permit the Appellant's pictures to be formally adduced in evidence as part of the Defence case

20. In my judgment it was clearly an error in law or, alternatively, an improper exercise of judicial discretion, to refuse to permit the Defence to recall Ms Zuill to formally place in evidence a photograph which had been put to two Prosecution witnesses, was contained in the Report of the Defendant's expert and which formed a central plank of the Defence case. The need to recall Ms Zuill occurred because Mr Horseman omitted to ask her to produce the photo in the course of her initial evidence. Having regard to the fact that the Court had already decided that the photo could be put the Prosecution witnesses on the basis that it would be produced in evidence as part of the Defence case, it is impossible to identify any or any sound principled basis on which the objection to recall her to produce it could have been made.

21. It seems obvious that the primary reason why this (in hindsight) elementary error occurred was that due to the passage of time between when the picture was deployed in cross-examination and when the attempt to adduce it as part of the Defence case was made, it was difficult for the Learned Magistrate to easily recall the terms and effect of his earlier ruling on the photo in circumstances where the ruling and the fact

that the photo was shown to two Prosecution witnesses was not recorded in his own notes. The relevant dates were:

- June 3, 2015: ruling that Defence could deploy its photo in cross-examination;

- February 12, 2016: ruling that Defence could not admit the photo in evidence.

22. A subsidiary reason for this erroneous decision is that the Learned Magistrate received no assistance from Crown Counsel, who objected to an unobjectionable application which in hindsight should have been consented to. I say with hindsight because I am mindful of the fact that it is extremely difficult, 'in the heat of battle', to precisely demarcate the boundaries between the prosecutor's duty to seek a conviction and the overlapping duty to be a 'minister of justice'. At the hearing the present appeal Ms Smith was unable to advance any convincing reason as to why the application to produce the photo should have been refused. However, it is necessary to consider the points advanced in her 'Submissions for the Respondent' in answer to this ground of appeal, which tellingly began with a submission which implicitly conceded an error of law had occurred:

> "*The Crown respectfully submits that the conviction can be supported on the weight of the evidence*…"

23. It is true that the Learned Magistrate had a discretion to refuse to permit the Defence witness to be recalled, but there is nothing in the transcript to suggest that he adverted to any of the grounds for refusal upon which the Crown now relies for the first time on appeal:

- *nothing in her evidence suggests that Ms Zuill left the car to take a photo*: the reason in any event for the application to recall her was that counsel had forgotten to ask her about the photo, Had she been recalled, she could have been cross-examined about the circumstances in which she took the photo;

- *the judge has a more generous discretion to allow late evidence on uncontroversial and formal matters than on substantive contested matters*: this argument was not supported by any authority and in my judgment is wrong as a matter of principle. The more important the matter to an accused person, the more cautiously a judge should approach a decision to exclude the evidence overlooked at an earlier stage, particular evidence

which is sought to be adduced before the Defendant has closed his case;

- *the photo was never put to Crown witnesses*: this appeared to be the case based on the initial appeal record derived solely from the Magistrates' notes. The record was supplemented by the Appellant's transcript and this point was not pursued in the end;

- *the photo would have invited much speculation*: if right, this point would have gone to the weight to be attached to the photo, not whether it should be admitted as part of the Defence case.

24. It is noteworthy that the Court did not identify any coherent basis for excluding the photo in any event. To my mind, the instinctive approach that a criminal judge ordinarily has to an attempt by the Defence to adduce evidence is as follows. Unless evidence is clearly inadmissible, irrelevant or abusive (e.g. seeking to call an excessive number of witnesses on a peripheral point), the Defendant is ordinarily given considerable leeway in how he seeks to present his case. The only reason for refusing the application which can be extracted from the transcript is the view that the photo (a) had marginal relevance because a Police sketch was already in evidence ("*Why is it necessary to have this then?*"), and (b) had little evidential value ("*it doesn't show the relationship between the…front left side and the kerb and the front right side with the right kerb…*"). Mr Horseman submitted in response: "*the picture's very important it shows a car going on the inside of it. It also shows the mirror being pushed forward which was put to Ms Dill*".

25. While it was far from a crucial piece of evidence which would have guaranteed the Appellant's acquittal, the photo was the centrepiece in the Defence advanced at trial. This ground of appeal succeeds. What impact this complaint has on the safeness of the conviction will be considered below.

Failing to properly consider to properly consider the physical evidence

26. This ground of appeal is closely connected with the complaint about the refusal to permit the photo of the Appellant's car to be admitted into evidence complaint. It is another procedural unfairness complaint and only has merit as such. It was clearly open to the Learned Magistrate to find that the physical evidence was ambiguous or did not support the Defendant's case. The only arguable complaint is that the Court failed to fairly consider the exculpatory value of this evidence. At the heart of the

Defence case were the following three key assertions relevant to the physical damage issue:

(1) the Appellant looked to the right and the road was clear because the motor cycle was behind him as he entered the roundabout, not beside him;
(2) the motor cycle struck the car from the rear, scraping along the driver's side of the car; and

(3) the best evidence that the motor cycle struck the car from behind was the physical of evidence of damage to the car (a scratch from the offside rear door of the car to the offside driver's door of the car combined with the driver's wing mirror being pushed forward).

27. The existence of the evidence of the damage to the car was not in dispute because it was confirmed by PC Simmons under cross-examination. There was also expert opinion evidence from Mr Venning which suggested (Report, page 6) that the damage to the mirror shown in the photo of the car attached to his Report was caused by the motor cycle striking the car from behind and pushing the mirror back. Mr Venning was not able to give free flowing testimony in examination-in-chief because of constant interchanges between Bench, counsel and the witness. However, even in his Report, Mr Venning made little if anything of the scrape marks at the rear of the car. In his oral evidence at trial, the following evidence was eventually given on the damage issue:

"*GV: the damage consisted of a scratch and dent by the driver's door and also as I saw in the in the photograph when the driver's door wing mirror was pushed forward slightly. That's the evidence relating to the damage.*

Court: And you're saying that your conclusion is what?

GV: the conclusion is that the motor cycle-and this was actually given in evidence by both Helen and Kanika Dill-that the nearside handlebar came into contact with the offside of the car and caused the scrape and dent to the driver's door. And also caused the rider of the motorcycle to lose control. I wouldn't think this was a high impact collision, but more of a glancing blow.

Court: But that conclusion doesn't sound very likely to me."

28. The opinion that the handlebar caused the scrape and dent to the car door at the beginning of the collision was at first blush implausible, because PC Simmons' evidence was that the dent and scratch were in the lower section of the driver's door. Mr Venning was not asked any follow up questions on the physical damage issue. The expert himself was most interested in showing the Court a video which he felt illustrated what most likely happened. In short, the Appellant's own expert opined that the first impact between car and cycle was at the front of the car based in part of the Prosecution's eyewitnesses' account. Mr Venning did not regard the physical damage to the car as a very significant indicator of what occurred.

29. Against this background the complaint that the Learned Magistrate erred in failing to adequately consider the physical evidence because it is not mentioned in his Judgment has a somewhat hollow ring to it. The only valid complaint which the Appellant succeeded in establishing was that:

- whether the physical damage supported the Appellant's version of how the accident occurred or raised a reasonable doubt about an essential element of the Prosecution's case was a point which fell for determination; and

- the Learned Magistrate failed to record his determination of this issue and the reasons for his determination as required by section 83(5) of the Criminal Jurisdiction and Procedure Act 2015.

30. Standing by itself this error of law is in the circumstances a technical one and insufficient to justify quashing the Appellant's conviction. However the outcome of the present appeal, described below, turns on an assessment of the cumulative effect of all the grounds of appeal which have, to some extent at least, been successfully made out.

Completely discounting the evidence of Gary Venning

31. The Judgment dealt with what was potentially the most significant and independent evidence adduced at trial in a surprisingly peremptory manner:

> "*The Defence also called Mr Gary Venning as an expert witness. Like any other witness his evidence can be rejected or accepted wholly or in part. His evidence is contained in a report. Venning also gave evidence from the witness box based on his report. I have carefully considered Venning's evidence. His evidence does not contribute to the issues in this case. Venning's findings are largely based on what he was told by the Defendant.*

Of course there is the Crown's case which paints another picture. I place no reliance on this expert evidence."

32. The most obvious problems with this part of the Judgment, as Mr Horseman rightly pointed out in the '*Appellant's Submissions*', are the following:

- inconsistently with the evidence of the expert who explicitly took into account the evidence of the Prosecution witnesses and his own analysis of the scene, the Judgment rejects the expert's evidence on the grounds that it was mainly based on what he was told by the Appellant;

- the expert gave important uncontradicted factual evidence about the road markings at the roundabout and their relationship with the Highway Code which potentially supported a legal finding that the Appellant was entitled to go across the roundabout in a similar manner to traffic leaving town in westbound lane one;

- the expert gave potentially important opinion evidence about how the accident could have occurred without any fault on the Appellant's part. This was based in part on the picture of where the Appellant's car supposedly stopped, the largely corroborative Police sketch plan and Mr Venning's filmed re-enactment. Crucially, the expert suggested that without the car turning sharply to the right, the motor cycle rider would perceive that the car was moving towards the motor cycle as it entered the roundabout and might have been surprised because she expected the car to turn towards Hamilton instead;

- the crucial part of the expert's account of how the car's movement would have been perceived from the cycle contradicted Mrs Dill's evidence of a dramatic "*yuck*" to the right by the car, but was not inconsistent with her daughter's description of the car "*moving over*";

- no explanation is given as to why this on its face credible evidence was wholly rejected and found to be so lacking in credulity as to not even raise a reasonable doubt about how the accident occurred.

33. I would add an additional criticism of my own which is only apparent on reading the transcript of the evidence. Contrary to the ruling the Court made at the beginning of

the expert's evidence, the Judgment inconsistently implies that the Report was admissible evidence. If the Report was in fact admitted in evidence, this happened without the knowledge of counsel and Defence counsel was deprived of properly deploying it through his expert and in closing submissions.

34. This ground of appeal is closely linked to the further complaint dealt with below that the Learned Magistrate failed to properly apply the burden of proof. The real point for determination in relation to Mr Venning was not whether his evidence was accepted, but rather whether his evidence raised a reasonable doubt about the Prosecution theory of how the accident occurred. Coincidentally, earlier this year, in *Zuill-v-Holder* [2017] SC (Bda) Civ (30 January 2017) I noted the distinction between the question of whether the same expert's evidence was accepted or rejected in civil proceedings or was relied upon to raise a doubt about an accused person's guilt in the criminal context:

> "*20….It is easy to see how Mr Venning's evidence (and Mr Horseman's typically eloquent submissions) would impress a jury and doubtless assisted the Defendant in his criminal trial by raising a reasonable doubt as to what must have occurred…*"

35. The '*Submissions for the Respondent*' understandably were unable to offer any convincing justification for the way in which the expert evidence was swept aside without any clear or cogent explanation. It was argued that Mr Venning did not give independent evidence at all and simply supported the Defence case. This argument is not supported by the full transcript of what occurred. Mr Venning's evidence at trial was clearly based on hearing all the witnesses and he did not explicitly support the Appellant's main thesis of the motor cycle coming from behind. It was also argued that the Learned Magistrate stated that he considered the expert evidence. That statement is not responsive to the complaint that, in effect, in the absence of any valid reasons for his rejection of the evidence, there is no solid basis for this Court to be satisfied that the evidence was properly considered and rejected on rational grounds. In my judgment, the manner in which the expert evidence was rejected (the only stated justification-that the evidence was mainly based on what the Appellant told the expert-was manifestly wrong) strongly suggests that this evidence was not properly considered and understood.

36. I am bound to find that this ground of appeal has been made out. The implications of this additional legal error for the safeness of the conviction will be considered below.

Failure to apply the burden of proof

37. This ground was advanced as a freestanding ground of appeal as well as by way of challenge to the approach adopted by the Court in finding that the Appellant had made an admission of failing keep a proper lookout. These combined criticisms are the most significant to the outcome of the present appeal, because the Learned Magistrate based his decision on the pivotal finding that the Appellant had admitted the offence. If he was justified in so doing, all other criticisms of the Judgment are merely technical and the safeness of the conviction is not subject to serious doubt. In the Appellant's Submissions (at paragraph 35) , the following complaint is set out:

> "*The judgment and the treatment of the evidence in it shows that the Learned Magistrate effectively reversed the burden of proof. Certainly at no time did he refer to the burden of proof.*"

38. Mr Horseman made two important points in seeking to undermine the finding of an admission. Apart from the fact that the admission was disputed, a point of little weight at the appellate stage, he submitted:

> "*Even accepting that the Appellant had* [said] '*Sorry I didn't see you', that was perfectly consistent with the accident itself and the Complainant striking the car from outside or behind the driver's line of sight.*"

39. This point was buttressed by reference to the following passage from this Court's judgment in *Cabral-v-The Queen* [2015] Bda LR 111:

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

40. The Respondent's answer to the broad attack on the burden of proof was simply to say that it was implicit that the burden of proof was applied from the way he assessed the evidence. There was no possible answer to the surprising (and in my experience unprecedented) omission of any express reference to the burden of proof in a reserved judgment which ran to over 5 pages. For my part, and this is an observation of my own, it was also striking that rather than beginning by reviewing the evidence of the

party which bears the burden of proof, as most judgments invariably do, the Judgment began with a review of the Defence case. The layout of the Judgment in this case implied that the Court was subliminally approaching the evidence as if the Defendant was the party who bore the burden of proof.

41. These unusual features in the Judgment combined with (i) the unreasoned rejection of the Defendant's expert evidence, (ii) the somewhat offhand rejection of the Defence suggestion that an under-aged rider was in fact riding the motor cycle, (iii) the failure to even mention the physical evidence which was a central part of the Defence case, and, finally, (iv) the failure to explicitly decide whether the Appellant was legally entitled to enter the roundabout from The Lane as he did are sufficient in my judgment to require this Court to find that the Learned Magistrate failed to properly apply the burden of proof.

42. This conclusion is only fortified by an analysis of the merits of the complaint about the finding that the Appellant's disputed statement amounted to an admission. The '*Respondent's Submissions*' in a short sub-paragraph argued in support of the finding that the words should be construed as an admission without engaging with the important second limb of the Appellant's submission, namely that it was also possible to construe what was said in a manner consistent with innocence.

43. It is easy to understand how the Learned Magistrate was likely drawn into the mind-set of viewing the disputed words as clearly amounting to an admission without further analysis. The extent to which the Appellant went at trial to deny saying "*I'm sorry. I didn't see you*" created the strong impression that the statement was being vigorously disputed because it was compelling evidence of an admission. Mr Horseman's submissions at trial focussed on disputing that the statement was made, and asking for any doubt to be resolved in the Defendant's favour.

44. The alternative submission made on appeal that the disputed statement if made could equally be construed in a way which was consistent with innocence was not advanced. It is entirely understandable that the Learned Magistrate, having been invited to view a two-dimensional issue in a one dimensional way delivered a one-dimensional ruling on this issue. The Learned Magistrate would have been assisted if Mr Horseman had explicitly invited him to consider the possibility that if the disputed words were found to have been spoken, they were not only consistent with guilt. However, I fully appreciate that Defence counsel may not always find addressing such alternatives to be palatable for fear that it may be perceived that they lack confidence in their client's primary case on a particular issue. It is for the trial judge to consider alternative inferences in favour of an accused person whether they are raised by the accused or not. That is an important aspect of applying the burden of proof.

45. The result was that the crucial inferential finding that the Appellant admitted failing to keep a proper lookout was arrived at without explicitly considering whether the

inference of an admission was the only reasonable inference which could be drawn from the words the Learned Magistrate found had been spoken. The finding that the words amounted to an admission of guilt was central to the conviction because it seems obvious that it resulted in the judicial determination that it both supported the Prosecution case and made it unnecessary to consider with any rigorous analysis the merits of the Defence. In my judgment the words were also potentially consistent with innocence for the following principal reasons:

- as Mrs Dill herself testified, it would be surprising if the Appellant had not approached her after the accident in which she was injured to express sympathy for her misfortune. Apologizing for the collision was not only consistent with an admission of responsibility, it was equally consistent with good manners and common decency;

- admitting not seeing the motor cycle was not only consistent with failing to keep a proper lookout. It was entirely plausible, even accepting the Prosecution version of events, that when the Appellant entered the roundabout no traffic was coming from Trimingham Hill and the motor cycle was outside of his field of vision;

- Mrs Dill did not mention the alleged admission in her Police Statement. Although under cross-examination she attributed this omission to being preoccupied with her injuries, the omission potentially suggested that she herself did not regard what the Appellant said to her as being an admission of guilt either at the time or when she gave her statement to the Police not long after the accident. (At trial, the Defence merely relied on this omission as grounds for inferring that the Defendant never made the statements at all, an inference the Court was entitled to reject).

46. It is on proper analysis somewhat difficult to see how, if these alternative possible inferences were consciously taken into account, the only reasonable inference from the Appellant's apology and admission of not seeing the motor cycle was an admission that he was not keeping a proper lookout. It is enough to justify the conclusion that an error of law occurred in reaching this finding to note that no explicit consideration was given to these alternative possible inferences which potentially undermined the inference of guilt. The failure to consider an alternative exculpatory view of the facts not explicitly advanced by the Defence is an error of law

relating to the proper application of the burden of proof which can by itself vitiate a conviction. In *Muhammed-v-Kuhn Edwards (Police Inspector)* [2017] SC (Bda) 74 App (25 September 2017), I recently held:

> "*27… However, in my judgment the Learned Magistrate erred in inferring that the Appellant's conduct in the Police Station amounted to a refusal when there alternative inferences which might have been drawn in favour of the Appellant, inferences which:*
>
> - *were not explicitly or implicitly considered; and*
> - *were not explicitly or implicitly rejected because according to the record, the conviction on Count 2 was not based on an objective assessment of the refusal issue.*
>
> *28. I find that the appeal against the conviction on Count 2 should be allowed on these grounds. The correct approach to drawing inferences in criminal cases is well known. In a frequently-cited judicial statement in Teper-v-R [1952]AC 480 at 489, Lord Normand observed:*
>
> > *"It is…necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are not other co-existing circumstances which would weaken or destroy the inference."*

Trial delays rendered the trial unfair

47. The Appellant sensibly abandoned the complaint that his constitutional right to a fair hearing within a reasonable time had been infringed. The complaint that the delays in the trial (i.e. the various adjournments) rendered the trial unfair was neither vigorously pursued nor substantiated as a freestanding ground of appeal.

48. Nevertheless, the fact that the trial took place on three separate days spread over a nine month period, combined with the other grounds of appeal which have been made out, makes it more difficult to avoid reaching the conclusion that, overall, the Appellant's trial was unfair.

Disposition of appeal

49. Section 18(1) empowers this Court to set aside a conviction on the grounds of a wrong decision of law subject to the following proviso:

> "*Provided that the Supreme Court, notwithstanding that it is of opinion that any point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it appears to the Court that no substantial miscarriage of justice in fact occurred in connection with the criminal proceedings before the court of summary jurisdiction.*"

50. Ms Smith invited this Court to find that even assuming (as the Crown conceded) the Appellant had been legally entitled to enter the roundabout from the lane customarily used to enter Hamilton alone, his doing so was so unusual that he was obviously to blame for the collision which occurred. This was best possible argument which could have been advanced on behalf of the Crown. From a civil perspective I have little doubt that it would be far easier to establish negligence on the Appellant's part based on the facts which were accepted as proved in the Magistrates' Court. Departing from local driving custom at that particular roundabout might be said to impose a special duty on him to take care to avoid harm to other motorists likely to be surprised by his route. However, this was a criminal trial in which the case the Appellant was required to meet was based on a single theory: he had failed to see the motor cycle and struck it with his car by cutting across its path.

51. In my judgment the combination of legal errors which occurred (failing to admit into evidence a photograph put to two prosecution witnesses, failing to properly consider the Defendant's expert's evidence and failing to properly apply the burden of proof) make it impossible to fairly conclude that no miscarriage of justice occurred. It is impossible to fairly conclude that without those errors the Appellant would inevitably have been convicted. An additional consideration which undermines the safety of the conviction is the protracted nature of the hearings which undermines the usual assumption that the trial judge must have had all relevant considerations in mind even though they were not explicitly dealt with in his Judgment. The proviso to section 18(1) is intended to be applied where this Court is satisfied that decision which the Magistrates' Court actually made was substantially a sound one. The proviso cannot be used to support the conviction on a factual and legal basis which was never examined by the trial court. It follows that the conviction must be quashed.

52. Mr Horseman submitted that having regard to the protracted nature of the present proceedings, their obviously significant cost to the Appellant and the comparatively minor nature of the charge, no retrial was appropriate. Ms Smith combatively invited the Court to order a retrial citing the prevalent nature of careless driving offences. This was to me an insufficient justification for ordering a retrial in all the circumstances of the present case. Only recently, I quashed a conviction for impaired driving, refusing to supply a breath sample and assaulting a Police Officer in the execution of her duty, on procedural unfairness grounds. These were traffic

convictions which were aggravated by uncharged but proven allegations of dangerous driving and no request for a retrial was made by the Crown in that case: *L Burchall-v-F Miller* [2017] SC (Bda) 68 App (6 September 2017).

53. The power to order a retrial must be exercised on a principled basis and in a consistent manner so that offenders charged with similar offences can have confidence that they are being treated in a manner which is consistent with the fundamental concept of equality before the law. No principled basis for ordering a retrial was advanced by the Respondent having regard to all the circumstances of the present case. My general sense of prevailing practice is, in any event, that retrials are not ordinarily sought by the Crown where convictions are quashed on appeal in relation to traffic offences prosecuted in the Magistrates' Court.

54. Nevertheless I have reflected carefully on Ms Smith's important submission about the inherent risks created by using the inner lane from The Lane to cross the Crow Lane Roundabout and enter Berry Hill Road. I have also drawn on my own driving experience in that area. I would add the following observation. Consideration could helpfully be given by the Department of Transport to converting local driving practice into the legal norm by signage which mandates that the inner lane may only be used to turn left towards Hamilton.

Conclusion

55. For the above reasons the appeal is allowed and the Appellant's conviction of driving without due care and attention is quashed.

Dated this 10th day of October, 2017 _____

IAN RC KAWALEY CJ