In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2018: 09

FIONA MILLER, Police Sergeant

Appellant

-v-

CHARLES RICHARDSON

Respondent

JUDGMENT

Appeal against Magistrates' Finding of No Case to Answer
Driving without Due Care and Attention (Section 37 of the Road Traffic Act 1947)

Date of Hearing:	22 June 2018
Supplemental Submissions:	02 July 2018
Date of Judgment:	19 October 2018

Appellant	Ms. Yanique Gardner Brown and Mr. Javone Rogers, for the Director of Public Prosecutions
Respondent	In Person

JUDGMENT delivered by S. Subair Williams J

Introduction

1. This is an appeal by the Crown against a no case to answer ruling made by the learned Magistrate, Mr. Khamisi Tokunbo, whereby he discharged the Respondent from both counts on Information 17TR06965. The offences concerned were for driving a motor vehicle on 26 November 2016 without due care and attention contrary to section 37 of

the Road Traffic Act 1947 (RTA) and failure to comply with demand made by a police officer for breath samples for analysis, contrary to section 35C(7) of the RTA.[1]

2. Having heard submissions competently made by both sides, I reserved my ruling and indicated that I would provide written reasons within a 6 week timeframe or moderately thereafter. Regrettably, the delivery of this ruling was necessarily delayed beyond what was initially foreseeable on account of my extended medical leave from office during the months of August and September 2018.

Summary of the Evidence

3. The Crown called no *vive voce* evidence at trial. Instead all of the prosecution evidence was read in by agreement which comprised of one statement from each of the three witnesses, namely PS 704 Watson, PC 2505 Tavin Trott and civilian witness Charles Clarke.

4. The evidence was that on 26 November 2016 at approximately 2:30am, the police witnesses were called to a report of a single-vehicle collusion on North Shore Road, Pembroke Parish. Upon arrival, the police witnesses observed the presence of a fire truck and a white Kia Cerato registration # 46565 with no driver or passengers inside of the car. The car was stationary and occupied both carriageways, facing in a south easterly direction toward the exterior wall surrounding Government House grounds. Photographs of the scene were taken and produced in evidence before the learned Magistrate.

5. PS Watson in his witness statement reported that he saw exterior damage to the front nearside of the car which appeared to him to be '*a broken axle car, extensive front nearside damage to the wing and the passenger door was buckled*.' PC Trott described the car damage as extensive and being to the '*left-front side, right-front side and front windshield*.' Police also noticed damage to the exterior wall of Government House which was consistent with the vehicle striking the wall and spinning into the road. Enquiries revealed that the white car was registered in the Respondent's name.

6. Civilian witness, Mr. Charles Clarke, made himself known to police at the scene of the accident. In his witness statement he reported that at approximately 2:00am he was at home when he heard a loud bang and figured that it was a road traffic accident. He said that it took him less than a minute to go outside and that he saw a white car occupying both sides of the road. He also reported visible damage to the wall entrance to Government House.

7. As Mr. Trott approached the damaged car, he observed a man who resembled the Respondent sitting on the ground and appearing to be in pain with no one else in sight

[1] At the start of trial, the Crown offered no evidence in respect of Count 2 (s.35C(7) RTA)

at the time. He returned to his house to make a 911 emergency call but upon his return to the scene the injured man was nowhere to be seen.

8. At approximately 4:30am on the same day, PS Watson and PC Trott attended the King Edward Memorial Hospital and spoke with the Respondent in a treatment room in the Emergency Department. Amongst the various verbal exchanges made, the Respondent was quoted as having said; "*I was driving I struck the wall, I'm really messed up- it hurts*."

9. PS Watson stated that he noted the smell of intoxicants on the Respondent and observed that his eyes were glazed. PC Trott also stated that the Respondent's eyes were glazed but said that he could not smell for any intoxicants on the Respondent due to other smells present in the emergency room at the time. Shortly thereafter, PS Watson informed the Respondent before cautioning him; "*I have reasonable and probable grounds to believe you were driving whilst impaired*". PC Trott informed the Respondent of his arrest and the Respondent stated; "*I'm not giving breath samples*". The Respondent was subsequently informed that a refusal to comply with a demand for breath samples constituted a criminal offence. The Respondent replied; "*I am officially refusing to take samples, it has been three or four hours since and I have had needles and medication while at the hospital.*"

The Learned Magistrate's Judgment

10. The Magistrates' Court ruling on the Respondent's no case submission is noted at pages 17-18 in the appeal record as follows:

    "*The authorities cited by the prosecution are persuasive but not binding on this Court. Moreover, it is for the prosecution to prove the offence. I find that those cases can also be distinguished on the basis of the facts applicable to them and that there is little or no facts known in this case as to the circumstances of the driving or accident. For that reason I find that there is no irresistible inference that can be drawn adversely against the Defendant in this case on the facts.*

    In the circumstances, I find there is no evidence that the standard of driving below fell that expected of a careful and competent driver. If I am wrong, I find that any such evidence adduced herein is so weak or tenuous that a trier of fact, properly directed on the law and facts, could not convict the Defendant.

    The application is allowed. Defendant is discharged on both counts."

The Crown's Ground of Appeal

11. The Crown appealed the following ground:

> "*…the Learned Magistrate Tokunbo erred in law when he found there was insufficient evidence on which a trier of fact, properly instructed, could convict in relation to Count 1*."

Competing arguments made on appeal

12. The Respondent maintained the position he advanced in support of his no case submission before the Learned Magistrate. He argued that evidence of the accident alone was insufficient to prove an offence of driving without due care and attention, contrary to section 37 of the RTA. Mr. Richardson emphasized that none of the evidence before the Court provided any insight as to his manner of driving leading up to the accident.

13. The Crown argued that the Learned Magistrate incorrectly applied the *Galbraith*[2] test behind his finding that the Crown had not proved a *prima facie* case. The Prosecution argued that the absence of an explanation from the Defendant as to how the accident occurred would entitle the fact-finder to draw inferences from the evidence adverse to the Defendant.

The Law

Sections 37 and 37B of the RTA

14. Section 37 of the RTA provides:

> "(1) *Any person who drives a vehicle on a road or other public place, without due care and attention… commits an offence*."

15. Section 37B (1)-(2) of the RTA provides:

> *(1) A person shall be regarded as driving without due care and attention if the way he drives falls below what would be expected of a competent and careful driver.*
>
> *(2) In determining for the purposes of subsection (1) what would be expected of a careful and competent driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.*

[2] *R v Galbraith [1981] 2 ALL ER 1060*

The Law Governing Applications on No Case Submissions

16. There are decades of reported cases which establish that, as a matter of Bermuda law, the Courts have been guided by the *Galbraith* principles in identifying the correct test to be applied when determining a submission of no case to answer.

17. One would be hard-pressed to find an experienced criminal law practitioner who has not cited from the well-known judgment of Lord Lane CJ at p. 1042B-D:

> "*How then should the judge approach a submission of no case? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury…*
> *There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge*."

18. The second limb of the *Galbraith* test entails a judicial assessment of the quality and reliability of the evidence, rather than its sufficiency. A Magistrate is thus called upon to consider whether or not the strength of the evidence is such that it *could* support a conviction.

19. Both parties referred to an impressive variety of case law. However, I do not consider it necessary to address each of those decisions in this judgment. The reasoned decision of particular note and persuasive value was delivered by Justice M.J. Epstein in *R v Shergill 2016 ONCJ 163* from the Ontario Court of Justice (at pages 7-8):

> *3. Can the fact of an accident alone establish the actus reus of careless driving?*
>
> *[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.

[24] R. v. McIver [1965] 2. O.R. 475 (Ont. C.A.) 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.

4. Can inadvertent negligence establish careless driving?

[25] In R. v. Wilson [1970] O.J. No. 1658 (Ont. C.A.) the court took issue with a comment of the trial judge who had said, "... I feel compelled to come to the conclusion in the law that inadvertent negligence, however slight it may be, is sufficient for a conviction under this section." The Court of Appeal indicated in paragraph 3: "Mere inadvertent negligence, whether of the slightest type or not, will not necessarily sustain a conviction for careless driving. In each instance, the Crown must prove beyond a reasonable doubt that the accused either drove his vehicle on a highway without due care and attention, or that he operated it without reasonable consideration for other persons using the highway. One of these two ingredients must be proven to support a conviction under this section.

[26] In light of the Supreme Court of Canada decisions in Beatty and Roy it seems clear that the gravamen of the offence of careless driving is inadvertent negligence. IF the conduct of the defendant falls below the standard expected of a reasonably prudent driver in the circumstances then it is negligent and deserving of punishment under Provincial careless driving provisions. If it does not fall below the standard expected of a reasonable person then it is not negligence and does not amount to a lack of due care and attention.

[27] It appears to me that the position of the Supreme Court of Canada in Beatty and Roy firmly supports the conclusion of the trial judge in Wilson and that the conclusion of the Ontario Court of Appeal can no longer be considered correct.

5. Is "momentary inattentiveness" careless driving?

[28] Again, the answer depends on the circumstances of each case. If, given all the surrounding circumstances, momentary inattentiveness by a driver does not constitute a departure from the due care and attention or reasonable consideration demanded of an ordinarily prudent driver then it cannot constitute the offence of careless driving and is not punishable. If the court considers that given all of the circumstances the

degree of inattentiveness displayed by the defendant goes beyond what one would expect of a reasonably prudent driver in such circumstances, then the offence has been made out.

[29] I emphasize that it is, in my view, incorrect to boldly state that momentary inattentiveness cannot constitute careless driving. The trier of fact must conduct an analysis of the evidence in each case and must measure the evidence of inattentiveness against the standard expected of a reasonably prudent driver.

Analysis and Decision

20. Does the evidence of the accident in this case prove the *actus reus* of careless driving? In order to unravel answer, it must be determined whether the Magistrate was entitled to make inferences on the manner of the Respondent's driving from the direct and circumstantial evidence about the accident scene and the vehicular damage.

21. The strength of the inferences which may be properly drawn will depend on the quality of the evidence. For example, in cases involving clear and compelling expert opinion evidence from an accident-scene investigator, adverse inferences against an accused's manner of driving may be more readily available. The quality of prosecution evidence will also likely strengthen in cases where the Crown has called evidence about the ease and clearness of driving conditions at the relevant period and location.

22. It is curious that the Crown agreed or elected for the written statements of each of its witnesses to be read in to evidence as opposed to calling its witnesses to the stand to elaborate on their statements. This prosecutorial short-cut limited the scope of evidential detail which was put before the Court. It was certainly open to the Crown to call their witnesses to the stand to speak about the driving conditions of the accident-scene which may have improved the quality of the evidence. Neither of the police witnesses spoke about the conditions of the road itself or the presence or absence of driving obstructions. If the Crown wished for the learned Magistrate to take judicial notice of any facts relevant to the accident scene, such an application should have been formally made for the benefit of the trial record. However, no such applications appear to have been made.

23. In the witness statement of Mr. Charles Clarke he stated; "*It was dark since it was 2:00am; it wasn't raining so it was clear I could see but still dark since the light posts were not in the area of the accident*." Notably, the photographic image at page 13 of the appeal record is suggestive of some street lighting at short distance from the damaged white car. Of course, it was not for the Magistrate to speculate about the quality or effect of the road lighting or any other relevant driving conditions or factors. This evidence should have been presented by the prosecution.

24. In my judgment, there will be examples of cases where evidence of the fact of an accident will prove sufficient to establish the *actus reus* of the offence of driving without due care and attention. However, this will depend on the quality and reliability of the prosecution's evidence of the accident and the driving conditions leading up to the accident.

25. In this case, the Magistrate was not bound to infer from the Crown's thin documentary evidence that the Respondent had been driving below the standard of a careful and prudent driver. I find that this case falls within the category of borderline cases which, as per Lord Lane CJ in R v *Galbraith*, should be left to the discretion of the trial judge, in this case the learned Magistrate. I see no reason to interfere with the exercise of that discretion.

Conclusion

26. The appeal is accordingly dismissed.

Dated this 19th day of October, 2018 _____

SHADE SUBAIR WILLIAMS
PUISNE JUDGE