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N2LR X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M.68/84

BETWEEN

HOWARD

340

Appellant

AND

POLICE

Respondent

Hearing 4 April 1984

Counsel P. D. Green for Appellant
K. G. Stone for Respondent

Judgment

12/4/84

JUDGMENT OF ONGLEY J

This is an appeal against conviction on a charge of careless use of a motor vehicle causing death entered against the appellant in the Childrens' Court at Lower Hutt on 16 November 1983.

The undisputed evidence showed that at about 10.00 pm on 3 June 1983 the appellant was driving his Cortina motor car at the intersection of Colson Street and Oxford Terrace at Lower Hutt. He approached the intersection travelling in an easterly direction in Colson Street and made a right hand turn intending to proceed in a southerly direction along Oxford Terrace. The District Court Judge found that the appellant's motor car had reached the centre line, or perhaps passed over it, in the course of making the turn when it collided with a motor-cycle which was approaching the intersection from the south and I agree with that finding. The impact occurred

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between the front of the motor-cycle and the front right hand mud-guard of the motor car. The rider was thrown off the cycle and it is admitted that he died as a result of the injuries he then received.

The appellant who was 15 years of age at the time of these events had as passengers in his vehicle five other persons of about his own age, three of whom gave evidence for the prosecution and one of whom was called for the defence. The main question in issue was whether the motor-cycle headlight had been showing as it travelled along Oxford Terrace or whether it had come on when the motor-cycle was only a short distance from the intersection. The alternative suggestions made by appellant's counsel are that either the rider had deliberately been travelling with the light off and switched it on only shortly before the collision or that the light was malfunctioning and had coincidentally lit up at that point. Either way the contention is that the failure of the rider to show a headlight deprived the appellant of a reasonable opportunity to become aware of its approach and to stop or drive his own vehicle so as to avoid a collision with it.

The overall impression which I gain from the evidence is that the appellant travelled down Colson Street at about 30 to 40 kilometres per hour, slowed down to a very slow speed as he reached the entrance to the intersection,

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without quite bringing his vehicle to a stop, and then proceeded to carry out the right hand turn at a speed of about 15-20 kilometres per hour.

Evidence as to the speed and position of the motor-cycle as it approached is sketchy but one of the two witnesses who did see the headlight some little distance away said that it was moving "quite fast" and both say it was about in the centre of the road when they first saw it. On that evidence the motor-cycle does not appear to have changed course significantly before the collision.

After the collision the appellant's motor car came to rest on the extreme eastern side of Oxford Terrace facing to the south at a point about 15 metres out of the area of the intersection. The motor-cycle was alongside it and the deceased's body lay some distance closer to the intersection on the same line.

Apart from evidence relating to the mechanical and electrical condition of the motor-cycle the attention of the witnesses was in the main directed to the questions of their first sighting of the motor-cycle headlight. The appellant did not give evidence but two written statements concerning the accident were made by him to the Police. The first was made at the Lower Hutt Police Station shortly after 1.40 a.m. on the next morning. In that statement this passage occurs:

"I turned right off the side street, onto Oxford Terrace, Lower Hutt, so going to head in a southerly direction. I looked right and left and right again and continued to look right before making my turn, but didn't see anything. I was looking right when I made my turn, and didn't see any headlights or anything.

As I was making my right hand turn, I was travelling about 15 to 20 KPH but could have been slower. Stephen was awake in the front seat the whole time.

The bang happened about ten to twenty metres south of the intersection, on my side of the road, being the left hand side facing south. I was closer to the far left of the roadway, than the centreline, a couple of feet away from the left hand kerb.

I didn't see anything or see a motorcyclist."

On the afternoon of 6 June the appellant made a second statement, the primary purpose of which was to correct his earlier statement that his brother S had been the only other occupant of the car at the time of the accident. In fact S had not been in the car at all on that evening. This statement differed from the earlier statement in describing what the appellant had seen at or about the time of the accident. He said:

"At the intersection, I almost slowed down to nil speed, just before turning right, and I looked both ways. I didn't see any headlight but saw a flash of light at the last second or at the moment of impact. I turned right from Colson Street into Oxford Terrace."

The other passengers who gave evidence for the prosecution varied from each other in recounting what they had respectively seen of the headlights of the motor-cycle.

M, aged 15 years, who had been seated in the rear

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seat on the right hand side recollected the car slowing down until it almost stopped as it approached the intersection.

He then said:

"... as we pulled out I noticed it must have been about two houses away, as we pulled out I noticed a light about, oh it would be about two houses away. I just noticed a round light, just looked roundish".

Another witness whose evidence was very similar to that was S , aged 14 years, who sat in the front seat passenger's seat by the door, there being three persons in the front seat. He described the car as going very slowly, though not quite stopping, as it approached the intersection. As to what he saw of the light, he said:

"After that we went around the corner and theres just a big bang. When the big bang occurred the car was just about over the line, just about over the centreline on the roadway. Before the big bang I seen a light about three houses back. I just seen a light. That was about two seconds before the big bang. It was quite a short time."

A third witness, B , aged 14 years, saw less than the other two. He said the car slowed right down and then started to turn to the right. He proceeded as follows:

"I saw the light of the motor cycle, it was kind of flashed on, that's all I seen. When I first saw it it would be about 8-9 feet away, 8 feet. I don't know if thats close to the car or a long way away from the car. When I saw the light it seemed that it was not too far away but not too close."

It seems to me that B 's evidence was so confused and uncertain that no weight could be attached to what he said.

L , another 14 year old, was called by the appellant. He was sitting in the middle of the front seat. He said that the car slowed down so that it could have stopped if any traffic had been seen on its right hand side. He then said:

"When I looked I had a good view of Oxford Terrace, I could see all the way down ... I am quite sure I saw no vehicles on my right. We turned round the corner and just before we straightened up I saw a flash of light and then went bang."

In cross-examination this witness said that when he first saw the light the motor car had crossed the centre line of the roadway and was just about out of the intersection.

There were then two significantly different accounts of what could be seen. The witnesses M and B saw the headlight approaching sooner than L did. L did not see anything until the car had crossed the centreline which must have been at the very moment of impact. Both the others say the impact was only a short time after they first saw it. I do not place much weight upon their estimates of time in seconds in such circumstances, but I do think it important, as did the District Court Judge, that they placed the point at which they first saw the headlight respectively as 2 houses or 3 houses down Oxford Terrace. If it is assumed that the appellant's car was on its correct side of Colson Street, the tree which was spoken of in evidence as

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possibly blocking the view would have been well over 100 feet away from it. Even if that tree did obstruct the view, which does not appear to me to be likely, it does not explain why L did not see the motor-cycle earlier than he said he did. Still less does it explain why the appellant did not see it at all, as he said in his first statement. As to his statements, I find it rather extraordinary that he should change his account upon this crucial issue as to whether he saw a light without explanation and expect the revised version to be accepted. The result of that unexplained conflict is that I place little reliance on either version. Even if the second one were accepted it is open to the same criticism as is L's evidence in that it leaves unexplained why he did not see the approaching motor-cycle at least as soon as two of his passengers did when he was in the most favourable position of any of them to observe the roadway to his right.

I am compelled to the conclusion that neither the appellant or the witness, L, were keeping as good a look-out as they say they were. Whether that failure caused the accident and the death of the motor-cycle rider is a further question to be decided. The car was being driven out of a side road on to a major thoroughfare and was executing a right-hand turn which obliged it to give way to all traffic in that roadway. It is reasonably practicable to drive into a position where such traffic can be observed without obstructing its passage and if necessary to stop so

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as to ensure that the way is clear before proceeding across the intersection. Had the appellant done that I am of the opinion that the approaching motor-cycle would have been visible to the him at least 100 feet away as he was about to enter the intersection and that he would then have had an opportunity to give way. By not keeping a proper look out he failed to exercise the degree of care which a reasonable and prudent and driver would exercise in the circumstance.

I do not find it necessary to go into the question of whether or not the light was there to be seen over the whole length of its approach in Oxford Terrace. It was there to be seen at the material time and it is the failure to see it at that time that constitutes the offence of careless use of the motor car from which a death resulted.

The appeal is dismissed.



Solicitors