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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M.412/84

1124

BETWEEN KEEREWEER

Appellant

A N D POLICE

Respondent

Hearing: 5 September 1984

Counsel: G.K. Panckhurst for Crown
W. Rosenberg for Appellant

Judgment: 5 September 1984

ORAL JUDGMENT OF HOLLAND, J.

The appellant was convicted in the District Court at Christchurch on three charges under the Transport Act 1962, one of driving a motorcycle while disqualified, one of failing to stop at the signal of a constable in uniform and one of driving at a speed which having regard to all the circumstances might have been dangerous to the public. Before the District Court there was no challenge to the evidence called by the prosecution that the rider of a motorcycle was in a situation where he was required to stop and failed to do so and that he rode his motorcycle at a speed which might have been dangerous. The issue was solely whether the appellant was the offender.

The unchallenged facts were that a police constable travelling north in Barrington Street in a marked patrol van was passed by three motorcyclists. His attention was attracted to these motorcyclists by their excessive speed. He passed one motorcycle

which turned to the left up a side street and disappeared. He followed two motorcyclists. The one in front escaped because it apparently went faster. The second of these two motorcycles which he followed was what he described as a Chopper motorcycle of a peculiar, although apparently quite common, description in that it has handlebars that go back on an angle into a position in front of the rider as distinguished from a more conservative design of motorcycle. He observed that the rider of this motorcycle was a person whom he described as "a male wearing a black full faced helmet and dark clothing". There was a passenger on the pillion whom he assumed to be a female due to the shoulder length blonde/brown hair. He went on to say that he could see through the helmet which he did not know whether it was full faced or not but felt sure that the pillion passenger was a female. Both passengers were wearing dark clothing.

He followed this motorcycle into Harman Street and at several times was able to pull alongside the motorcycle at quite fast speeds with the siren going. When he was able to get right on the tail of the motorcycle it was unable to get away from him. The motorcycle turned into an address at 100 Harman Street and he was then completely on its tail and as he described it almost able to prevent it from turning into 100 Harman Street. He then observed another patrol car coming into Harman Street, leapt out of his van and sprinted into the address. He said that when he left his van the motorcycle which he had been chasing was just disappearing round the rear of the address. Presumably he meant the house at the address. He described himself as having sprinted from the van round to the back of the house, saw a motorcycle which he eliminated because it was not a Chopper and then moved further and saw a Chopper motorcycle.

From this stage on there is some conflict as to the evidence. The constable said that he saw the appellant standing alongside this motorcycle and that he was "in the process of taking off a full faced black helmet". He described that the defendant was in dark clothing. It is common ground that there were at least three or four, and on the accused's version more, people around the motorcycle. He reached the conclusion that the motorcycle was the offending vehicle and that the appellant was the offender and he arrested him on a charge of dangerous driving and failing to stop.

The issue as both counsel have said is one of identification. Counsel for the appellant has referred me to the well known case of R v Turnbull (1977) 1 Q.B. 224 and has also referred me to R v Jeffries (1949) N.Z.L.R. 592, although counsel will perhaps forgive me if I say I cannot understand the relevance of the latter case. The District Court Judge emphasised as does this Court that care must be taken over questions of identification. This, however, is not one of the fleeting glimpse cases that was referred to in R v Turnbull. It is not a case here of the constable having said "I saw this accused, I recognised his face and he is the man that I have arrested". The constable drew the conclusion from what he found at the scene immediately following his chase that the defendant was inevitably the rider of the motorcycle. The District Court Judge had no hesitation in concluding that that conclusion was correct. He rejected the evidence called for the accused to the contrary. His rejection of the evidence called for the accused does not necessarily dispose of the matter but that is an issue of credibility and no ground has been established that would justify me in this Court differing with that finding of fact.

What, however, must be considered by this Court is whether the evidence, quite independent of the rejected evidence of the accused, was sufficient to draw the Court inevitably to the conclusion that the accused was the offender. The matter has caused me some concern but I am conscious that it is easy for this Court to be unfair in looking at this matter on notes of evidence when considering the conduct of a police officer just arriving with a group of motorcyclists late at night in circumstances where sadly in this day and age assaults are not uncommon. For myself I would have thought he might have been better to have made some enquiries of the accused immediately prior to arresting him and to have asked the accused whether he was the rider of the motorcycle or whether he was willing to give an explanation as to what he was doing at the time. He chose not to, and while to a certain extent that may appear to be a matter of criticism I am not sure that I blame him for deferring the questioning of the accused until he got him to the police station. The plain fact is that when the accused was asked for an explanation he said that the officer had got the wrong man and he would give his explanation in Court. He offered no other explanation of his being where he was at the time or his preceding activities.

There is no evidence before the Court that there were any motorcycles in the yard other than the two referred to by the constable. The very fact that the constable referred to one which he excluded enables me to infer as I do that in the absence of any further questioning there were only the two motorcycles in the yard at the time. There was only one that complied with the description of the motorcycle that he had been immediately chasing. The defendant was standing alongside it and if the constable is to be believed he

was in the process of taking off a full faced black helmet. The defendant denied this but his evidence has been rejected. Alongside him, or in the vicinity of the appellant, was a female described as being blonde. Certainly the original description of the pillion passenger was blonde/brown, and certainly it appears from the evidence that she did not have her helmet on at the time the constable saw her. Unfortunately this appellant was not legally represented before the District Court and conducted his own case. Had he been legally represented one would have been entitled to have expected the officer to be questioned about the helmet or lack of helmet. The plain fact is that there is no evidence as to whether there was a helmet which the girl could have taken off or not. In so far as it is relevant the absence of such evidence must tell against the prosecution but the appellant cannot positively assert as did his counsel that there was no helmet in the vicinity.

The District Court Judge has found as a fact that the constable considered it was only 20 seconds from his leaving the van until he arrived in the porch area where he arrested the accused. That arises from a passage in the evidence which is followed by a further passage in cross-examination which casts some doubt on that statement if the latter question and answer are taken literally. It may well be that the District Court Judge was quite right in finding that the evidence was a period of only 20 seconds but the notes of evidence as recorded make it difficult to see that that conclusion was justified. Far more important, however, seems to me to be the final cross-examination of the constable where he was asked whether or not the persons who were on these bikes could not have had ample time to take off their clothing or gone into the house or round the back of

the house. His answer was unequivocal and it was "Not from the Chopper". It therefore follows that the only person in the group alongside the Chopper with a helmet was the accused and there was no time for the rider to have disappeared. There is no doubt that the person riding the motorcycle had a helmet and had dark clothing. In the absence of a satisfactory explanation, and there was none, there is only one conclusion that can be reached and that is that the appellant was the rider of the motorcycle in question. That beig so the conviction was properly entered and the appeal against conviction must be dismissed.

The appellant appeals against sentence. In the light of the finding that he was the offender it is difficult, indeed impossible, to say that the sentence was not appropriate in the circumstances. He has been convicted of both driving at a dangerous speed and driving while disqualified. The disqualification period of 12 months may well seem a long while to him but I am satisfied it is the minimum that could have been appropriately applied. Likewise he has been sentenced to three months periodic detention. That is a sentence which is imposed in lieu of imprisonment. But the circumstances of the offending were such that imprisonment must have been considered as an appropriate penalty and the decision of the District Court Judge to reduce that to periodic detention can only have been regarded as both merciful and wise. The sentence is entirely appropriate. The appeal against sentence is dismissed.