S/10

NZLR

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M 169/84

1190

BETWEEN JOHN DOUGLAS FORSYTHE

Appellant

A N D POLICE

Respondent

Hearing: 20 September 1984

Counsel: J.P. Gittos for the appellant
L.H. Moore for the respondent

Judgment: Delivered 4 OCT 1984

C.W. ENTWISTLE
Deputy Registrar

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

This is an appeal against both conviction and sentence. The appellant, John Douglas Forsythe, was convicted in the District Court at Waihi on 7 May on a charge that he caused the death of Edward Douglas Stevens by carelessly using a motor vehicle. He was sentenced on 12 July, the court imposing a fine of $500 together with court costs $20 and witnesses' expenses $6.50, and he was disqualified from holding a driver's licence for six months. The grounds of the appeal in respect of the conviction as set out in the Memorandum of Points on Appeal that was lodged were, first, that the evidence did not disclose beyond reasonable doubt that the appellant was guilty of any careless act which caused the accident and, second, that

the learned District Court judge gave undue weight to the evidence of a Mr Long, an automative surveyor of the Ministry of Transport, and that questions put to Mr Long by the judge as an expert witness should not have been put at the time the judge put them but that rather he should have been recalled and questioned as an expert witness after the defendant had given his evidence. Mr Gittos made it clear, however, that his second point was not a separate or independent ground of appeal but was urged to reinforce the first main ground.

The facts, so far as it is necessary to recount them, were that a Mr and Mrs Stevens were driving on 5 October 1983 from Hamilton to their home at Whangamata. Mr Stevens was driving their car, an Austin Allegro. The weather conditions were poor and, indeed, there had been a good deal of rain. The road where the accident happened is a somewhat winding one and is about five kilometres south of Whangamata on state highway 25. The Stevens' car rounded a corner and was straightening up preparatory to moving around a further corner when a petrol tanker coming from the opposite direction, driven by the appellant, moved across the road and struck it. The car was pushed up a bank and half turned over. Mr and Mrs Stevens were both injured. Mr Stevens died some eight days later and it was not contested that his death was as a result of injuries sustained in the accident. The appellant was spoken to by a constable shortly after the accident at the scene. He stated that he had been travelling south from Whangamata and had been travelling at approximately 65 km per hour prior to entering

the corner and he said that while taking the corner he touched his brakes and the vehicle just slid straight ahead and he could not correct it. Some time later the appellant made a statement at the Whangamata police station in which he stated that he was travelling at approximately 65 km per hour but he did not know the exact speed. He repeated the statement that he did not know the exact speed in evidence. The day after making the statement, however, he got in touch with the constable and said that he considered the speed given as being too fast and that in fact he had been travelling at a lesser speed. It appears, too, that the appellant knew this route very well, having driven on it for a considerable period at least four times a week. When he gave evidence he added to his statement to the constable by saying that he had changed gear down slightly just before entering the corner; and in addition to referring to the speed at which he was travelling he had referred to another episode, which he said was similar, but it is clear from the evidence that it had happened some months before on an unsealed metal road. It appears, too, that when he said he changed down it was to change from a 10 ratio to a nine ratio and in answer to an express question put to him by the prosecuting officer he accepted that he was approaching the particular bend at a cruising speed of roughly 50 kilometres per hour knowing that if he had to brake his vehicle it would slide. It is perhaps appropriate to add that shortly before that particular question and answer were given he had been questioned on the weather conditions and he had said that it

had been a very wet day and in his written statement he had said the road surface was greasy.

Evidence given by an automative surveyor for the prosecution was to the effect that he had examined both vehicles after the accident and that neither had any mechanical fault to which the accident could be attributed. He was cross-examined by the appellant's counsel and in answer to the questions put to him he had said that what had occurred in this case, that is the tanker sliding across the road, could happen to any vehicle when the wheels failed to grip the road. The momentum of a vehicle could be such as to carry it on, and the failure of the wheels to grip the road could be attributable to the speed or the road conditions. The judge then put to him a question in which he postulated three matters referred to by the appellant in his written statement, namely the condition of the road, his braking of the vehicle and the fact that the tanker then went straight ahead instead of turning. The witness expressed the view that if the tanker had been driven at a proper speed it should have had no trouble in negotiating the particular corner.

Mr Gittos in supporting the appeal made a number of submissions on both the law applicable and the facts. On the law he submitted that the prosecution had failed to prove the mens rea which is a part of this offence. He relied on Boyes v Transport Department [1966] NZLR 171. In that case the appellant had been charged with using a motor vehicle without reasonable consideration for other persons using the road.

Wilson J. held that mens rea was an element of the charge but he went on to say that did not mean that the prosecution was required to prove that the appellant had acted deliberately to hinder the complainant in his lawful use of the road but the offence could be proved by what he referred to as "negative guilt" in the sense of inattention or thoughtlessness, which in effect was the mens rea, and either of which came within the phrase "without reasonable consideration". In my view the charge here is a charge of using a motor vehicle carelessly, and carelessness is to be judged on an objective basis and not a subjective one: see Simpson v Peat [1952] 2 QB 24 as followed in Police v Chappell [1974] 1 NZLR 225. The test is whether the driver was exercising the standard of care in his driving that a reasonably prudent driver would have exercised in the circumstances existing at the time. The issue, as a matter of law, is whether the learned District Court judge was justified in being satisfied that the appellant drove carelessly, his driving being judged on an objective basis. The burden is on the appellant to show that the learned judge was wrong. In my view the learned District Court judge made it clear that he was viewing the evidence on an objective basis and it is necessary therefore to consider the actual evidence he had before him and his assessment of it to determine whether he was justified in being satisfied beyond reasonable doubt that the appellant drove carelessly. I turn to consider that matter now but before doing so I record that I do not see anything objectionable in the way in which the judge considered the

evidence of the automative surveyor nor the questions which he put to him, nor do I think it would have been proper for the judge to have recalled the automative surveyor after the defence had completed its evidence and questioned him at that point. In my view, the proper course for the judge to adopt when he chose to ask the questions that he did was the course that he adopted.

The learned District Court judge summarised the evidence and observed that there must be some explanation for the accident and noted that the vehicle was in a good mechanical condition. He then said he was driven to the inescapable conclusion that the speed at which the defendant himself had suggested he was driving an hour or so after the accident was more likely to have been closer to the real speed than the speed he had suggested in his evidence. Mr Gittos criticised this approach, submitting that the judge appeared to proceed on the basis that since there had been an accident there must have been some fault on the part of the appellant and that fault was excessive speed; further, it ignored the evidence of the appellant that his vehicle had behaved in an unusual manner in not responding to his steering it so that it slid across the road; and, lastly, that it gave insufficient weight to the appellant's evidence of the other occasion when the vehicle slid across the road. This evidence, he submitted, if accepted, provided an explanation for the accident without carelessness on the part of the appellant and presumably, even if not accepted, ought to raise a doubt as to the cause. I do

not think the judge was wrong in his approach. It is correct that the maxim res ipsa loquitur is not applicable but when one reads what else the judge said it is clear he did not apply it. After having referred to the matter of speed in the way I have just described, the judge went on to say this:

> "In those circumstances, a vehicle such as he was driving, on this stretch of road, in the weather conditions prevailing, must have been extremely difficult to handle and the slightest miscalculation would have resulted in problems. What happened here I am quite satisfied beyond any doubt, was that the Defendant was travelling at a speed which was in excess of what was a prudent speed for the road conditions prevailing and the vehicle which he was driving and that that inevitably put him in a position where he was forced to take emergency action and that emergency action merely compounded the situation. The combination of that finding, of course, is that there is carelessness in the use of the motor vehicle."

I think that on the evidence before the judge that is a finding he was wholly justified in making. I add that, so far as the evidence given by the appellant in relation to the other occasion when the vehicle failed to respond to steering is concerned, I think it is clear the judge did have it in mind because he referred to it but clearly concluded it was no help to the appellant. In that approach, too, I think he was quite correct. That other occasion appears to have been on a quite different kind of road surface and in my view it could well have been contended that rather than being exculpatory it was

an episode which should have emphasised to the appellant the need to exercise particular care. The judge earlier noted in his judgment that the appellant in his evidence in chief had said that as a result of his experience as a tanker driver for a number of years he was aware that when road conditions became wet the worst possible thing that one can do on a relatively winding piece of road is to apply the brakes hard because the driver then loses control. The appellant may not have applied the brakes hard but any application of brakes was accompanied with risk. In result the appeal against conviction is dismissed.

The appeal against sentence was directed solely at the disqualification. Mr Gittos submitted that the circumstances of the accident were such that the discretion given under s 30(3)(b) of the Transport Act 1962 not to impose a period of disqualification should have been exercised. That subsection provides that without prejudice to its power to impose a longer period of disqualification the Court shall, for an offence of this kind, order the offender to be disqualified for a period of six months unless the Court for special reasons relating to the offence thinks fit to order otherwise. Counsel were agreed that the test in applying this provision is that the special reasons must be special to the facts of the particular case. In other words, there must be mitigating or extenuating circumstances, not amounting to a defence but directly connected with the commission of the offence, which the Court

ought properly to take into consideration: Whittall v Kirby [1947] KB 194. Mr Gittos submitted that the judge had mis-stated the test and that had it been applied properly to the circumstances of this case the judge should not have ordered disqualification. I think Mr Gittos is correct that the way in which the judge expressed the position is not quite in accord with the test laid down in Whittall v Kirby, for the judge said the degree of carelessness must be minimal and the circumstances extraordinary before the Court can consider special circumstances. I think that states the test too stringently. However, when I consider the question in the light of the circumstances I think that in result the judge was right. There is, unhappily for the appellant, and I realise how serious a matter this is for him, nothing in my view that can properly be described as special to the facts of the case that would justify not making an order of disqualification. Mr Gittos submitted there was the unexpected failure of the vehicle to respond; in view of what I have said earlier I do not accept that as a mitigating factor. Mr Gittos urged that this was a very minor want of care; I do not think for a person driving this kind of vehicle in the circumstances then prevailing on a winding piece of road that it was very minor. The appeal against sentence is accordingly dismissed but I note in passing that the learned District Court judge clearly took the serious consequences to the appellant of the disqualification into account in the amount of the fine he imposed which was less than it otherwise would have been.

Solicitors for appellant: Sharp, Tudhope & Co. (Tauranga)

Solicitor for respondent: Crown Solicitor (Rotorua)