23/7

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M.58/85

829

BETWEEN R MILBURN

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 18 July 1984

Counsel: J. Walker for Appellant
R.P. Bates for Respondent

Judgment: 19 July 1984

ORAL JUDGMENT OF HARDIE BOYS J.

By this appeal against conviction on a charge of careless use of a motor vehicle, the Court is asked to set aside a conscientious and reasoned decision of three Justices of the Peace on a question of fact. Although the appeal is by way of rehearing, it is conducted on the written record, not by repetition of the oral testimony, so this Court is deprived of the essential advantage of the trial Court in hearing and seeing the witnesses. In these circumstances this Court's approach may be stated in the words of Henry J. in O'Callaghan v Galt [1961] NZLR 673:

> "So long as the advantage enjoyed by the Court of first instance of seeing and hearing the witnesses is sufficient to explain or justify the conclusion reached in that Court, it ought to be upheld.

> However, the Supreme Court, either because the reasons given by the Magistrate are not satisfactory, or because it unmistakably so appears from the evidence may be satisfied that the Magistrate has not taken proper advantage of having seen and heard the witnesses, and the matter will then be at large for the Supreme Court."

This prosecution arose out of an accident in which a car driven by a Mr Pemese, who had been waiting for oncoming traffic so that he could turn right and who was signalling that intention, was struck by a car driven by the appellant who, without any warning, passed it on its right as it was about to move off into its turn. It was the prosecution case that Mr Pemese's car was waiting in the centre of the road and that the appellant's carelessness lay in passing it in that position, - a manoeuvre which of course Mr Pemese would not expect and which would involve the appellant crossing to the wrong side of the road - rather than going to his left where, if Mr Pemese's car was where the prosecution said it was, there was ample room and where indeed Mr Pemese's passenger said that at least one other car had already passed.

The defendant's case was that Mr Pemese was waiting to the left of his side of the road, so that the only place for the appellant to pass was on Mr Pemese's right and that the appellant was passing on that side, as indeed a car ahead of his had done, without crossing the centre line at all. Mr Bates did not dissent from the proposition that if that was so, the charge could not be sustained.

The case thus resolved itself to a dispute as to whether Mr Pemese was waiting on the right of his side of

the road or on the left, so as to allow vehicles behind to pass on his left or his right as the case may be. He and his passenger were, to use the Justices' word, adamant that his car was on the right. The appellant and one of his passengers was sure that it was on the left; although there was some difference between them as to how far over to the left it actually was. Two other passengers in the appellant's car also gave evidence, but they were not of much assistance on this point because they were not taking a great deal of notice of the road ahead.

The existence of a conflict such as this was not in itself reason for the Justices to hold that the prosecution had not proved its case. Their duty was to endeavour, if they could, to determine whether they could confidently accept the prosecution evidence. The discharge of that duty required them to assess the weight and the reliability of that evidence, and this they had to do by reference to three things: the intrinsic conviction that evidence carried; its consistency with any extrinsic evidence; and the conviction carried by the defendant's evidence. In their decision, the Justices clearly set out to consider these various matters. They appear to have been more impressed by Mr Pemese and his passenger than by the appellant and his. This was a matter entirely within their province. Mr Walker submitted that in arriving at that preference they had given undue weight to some inconsistencies and vagueness on the part of the defence witnesses. But I do not accept that submission. These

matters were very properly mentioned in the decision, not so much in my view as criticism which was intended to reinforce the prosecution case, but as points to be taken into account in assessing the reliability of the defence evidence. That is a perfectly proper approach. In this regard, some of the submissions which Mr Walker placed before me were really matters going to the question of weight of evidence, which as I have said was really a matter for the Justices themselves.

They then went on to look for any extrinsic evidence and here I think, with respect, they may have fallen into error. The obvious way of helping to resolve the conflict between the witnesses was to fix, if possible, the point of impact. Neither vehicle had remained at that point, so all that was available was the usual kind of debris on the road, and in addition of course any admissible statement made at the time by one of the drivers, particularly the appellant.

A traffic officer came to the scene soon after the accident and he said that in discussion with the two drivers they had agreed that the point of impact was just on the centre line. In cross-examination, however, he does not appear to have been so clear and one has the impression that the agreement to which he referred may have been one which involved the passengers and perhaps not the appellant at all. And of course if that was so, it would be inadmissible as evidence. The appellant in cross-examination first denied any such agreement and then said that he could have come to some agreement. The Justices said in their decision that the

traffic officer had himself come to the conclusion that the point of impact was in the centre of the road, but that was not so. He had made it clear in his evidence that he could not form a view of his own. This was because the silent evidence afforded by the debris was equivocal.

As to that, his evidence was that there was "a bit of scattered glass around" but that passing traffic had "scattered the bits and pieces of glass all around the place". Mr Pemese had said that the only glass that was broken was his indicator light and that he could not say where that glass had fallen. His passenger said there was glass on the right side of the road. The appellant said he did not notice any glass, but only a chrome strip in the left lane. The Justices said:

> "...the defendant admitted that much of the broken glass was on the right hand side of the centreline which is inconsistent with his car being struck on the left hand side well to the left of the centreline."

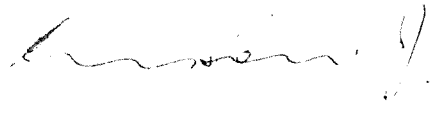
That, of course, is quite incorrect because the defendant made no such admission.

It is no criticism of the Justices' decision to say that it is not at all clear how large these two factual matters about which they were regrettably mistaken loomed in their decision. Even on a correct appreciation of the evidence, they may, as they would have been entitled, have preferred the prosecution witnesses to those of the defence. But they may well have regarded the two matters I have referred to as tilting the scales in favour of acceptance of the prosecution version. Without knowing more than I do of the process by

which they came to their final conclusion I consider that in the circumstances I have outlined their decision cannot safely stand.

There is one other matter. Mr Pemese said that he moved into his turn as soon as the approaching vehicles had passed and that almost at once the appellant's car struck his. If this is so the appellant, who did not suggest that he had paused or slowed down in his approach and passing movement, is likely to have begun to pass Mr Pemese on the wrong side in the face of this approaching traffic. The Justices did not consider the implications of that at all.

As this case depends so much on an assessment of the witnesses, I do not think that I can myself determine whether on the material before me the prosecution or the defence should succeed. In those circumstances the proper course is to direct a rehearing. The appeal will accordingly be allowed and a rehearing ordered in the District Court in accordance with s 77(a) of the District Courts Act 1947. The question of costs on this appeal is reserved and will I suspect depend on the outcome of the rehearing.



Solicitors:

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