14/5 NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.93/84

501

BETWEEN V NELSON
Appellant

A N D POLICE
Respondent

Hearing: 30 April 1984

Counsel: K.P. McDonald for Appellant
C.Q.M. Almao for Respondent

Judgment: 9-5-84

JUDGMENT OF GALLEN J.

The appellant was convicted in the District Court at Taumarunui on 19 December 1983 on a charge of careless use causing injury. The charge arose as a result of a motor accident which occurred at Owhango on 7 July 1983. The appellant was driving a motor vehicle when it was involved in a collision with a bus. The driver of the bus was also prosecuted on the same charge. Both the appellant and the bus driver defended the proceedings. Their accounts were not reconcilable and the learned District Court Judge after hearing the evidence, arrived at factual conclusions resulting in his deciding that both the appellant and the bus driver were guilty as charged and accordingly entered convictions and imposed the same penalty in respect of each, a fine of $300

with a disqualification from driving for a period of 6 months from 19 December 1983.

The circumstances were such that the case was pre-eminently one which had to be decided on the basis of the evidence in the District Court with an assessment of the credibility of the witnesses and the consistency of the evidentiary material before the learned District Court Judge. Counsel for the appellant submitted that the findings of fact of the learned District Court Judge were open to question because of the reliance he placed upon the evidence of a Mr Cooper who was described by the learned District Court Judge as the only truly independent witness. Counsel points out that the evidence indicates a long and friendly association between the witness concerned and the bus driver and that under those circumstances he could not properly be described as an independent witness and that this emphasis vitiated the conclusions of the learned District Court Judge. I cannot accept this.

I think that although the learned District Court Judge did refer to independence as an aspect, he also placed an emphasis on his impression of the reliability of the witness and I do not consider that his decision could be called in question because of the comment made relating to independence.

Mr McDonald also placed reliance on photographs which were produced and which he contended supported the version put forward by the appellant because of the position on the roadway

of the vehicles revealed by the photographs. The photographs need to be considered in relation to the evidence. There is evidence to the effect that the point of impact was some distance from the final resting place of the vehicles. I do not think that the photographic evidence is sufficient to controvert the findings of the learned District Court Judge.

If these were the only matters in issue, I should have concluded that the matter being one of fact, that the appellant failed and that that should be the end of the matter. However, there were other aspects which give rise to concern. The appellant is years of age and a In order to get to the District Court at Taumarunui by 10 a.m., she needed to leave her home in Auckland on the day of the hearing at 5.30 a.m.. It appears that there were procedural problems associated with the presentation of the prosecution case related to the age of the appellant. In addition, it is not surprising that with limited sittings, the day was an extremely busy one for the Court. The combination of these factors meant that the case was not reached until 8 p.m.. During the whole of the period the appellant and her counsel remained at the Court, apart from the luncheon adjournment, because they were unable to ascertain when the case might be heard. No doubt because of the hour and a concern for the parties as well as a laudable desire to dispose of the business before the Court, the suggestion was made that the prosecution against the appellant should be heard at the same time as the prosecution against the bus driver. This immediately raises difficult problems of procedure and of onus of proof as

well as standard of proof. Mr McDonald stated that the learned District Court Judge effectively took over at least part of the conduct of the proceedings by determining the order in which witnesses would be called, the result being that the appellant was called as the first witness presumably in the case against the bus driver, but also in her own prosecution. I should have thought that the difficulties raised by such a course of action would be enormous. The matter is compounded from my point of view by the fact that the recording device at the District Court was not apparently operating during part of the proceedings. None of the evidence in chief of the appellant has been recorded and there is other evidence which has not been available. The case itself concluded at 10.15 p.m.. I hasten to say that none of the above reflects any criticism on the learned District Court Judge. He was faced with daunting practical difficulties, constrictions of time and a very heavy work load.

Under normal circumstances I should have considered it an appropriate case to allow the appeal and direct a re-hearing under the provisions of the Summary Proceedings Act. In this case bearing in mind what occurred, the age of the appellant and the practical difficulties associated with the venue, I do not consider it appropriate that she should be required to endure a re-hearing. Following the practice adopted by the

Court of Appeal in the case of Civil Aviation v. MacKenzie 1983 N.Z.L.R. 78, I therefore allow the appeal but make no award of costs.

8/3/84

Solicitors for Appellant: Messrs Williams, McDonald and Company, Auckland

Solicitor for Respondent: Crown Solicitor, Hamilton