

11/10

(2/3) RWJ

IN THE HIGH COURT OF NEW ZEALAND

M. 795/84

X

AUCKLAND REGISTRY

1235

BETWEEN      E      OU HONG  
APPELLANT

A N D      POLICE DEPARTMENT,  
AUCKLAND

RESPONDENT

Judgment:      31 August 1984  
Hearing:        31 August 1984  
Counsel:        Hawk for Appellant  
                  Miss Shine for Respondent

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ORAL JUDGMENT OF CASEY J.

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The Appellant faced a charge of causing death by driving his motor cycle at a speed which having regard to all the circumstances was dangerous to the deceased. He was convicted in a defended hearing on 3rd May 1984 and sentenced to six months Periodic Detention and was disqualified from driving for two years and was ordered to pay witnesses expenses of \$293.30. He appeals against conviction and sentence. He is a young man of about      at the time of the accident and he had owned for some months a      motor cycle - a powerful four cylinder machine - and on the evening in question, he was with friends on Three Kings Road. The evidence is that it was clear with excellent visibility, light traffic conditions and this is a wide straight road, at that time in three lanes. The evidence from his friends is that he took off after saying goodbye to them.

He travelled about 275 metres along the road and he collided side-on with an      car driven by the deceased as she was making a U-turn in front of him. He was thrown beside the machine on to the roadway. His injuries were apparently only minor, although he suffered from loss of

memory of events after leaving the front entrance of the friend's house. She was in the driver's seat where the impact occurred and she died shortly afterwards in hospital from multiple injuries. The motor cycle apparently struck about the driver's door and rolled the car on to its side, spinning it around and it also slid along the road. It ended up after the accident distorted into almost a banana shape with the driver's seat pushed right across the passenger's side and, it ended up as I have said on its side with the motor bike sticking straight up into the air still attached to it.

The evidence of the actual event itself was almost non-existent. Mr Hong (the Appellant) could remember nothing about the accident and nobody saw it or had any continuous view of the motor cycle as it was driven along the road. The friends could throw no light on the possible speed at which he was travelling, but the police were able to call two people living along the road fairly close to where the driving started. One said he heard the noise of high engine revolutions on the bike and his attention was attracted to it because he had had previous experience with motor cycles, but he did not see it at any stage. Another man a few doors down had his attention also struck by the noise and he actually saw the bike for a brief period, gaining an impression of high speed. In re-examination he said it was over 70 miles per hour but it is accepted that he could only have seen it for a very short time, having regard to his point of view between two shrubs and the fact that he was standing a little below the level of the road. Curiously enough, he also was a very experienced motor cyclist and naturally in these circumstances his impression of the matter must be given some weight. There was a Mrs Purnell putting milk bottles out close to the scene of the accident. She says she heard nothing and saw nothing until the impact, but said the driver had clearly fallen off the bike and was lying on the road by its side. She was the first at the scene.

There was evidence of tests done by various authorities. One of them established quite clearly that such a machine could attain a high speed in the distance involved

in this case and Constable Harvey tested a similar machine for stopping distances on the road at 50 kilometres per hour and found it left a skid mark of something just over 7 metres. I should mention that the evidence of the impact was clearly marked on the road for 11 metres, the skid mark near the centre line running to it from the motor bike and indeed somebody was on the scene taking photographs very shortly afterwards. The car was clearly pushed back and rolled over as I have described and precise measurements of the data relevant to the collision could be easily obtained.

Two experts gave evidence. Both of them devoted their attention to trying to work out the speed of the motor bike before the application of the brakes. The first was Mr Simpson of the D.S.I.R. He adopted what he called an "energy absorption" technique in an endeavour to work back to the speed, taking each segment of the episode and calculating the speed required at the time to achieve the results which were observed. I might note the surprisingly low speed that was necessary for this bike to roll the car over. Mr Simpson thought it would vary from 7 to 30 kilometres per hour. But he accepted quite frankly that he was unable to get any reliable results because of the impossibility of putting any sort of figure on the energy needed to deform the car in the way that it was found after the accident. He described enquiries he made overseas and I was left with the impression that the only way this could be done was to repeat the experiment with a similar make of car and bike. Understandably enough the Department were not prepared to go to these lengths. The best figures he could come up with were between 66 kilometres per hour and 96 kilometres per hour as the range, but it is quite obvious from his evidence that this was really speculation and, to use his own term, they "bombed out" when it came to trying to apply this formula to that part of the episode dealing with the actual damage to the car.

The other expert called for the defence was Mr Marks, a consultant mechanical engineer. He gave lengthy and complex technical evidence but adopted a radically different method for his calculations. He criticised Mr

Simpson's approach as invalid and impossible to produce a result and, of course, this was borne out by the event. His approach was the "impact momentum" technique whereby he said he could assign an absolute upper limit to the possible speed the bike was going before the braking commenced, regardless of what happened to the vehicles because both ended up together, thereby presenting an unusual situation with all the facts, as it were, compressed in the one combined object, making it unnecessary to consider the number of variables which would have been the case had the car and the bike not ended up in this state. Taking the figures most adverse to the Appellant, he arrived at a maximum possible speed of the bike before braking of 82 kilometres per hour. But taking the more favourable co-efficient of friction adopted by the D.S.I.R., he came up with a maximum of just over 70 kilometres per hour.

He said he used two back-up calculations in order to test these results. One was based on the force needed to shear a front pin on the bike and another on the calculation of the G-forces to which the Appellant would have been subject. He found it very significant that he simply ended up on the road lying by his bike and not smashed into the car or catapulted over it, which would have been the inevitable result of the forces operating if the machine had hit the car at anything substantially over the speed that he was talking about, taking as the most probable a limit of 70 kilometres per hour. He conceded, of course, that his figures on these checks were not accurate being subject to a number of variables, but in his view they tended to support the calculations based on his principal technique; as I have said, he thought the most probable maximum would be 70 kilometres per hour.

In her decision the learned Judge looked at the evidence from the other witnesses, though the impression of speed based on the noise of the machine was clearly affected by Mr White's concession in cross-examination about the difficulty of forming any accurate impression of engine speed simply from its noise. He accepted that there were other circumstances which could affect it, rendering any impression

of high revolutions inaccurate. She was also influenced by Mr White's impression of the high speed the bike was travelling at, he being the witness who had the brief glimpse of it as it passed in front of his house. She looked at the skid mark and correctly concluded from the evidence that the bike must obviously have been doing over 50 kilometres per hour when the brakes were applied. She also took into account the results of the collision and the damage to the car. After noting that the experts agreed the speed must be in excess of 60 kilometres per hour (which clearly emerges from their evidence) she held that neither could fix the precise speed at the relevant time with any degree of certainty. If one looks simply at what I might call the lay evidence and the tests taken on the machine and at what happened to the car, the Judge's conclusion about the high speed the bike must have been doing at the time could readily be supported and she was then perfectly entitled to hold that in the circumstances it was dangerous.

The question is whether Mr Marks' evidence, with its likely estimate of the maximum speed, should have been given more weight in her deliberations, taking her at least to the stage of being left with a reasonable doubt about this critical aspect of the case. I must say that from my perusal of it, and the way I was taken through that evidence by Mr Hawk, it is obviously of a very different quality from that of Mr Simpson's, the latter clearly accepting that his calculations were unreliable. Mr Marks adopted a radically different approach which I must say was not really affected by the cross-examination. At first blush it seems contrary to common sense when one looks at the condition of the car to suggest that this bike was travelling at anything but a grossly excessive speed. But when one takes into account the fact (as Mr Marks said in his evidence) that cars of this vintage were largely unprotected from side collisions and the motor bike was a big heavy machine, and when one looks at the surprisingly low speed that was needed for that machine to turn the car over, the proposition that it could have done such damage within speeds that might not be dangerous does not seem quite so unreasonable. While Mr Marks certainly did

not put any precise figure on the maximum speed he thought the machine was doing before starting to brake, (nobody could do this), he came up with a reasoned estimate of probably 70 kilometres per hour and, as I have said, he was not shaken on this in cross-examination.

The Judge did not really discuss his evidence at any length or give her views on the reliability of his methods. With respect, my reading of her decision leaves me with the impression that she relegated it rather too readily to the same area of speculation in which Mr Simpson's undoubtedly belonged. Mr Marks' evidence, of course, must be looked at in the light of the other testimony - the impression of noise and speed reported by the two other witnesses and their observations must, of course, be treated with the respect they deserve as experienced motor cyclists. But one must bear in mind that what they saw and heard happened at about the time the bike was starting up, when there would be gear changes and revving up of the engine. They also happened quickly and Mr White's view was circumscribed so that a Court might not be justified in preferring such evidence or giving it weight over and above the calculations made by Mr Marks or using it to lessen their impact.

I have reached the view that the learned Judge did not give his evidence the weight it deserved and at the least it leaves open as a reasonable conclusion that his speed was only about 70 kilometres per hour. If so, I would find it difficult to hold in these circumstances - namely, the wide, clear road with good visibility and little traffic - that it was dangerous, even though it was over the authorised speed limit for the area. The machine would have been controllable in an emergency under those conditions. I find at the end of the day that the effect of Mr Marks' evidence is to raise a reasonable doubt in what otherwise could have been sufficient to justify a conviction and with respect I think the learned Judge should have reached that view as well. It would be

unsafe to allow the conviction to stand in these circumstances. The appeal will be allowed and the conviction, sentence and order for payment of the witnesses expenses are quashed.

*Mr. Casey*

Solicitors:

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