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NZ Law Reports

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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243

BETWEEN PLAISTED

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 21 March 1984

Counsel: Appellant in person
J.H.C. Larsen for respondent

Judgment: 23/3/84

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

This is an appeal against conviction and sentence. The appellant, Gwendolyn Mary Plaisted, was convicted in the District Court at Upper Hutt on 2 November 1983 on a charge that when turning at traffic lights she failed to yield the right of way to a vehicle not turning. She was fined $150 and ordered to pay costs of $20 and witnesses' expenses of $13. She was also ordered to attend a defensive driving course. The case was heard by Messrs E.R. Menzies and W.J. Hamilton, Justices of the Peace.

The charge against the appellant arose out of a collision at the intersection of Fergusson Drive and Camp Road at Upper Hutt. The appellant was driving a car in a northerly direction towards Upper Hutt and at the intersection with Camp Road she turned right to enter Camp Road. She was struck while carrying out this manoeuvre by a van travelling in a southerly direction towards Lower Hutt. The intersection was controlled by lights. It seems clear

that at the time the lights were green for both the appellant and the driver of the van. The appellant defended the prosecution on the basis that when she commenced her turn into Camp Road from Fergusson Drive the road was clear and the van had not come into sight. The distance from a curve in Fergusson Drive to the intersection, when approached from Upper Hutt which was the direction from which the van was coming, was stated by a prosecution witness, a Mrs Davies, as being possibly 100 to 120 yards. Another prosecution witness, however, a traffic officer, referred to what I am assuming is the same distance as being about 200 to 250 metres. I note that the appellant and Mr Larsen appeared to accept that these two pieces of evidence relate to the same stretch of road.

The appellant appeared in person. Her appeal against conviction was based on three grounds and her appeal against sentence on one. Her submissions had been prepared, fully and carefully, and were put before me in writing. She read them and expanded upon them during the course of the hearing. They were clearly and logically presented and I commend her upon them. In the event, though I dismiss the appeal against conviction, I accept one of her three grounds as sound; and I also accept the ground of appeal against sentence as sound, and in result the sentence is varied. I propose to deal shortly with each of the grounds in relation to the appeal against conviction and then to consider the ground relating to sentence.

The appellant's first ground was that hearsay evidence had been wrongly admitted as part of the prosecution case. Traffic Officer Wright gave evidence of statements made to him by the driver of the van, who did not give evidence.

The prosecution had sought to justify this clearly hearsay evidence on the basis that the statements were made by the driver of the van to the traffic officer in the presence of the appellant and so were admissible as an exception to the hearsay rule. What had happened was that both the driver of the van and the appellant had been taken from the scene of the accident in the same ambulance to hospital. The traffic officer had travelled in the ambulance and had spoken to the driver of the van on the journey to the hospital. The prosecution relied on the principle that a statement made in the presence of a party is admissible evidence of its truth to the extent that it is expressly or impliedly admitted by the party's words or conduct. However, if the circumstances are such that the party cannot properly be expected to challenge the statement then his or her silence will afford no inference of acceptance of its truth by that party and the statement is not admissible. The appellant submitted that it had not been established that she had in any way acknowledged or accepted the truth of the van driver's statements to the traffic officer. She contended that because of injuries to her head (of which there was no actual evidence) she could not recall anything of events after the collision and therefore no acceptance of the truth of what the van driver said could be drawn from her silence.
Mr Larsen submitted that though there were matters that could be urged in support of an argument that the evidence was properly admitted nevertheless he was prepared to concede that the test of admissibility probably had not been met. He submitted, however, that the content of the actual statement of the van driver given in evidence was in the

circumstances of no consequence in relation to the matters that were important in the determination of the case. I accept the appellant's submission and am satisfied that the evidence of what the van driver said to the traffic officer should not have been admitted. However, after reading carefully the short passage in the evidence in which the traffic officer said what it was that the van driver had told him, I accept Mr Larsen's second submission that it was not of sufficient consequence on the real issues in the case as to justify allowing the appeal. I do not think the abbreviated and somewhat equivocal statements of the van driver affect the real issue.

The appellant's second ground was that the District Court did not hear all the available evidence in relation to the issue which was the appellant's specific defence. Ordinarily proof that the appellant had failed to give way to the van, which had the right of way, would be sufficient for the Court to infer that the appellant was at fault. See Police v Creedon [1976] 1 NZLR 571. The appellant, however, as I noted earlier, had defended the prosecution on the basis that when she commenced her turn into Camp Road the road was clear and she went on to contend that the collision was solely attributable to excessive speed on the part of the van driver. It was the appellant's contention that had the van been driven at a proper speed she would have been able to complete her turn before it could have travelled the distance from the curve in Fergusson Drive to the intersection. She submitted a number of points in relation to this ground. She first contended that she had been prejudiced by the failure of the prosecution to call the van driver. She said that she had been informed that he had been summoned and

would be giving evidence; this was on the day of the hearing before the case started. However, when the case was opened the court was told that the van driver had not answered his summons but the prosecution was nevertheless proceeding on its other evidence. This was unfortunate but I think the point Mr Larsen made, that had she considered she was unfairly prejudiced at that stage the appellant should have applied for an adjournment and sought the court's assistance in ensuring that the driver was made to attend, is sound. No doubt had she been legally represented this would have been recognised and an application made for a warrant to compel the driver's attendance at an adjourned hearing. I do not, however, think that his failure to attend can be a ground for allowing this appeal. The prosecution was not obliged to call the driver and in the event was able to prove its case without him. The appellant, it appears, was not aware that he would be called before she attended at the court, though no doubt she could well have expected that he would. Perhaps if she had been legally represented steps would have been taken to ensure his presence. It is, however, now too late for the appellant to complain about the absence of the van driver.

The next point relating to this ground that the appellant urged was that a witness whom she had called was not permitted to give evidence in respect of several matters upon which she wished him to give evidence. The witness was her husband, who is a sergeant in the Army and in the military police stationed at Trentham. He has been in the military police for some 11 years and has had considerable experience in the investigation of traffic accidents. The transcript of his evidence shows that there were three occasions on which objection was taken by the prosecuting officer to what he was

about to say and it would appear that these objections were upheld. Two of the objections related to skid marks upon the road. I note, however, that Sergeant Plaisted said that when he arrived at the scene of the accident, not long after it occurred, the road was wet and there were no skid marks but that when he went again some three days later to the same point on the road there were quite a number of skid marks. I think that the court's refusal to permit evidence in relation to those skid marks to be given is clearly correct. This intersection is a very busy one and, without labouring the point, it is obvious that there could be no certainty that the skid marks seen three days later were skid marks which had been produced by the vehicles involved in the original collision. The third objection related to evidence that Sergeant Plaisted was giving in the nature of opinion evidence, which was to be in the form of inferences that he drew as to the speed of the vehicles from the damage done to them and their position on the road. I do not think that Sergeant Plaisted was qualified as an expert to give such evidence. I think it would be necessary, for such evidence to be admissible, for the witness to qualify himself as an expert by showing that he had experience and qualifications in motor engineering, road design and physics. It is, in any event, very difficult to draw inferences as to speed from damage to vehicles or from the position of vehicles on the roadway. A great deal depends upon imponderable factors. I know that evidence is often given about damage to vehicles and the court is then invited to draw broad inferences as to the speed of the vehicles from it, but I think that little assistance can be gained from such evidence by itself as a general rule. Relatively modest speeds can lead to very

considerable damage; and the converse can equally apply. The position of a vehicle on the road after a collision is also much dependent upon the actions of the driver and so by itself does not assist much. The third point relating to this ground was that Sergeant Plaisted had been prevented from giving evidence as to speeds and distances. This is not disclosed by the record and as I understood the appellant she said that after the court had upheld the objections referred to above she gave up trying to lead further evidence from Sergeant Plaisted. If that be so, then again it is unfortunate and probably would not have occurred had she been represented by counsel. It is, however, too late now for the appellant to complain of this.

The appellant's third ground was that the District Court gave no findings of fact or law in its judgment, nor did it give any indication that the appellant's submissions as to her specific defence had been considered. The appellant submitted that she was entitled to know exactly what the court had decided about her submissions as to the facts and what the ruling in law was in relation to her efforts to establish the specific defence that she had raised. The appellant then referred to R v Awatere [1982] 1 NZLR 644 in support of this submission. The headnote to that case is as follows:

> "It must always be good judicial practice to provide a reasoned decision. Judges and Justices should always do their conscientious best to provide with their decisions reasons which can sensibly be regarded as adequate to the occasion. Failure to follow that normal judicial practice might jeopardise the decision on appeal. But, in the absence of a statutory requirement, there is no general

> and inflexible obligation that reasons must be given for judicial decisions."

It follows that the failure of the Justices to give their reasons for rejecting the appellant's defence is not in itself a ground for allowing the appeal. I add that the judgment in R v Awatere discusses at some length the position of a District Court in dealing with the many cases of this nature which come before it and yet emphasises the desirability of giving reasons for the court's decision. It would have been far better in this case if the Justices had dealt with the appellant's specific defence of excessive speed on the part of the van driver when giving their judgment, but the fact that they did not do so is not fatal to the judgment. I add that in my view, from what the Justices did say and from my reading of the evidence, they were justified in reaching the conclusion that the appellant should have given way to the van driver. I think there was evidence on which the Justices could be satisfied that she failed to see the van as it approached the intersection, when she should have done, or that she misjudged the time it would take her to make the turn. It has to be remembered that the distance from the curve in Fergusson Drive to the intersection was, on the basis most favourable to the appellant, 100 to 120 yards. However, since the matter of the speed of the van was the cardinal issue raised by the appellant, I want to emphasise that in fact there was no actual evidence to raise this issue. The appellant submitted that it was for the prosecution to prove that the van was not speeding and that if it failed to do that then there was a reasonable doubt about the van's speed and the appellant was entitled to the benefit of that doubt. That submission misconceives the

position. The fact that the van was speeding, if it was a fact, does not mean that the appellant should necessarily have been acquitted. The van driver was entitled to the right of way and excessive speed on his part would be a factor that was relevant to the question of whether the appellant had failed to yield him the right of way when she should have done so, but not the only factor. The extent of the excessive speed in the light of the traffic conditions at the time is obviously one very important factor that bears on the appellant's duty to yield the right of way. Excessive speed alone is not necessarily decisive. Further, it was not incumbent on the prosecution to negative excessive speed or otherwise deal with the matter until there was material in the evidence to raise the question as a reasonable possibility. See Police v Creedon (supra). In fact, as I have already said, there is no actual evidence of excessive speed; indeed, the only evidence on the point, that of Mrs Davies, is to the contrary. The appellant herself did not see the van until the last moment and so was unable to give any evidence on the point.

The appeal against conviction is accordingly dismissed and I turn to the appeal against sentence. Mr Larsen accepted that what the Justices did was wrong. They failed to give the appellant an opportunity to be heard on the matter of sentence before they imposed sentence. Plainly that was wrong. Had they given her the opportunity, they would doubtless have heard that she had already done a defensive driving course and her reasons for so doing it. They would, too, have been informed of her particular personal circumstances. I have considered the matters now raised by the appellant and, taking those into account and bearing in mind that the maximum

fine for this offence is $200, I reached the conclusion that the penalty imposed was in the circumstances clearly excessive. The sentence is accordingly varied by reducing the fine to $75 and by quashing the order that the appellant attend a defensive driving course. The order as to costs and witnesses' expenses must stand.

Solicitors for respondent: Luke, Cunningham & Clere (Wellington)