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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.124/84

663

BETWEEN THORBY
Appellant

A N D MINISTRY OF TRANSPORT
Respondent

Hearing: 5 June 1984

Counsel: D.J. McNaughton for Appellant
C.Q.M. Almao for Respondent

Judgment: 14-6-84

JUDGMENT OF GALLEN J.

This is an appeal against conviction on a charge of careless driving and is a rather unusual case. The factual background was set out with clarity in the very helpful points on appeal prepared and filed by Mr McNaughton. In summary, a Mr Smith contended that on 18 April 1983 as he was driving from Taumarunui to Turangi, a truck crossed the centre line of the roadway and struck the front of his car causing damage to the front and right hand side. He alleged that the truck did not stop following the accident; that he followed it to Taumarunui where he observed it make a "three point turn", during the course of which Mr Smith described seeing debris fall from the side of the truck which he identified as having come from his motor vehicle. He alleged

that the driver of the truck said "you prove it was me"; secondly, "Alright, alright, you prove it was my fault" and thirdly a statement to the effect that Mr Smith was driving too fast, driving on the wrong side of the road and could not prove anything.

The appellant admitted passing a cream coloured Cortina travelling up the hill in the vicinity of the place where the accident occurred. He denied that he was involved in any collision; he denied that debris from the Cortina car had fallen from his truck and denied that he made the statements testified to by Mr Smith. The appellant maintained that he was on the correct side of the roadway at all material times.

Evidence was given by a Traffic Officer as to an interview with the appellant and an inspection of the truck, as a result of which no visible signs of damage were found. The appellant's father also gave evidence that he had examined the truck driven by the appellant which was undamaged, contained no marks or scratches or foreign paint and in his view, the vehicle had not been involved in a collision.

The learned District Court Judge found that an accident had occurred, but he was not prepared to find that it was proved beyond reasonable doubt that the appellant was aware of the accident. In arriving at this finding, he expressed himself in such a manner as to indicate that he considered it probable the appellant was aware, but was left with a reasonable doubt.

On that basis, he dismissed those informations which related to failing to stop. This left him with a charge of careless driving. The learned District Court Judge stated that he was satisfied that the accident occurred on the appellant's incorrect side of the road and that the accident was as the result of carelessness on the part of the appellant. He therefore convicted the appellant. Having regard to the circumstances, he did not impose any disqualification but imposed a fine of $250 and ordered the appellant to pay Court costs of $20 and witnesses expenses of $67.20. He was also ordered to re-sit his driver's licence.

Mr McNaughton made as his primary submission, a contention that the learned District Court Judge had made a finding as to credibility between the appellant and Mr Smith, but gave no reasons for accepting the evidence of one and rejecting the evidence of the other. He contended that on the basis of that line of cases of which Connell v. Auckland City Council (1977) 1 N.Z.L.R. 630 is representative, the conviction could not stand because no reasons were given for the conclusion to which the learned District Court Judge came. The decision in Connell has been overtaken by the decision of the Court of Appeal in R. v. Awatere (1982) 1 N.Z.L.R. 644. The Court of Appeal in that case emphasised the desirability of reasons being given for particular conclusions but held that there was no general and inflexible obligation that reasons must be given.

In the case of R. v. MacPherson (1982) 1 N.Z.L.R. 650, Somers J. suggested it to be a desirable practice for a Judge to say why he preferred the evidence of one witness to that of another and that in its absence the finding might be infirm on appeal. However, the other two members of the Court preferred to accept what they stated as being the less strict view set out in R. v. Awatere (supra). In this case, the learned District Court Judge has not given the reason why he preferred the evidence of Mr Smith to that of the appellant, but I do not think that this vitiates his decision having regard to the circumstances and reading the whole of his decision and I do not think the appellant is entitled to succeed on this ground.

Mr McNaughton drew attention to the fact that the learned District Court Judge was not prepared to say that one person had told lies on oath although there were two conflicting stories. He submitted that in the absence of such a finding, he has not really determined the dispute between the two points of view and that the conviction cannot therefore stand. The comment made by the learned District Court Judge needs to be considered in context. It occurs in that part of his decision where he considers whether or not the appellant was aware that a collision had occurred. He does not specifically make such a statement in relation to the careless driving charge. I think it is important to remember that the learned District Court Judge had earlier in the case given a decision on the submission

of no case to answer and had incorporated this in his final decision in order to avoid repetition. A finding that it had not been proved beyond reasonable doubt that the appellant was not aware an accident had occurred, is not in conflict with a conclusion that the appellant had been guilty of careless driving. The reference to the telling of lies related to the awareness of the appellant of the occurrence of an accident and in particular to the alleged statements made by him during the confrontation with Mr Smith. The conclusion with regard to this aspect of the matter does not necessarily have any bearing on his conclusion relating to careless driving. On that, he was confronted by an account given by Mr Smith and an account given by the appellant. Having concluded that an accident occurred and accepting Mr Smith's evidence as to the position on the roadway at which the vehicles were when the collision occurred, he was entitled to come to the conclusion he did.

In the end, this is a question of credibility and one to which the learned District Court Judge was entitled to come having seen and assessed the witnesses and having listened to the evidence adduced. I do not think that his comments as to lies in connection with a different charge, affect his conclusion on the careless driving, nor do I think that having regard to the principles expressed in R. v. Awatere, that his failure to give reasons for accepting the account of Mr Smith

in relation to careless driving rather than that of the appellant, is a cause for allowing the appeal.

The appeal will therefore be dismissed.

R.D. Walker J

Solicitors for Appellant: Messrs McCaw, Lewis, Chapman, Hamilton

Solicitor for Respondent: Crown Solicitor, Hamilton