IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.602/83

Counsel

BETWEEN MICHAEL JOHN DARKE of Auckland

Appellant

AND MINISTRY OF TRANSPORT of Auckland

Respondent

M.30/83 (Rotorua)

BETWEEN MICHAEL JOHN DARKE of Auckland

Appellant

AND MINISTRY OF TRANSPORT of Auckland

Respondent

Hearing: 5th June, 1984.

Counsel: Appellant in person.
Miss Shine for Respondent.

Judgment: 8 June 1984

JUDGMENT OF TOMPKINS, J.

In both the above matters the Appellant has filed a notice of motion for leave to appeal to the Court of Appeal against determinations of the High Court on a question of law arising from two general appeals. Although they arise from different facts, they both concern s.60 of the Transport Act, 1962, and the questions posed are similar. Both motions were argued together before me. Hence I consider it preferable to deliver a judgment setting out my decision on both motions.

In the case of the Rotorua appeal, the motion for leave to appeal was filed out of time. The Appellant sought

leave to extend the time pursuant to s.144(2) of the Summary Proceedings Act, 1957. Miss Shine, for the Respondent, raising no objection, and the reason for the delay being adequately explained by the Appellant in his affidavit, I made an order extending the time within which the Appellant may give notice of his application for leave to appeal until the 5th June, 1984.

As in both hearings in the District Court, and in both hearings of the appeals in this Court, the Appellant appeared in person in support of these motions. He made his submissions in support of the motions with (judging from the comments made in the various judgments) the same ability, skill and clarity as he had displayed then.

THE PRINCIPLES APPLICABLE:

The motions are filed pursuant to s.144 of the Summary Proceedings Act, 1957. Subs.(2) provides that the High Court may grant leave -

> " if, in the opinion of that court, the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision. "

This provision was considered by the Court of Appeal in Clifford v. C.I.R. (No. 2) (1963) N.Z.L.R. 897. North, delivering the judgment of the Court, applied the similar language in R.2(b) of the Privy Council Rules and concludes:-

> " It will be observed, moreover, that s.144 of the Summary Proceedings Act, 1957, does not contain the word 'great' in relation to the words 'general or public importance'. Furthermore, it introduces a phrase which shows more clearly perhaps that it was the intention of the legislature that the power of the Court of Appeal to do what was right in any particular case should be unfettered. "

In Police v. Anderson (1972) N.Z.L.R. 233, the Court of Appeal were concerned with an appeal relating to the blood alcohol legislation. North, P. at p.237 said:-

> " It will be seen that this appeal raises questions of considerable public importance. Nevertheless I must make it plain to those who read my judgment that the powers of this court to review the judgment of Roper, J. are limited for s.144 of the Summary Proceedings Act, 1957, restricts appeals to this court from the Supreme Court in respect of summary offences to questions of law. "

Then at p.241 he emphasises that the judgment of Roper, J. is not reviewable unless it is first shown that his findings on the facts were dependent on an erroneous view of the law.

In Leveridge v. Kennedy (1959) N.Z.L.R. 1317, the Court of Appeal granted leave to appeal to that court, leave having been refused in this court. The decision which it was sought to appeal against was one dealing with the proper construction of R.11 of the Traffic Regulations, 1956. The Court of Appeal, in granting leave, pointed out at p.1318 that the regulation at issue dealing with what is commonly called "the right hand rule", was one of considerable importance to all motor users of the highway, to all those who are called upon to police and regulate motor traffic, and to all those who are called upon to adjudicate.

I approach these motions, therefore, with those observations in mind. The Appellant must satisfy this Court that there are questions of law involved in the appeals and also that those questions are ones which ought to be submitted to the Court of Appeal for decision by reason of their general or public importance or for any other reason. No "other reason" was advanced by the Appellant in the course of his submissions. But he submitted that they did involve questions of general or public importance on grounds similar to that found by the Court of Appeal

in Leveridge v. Kennedy (supra).

THE ROTORUA PROCEEDINGS:

The Appellant was charged that on the 18th January, 1982, he used a motor vehicle on Malfroy Road, Rotorua, carelessly.

The Appellant had been driving his vehicle along Malfroy Road intending to make a right hand turn into a driveway. Before this turn was completed there was a collision between the Appellant's vehicle and a vehicle travelling along Malfroy Road in the opposite direction.

After a defended hearing the learned District Court Judge, after setting out his reasons in some detail, found that the charge had been proved.

The Appellant's appeal came before Bisson, J. in the High Court at Rotorua on the 24th June, 1983. In his oral judgment the learned Judge reviewed the findings and the evidence and concluded that the learned District Court Judge was entitled to hold that the Appellant's driving into the position that he was when the impact occurred fell short of the degree of care which should be taken by a reasonable and prudent driver on that particular bend in the road which had its problems and which called for extra care.

THE AUCKLAND PROCEEDINGS:

The Appellant was charged that on the 15th March, 1983, he did use a motor vehicle on a road, namely, Bader Drive, carelessly.

The Appellant was following another vehicle along Bader Drive. A girl ran out in front of that other vehicle. The

driver saw the girl and stopped suddenly and the Appellant's vehicle then collided with the rear of the vehicle in front.

After a defended hearing, before Justices of the Peace, they found that the Appellant had been guilty of careless use of his motor vehicle in colliding with the rear of it when he had sufficient time to stop in the normal manner.

The Appellant's appeal against this conviction came before Moller, J. in this Court on the 17th November, 1983. By a judgment delivered on the 21st November, 1983, the learned Judge dealt with a number of submissions that had been raised by the Appellant and concluded that the appeal against conviction should be dismissed. The appeal against sentence was allowed.

THE QUESTIONS OF LAW:

The questions of law submitted by the Appellant in support of his application for leave to appeal in respect of the Rotorua proceedings were set out in his affidavit in support of the motion. They were:-

" (1) I submit that the weight of the evidence is such that as a point of law a conviction could not be sustained.

(2) Is the test of reasonable care made on a balance of a situation, does the action of another driver under any circumstances reduce the criteria of reasonable care? For instance, if a driver who is weaving all over the road hits a vehicle that is slowly backing out on to a road, is the backing driver careless because he happened to be there, or does the test of reasonable care have a balance in relation to other drivers normal use of a road? Is the test of reasonable care qualitative having regard in the main to those situations that arise in the normal course of road use or is the test universal and absolute?

(3) What is the standard of mens rea that is created by the offence under s.60 of the Transport Act and further does that standard as may be decided exclude a defence of honest belief based on reasonable grounds?

(4) What are the principles of the careless use test and have they regard to subjective circumstances and also regard to road conditions or other factors? And further in that test is there a possible consideration of a defence that an occurrence was an inevitable occurrence?

(5) What is the proper burden of proof that falls upon the prosecution on the charge of careless use and does the absence of any established explanation by a defendant entitle the court to decide absolute guilt? "

I do not propose to examine each of these questions in detail. The first, to the extent that it was based on a submission that there was no evidence upon which the finding of careless use could be justified, does raise a question of law (Edwards v. Bairstow (1956) A.C. 14). But it is a question that relates solely to the facts of the present case. The second, fourth and fifth questions relate essentially to the principles to be applied in determining whether the prosecution has proved a careless use charge. These principles have been dealt with in a number of cases. Those cited in the course of argument were Simpson v. Peat (1952) 2 Q.B. 24; Taylor v. Rogers (1960) 124 J.P. 217; and Police v. Chappell (1974) 1 N.Z.L.R. 225. In the last named case Roper, J. cited Simpson and Taylor in support of his view that -

> " The real question is - was the appellant exercising that degree of care and skill one expects from a reasonable and prudent driver? If he was not, he will not be excused merely because it arose from an error of judgment. "

The Appellant did not contend that these cases were wrongly decided, nor did he contend that there was any conflict in the authorities on the proper test to be applied. Nor did he submit that Bisson, J's findings were dependent on an erroneous view of the law. He contended that these and like dicta were based on decisions now given many years ago. He contended that they should now be reviewed by our Court of Appeal to see whether there should be a change in the manner in

which the section is to be applied because of a change in social conditions and the experience of cases that have been brought before the courts since.

The third question raised a question of mens rea on a charge under s.60. In Boyes v. Transport Department (1966) NZLR.171, Wilson, J. held that on such a charge the court must be satisfied that mens rea on the defendant's part is proved but the language used includes negative guilt such as inattention or thoughtlessness as well as positive intention if accompanied by acts or omissions which may be otherwise lawful but which unreasonably interfere with the lawful use of the road by other persons. The Appellant did not submit that this approach was in any way incorrect. His submission that he had an honest belief based on reasonable grounds that his driving was not careless misunderstands the application of the principle of mens rea to a charge of this kind.

Making all due allowance for the fact that the questions have been framed by a lay person, I cannot find in them questions of law of the kind required by s.144(2). As emerged in the course of the submissions, they in each case really involved the application of the facts of this particular incident to principles of law which have been well established and which were not, and indeed could not be, questioned. For these reasons leave to appeal in respect of the Rotorua proceedings must be refused.

The questions of law submitted by the Appellant in support of his application for leave in respect of the Auckland proceedings are again set out in the affidavit he filed in support. They read:-

" (1) In a situation where a person's behaviour is clearly provided for by a particular regulation and that person is in breach merely of that specific regulation, can that breach entirely of

its own accord entitle the statutory prosecution to succeed absolutely?

(2) Does the test of reasonable care have application in situations that fall into the extraordinary class of events? It is the test qualitative having regard in the main to those situations that arise in the normal course of road use, or is the test universal and absolute?

(3) What is the mens rea of the offence created by s.60 of the Transport Act and further, does that standard as may be decided exclude a defence of honest belief based on reasonable grounds?

(4) What are the principles of the careless use test and have they regard to subjective circumstances and also regard to road conditions or other factors. And further, in that test is there a possible consideration of a defence that an occurrence was an inevitable occurrence?

(5) What is the proper burden of proof that falls upon the prosecution on a charge of careless use and does the absence of explanation on the part of any defendant entitle the court to decide absolute guilt. "

The first question arises from a submission advanced by the Appellant that in the circumstances that occurred he ought to have been charged for a breach of R.22(3) of the Traffic Regulations, 1976. He submitted that if the facts were within that regulation then he should not be charged with the more serious careless use offence. I cannot see how this submission can give rise to a question of law. If the informant chooses to lay the more serious charge, then of course he assumes the burden of proving all the elements of that charge. If he is able to do so to the requisite standard of proof, then it must follow that he was entitled to lay that charge. That the facts may also amount to the lesser offence cannot affect the validity of the conviction on the more serious offence.

Question (2) is very similar to the second question on the Rotorua proceedings. Questions (3), (4) and (5) are identical to questions posed in the Rotorua proceedings. For the same reasons that I have expressed in connection with the Rotorua proceedings, I do not consider that any of these questions amount to questions of law of the kind required by s.144(2). In

the result, therefore, the motion for leave to appeal in respect of the Auckland proceedings must also be dismissed.

There will be no order for costs.

[signature] J

Solicitors:

Crown Solicitor, Auckland, for Respondent.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.602/83
M.30/83 (Rotorua)

BETWEEN MICHAEL JOHN DARKE
of Auckland

Appellant

A N D MINISTRY OF TRANSPORT,
Auckland

Respondent

JUDGMENT OF TOMPKINS, J.