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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. 1037/84

BETWEEN DAGG

APPELLANT

A N D COMMISSIONER OF POLICE

RESPONDENT

Hearing: 8 November 1984

Counsel: Levitt for Appellant
Jones for Respondent

Judgment: 8 November 1984

ORAL JUDGMENT OF THORP J.

This is an appeal against conviction and sentence imposed in the District Court at Auckland on 29th June 1984, on a charge of careless driving causing death.

The background facts were that the Appellant was driving a friend's motor vehicle along Great South Road towards Penrose at about 8 p.m. on a Saturday night. Outside the Ellerslie Fire Station he ran into a pedestrian, who died from the injuries he then received.

It was admitted at the commencement of the prosecution that the pedestrian had died from the injuries received in the accident, and that the pedestrian's post mortem blood analysis showed 219 milligrams of alcohol per 100 millilitres of blood.

Her Honour Judge Wallace concluded that the Appellant was in breach of a driver's normal duties of care, and in particular, the duty to drive at a reasonable speed and in such a manner as to be able to avoid pedestrians crossing the highway.

I am satisfied that her finding that the Appellant was driving at an excessive speed was one she was entitled to reach on the evidence before her. The evidence does not establish with any degree of precision the speed of the Appellant's vehicle, but the evidence in particular of Mrs Balcovic certainly justifies a conclusion that the car was going well above an acceptable speed for that highway.

There is discussion in the evidence, and in the judgment, of the possible significance of a finding that the brakes were defective. As I read the latter part of the judgment Her Honour concluded that that factor was of no great significance. That final conclusion is, if I may say so, supported by the evidence of the Appellant, (in the form of the statement he gave the police) and of one of his passengers who was called to give evidence. The Appellant spoke of seeing the pedestrian walk into his path in a manner which did not give him time to do anything to avoid the pedestrian. The passenger said that he saw the pedestrian only when he was in front of the car.

The point taken by Mr Levitt which seems to me that most favourable to the Appellant, is that the Court effectively placed upon the Appellant the obligation of proving that some extraordinary event occurred which would justify his failure to avoid the pedestrian. This, Mr Levitt says, in the circumstances the pedestrian was obviously intoxicated, fails to take adequate consideration of the possibility, it not probability, that his conduct would be unpredictable.

It is necessary for this Court to keep in mind that it is not seeing and hearing the witnesses and has not as good an appreciation of what the evidence meant as the trial Judge had.

In my view the statement by the Appellant that he saw the pedestrian walking out on to the road speaks

fairly strongly against any suggestion that there was a sudden aberrant action which he could not foresee which might have been a significant cause of the fatality which followed. Certainly, that statement together with the fact that the collision occurred a considerable way from the kerbside, seems to me to take the case to the point where, in the absence of some explanation, some evidence of extraordinary circumstance, the criminal standard of proof is met, by what is before the Court.

The points on appeal include as Point 5:-

> "The deceased was obviously quite drunk and it was mere speculation as to the manner in which he entered the roadway."

Any suggestion in the evidence of a reasonable possibility of aberrant conduct of causative significance would suffice. The only evidence is that the man walked from the side of the road the quite considerable distance needed on this highway to reach the point of collision, at a position either at or a few metres past the light-controlled intersection and pedestrian crossing.

Reasonable possibilities have to be reasonable, and I cannot hold that the learned trial Judge should have seen a reasonable doubt arising from the evidence before her such as would make the pedestrian's intoxication relevant in the fashion Mr Levitt proposes.

As to the appeal against sentence. In my experience the range of penalties for fatal road accidents, whether caused by careless or dangerous driving, is very broad. This young man has one previous conviction for speeding. I am not prepared to hold that the penalty imposed was manifestly excessive or inappropriate.

The appeals against conviction and sentence are

accordingly both dismissed. Taking into account the Appellant's age, the order for costs will be one of $75.

Solicitors:

B.J. Hart, Auckland, for Appellant
Crown Solicitors Office, Auckland, for Respondent