NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

AP.49/87

NOT RECOMMENDED

BETWEEN: JOBLIN

Appellant

AND: POLICE

Respondent

Hearing: 21 May 1987

Counsel: D.M. O'Neill for the Appellant
C.Q.M. Almao for the Respondent

Judgment: 21 May 1987

ORAL JUDGMENT OF DOOGUE J

This is an appeal against conviction and sentence.

The Appellant was convicted of driving a motor vehicle on State Highway 3 on 10 August 1986 in a manner which, having regard to all the circumstances of the case, might have been dangerous to the public.

He was disqualified from holding a drivers licence for eight months and fined $450 together with certain costs.

The District Court Judge, in his reasons for judgment, upheld the conviction in respect of two complaints in relation to the driving of the Appellant out of a number of complaints by the occupants of a vehicle travelling in the same direction as the Appellant along State Highway 3 on the day in question at about 7.30 in the evening.

The two matters upon which the District Court Judge relied for convicting the Appellant were, first, an incident just north of Otorohanga and, secondly, one in Kihikihi.

As to the incident just north of Otorohanga, the evidence of the complainant's witnesses was that the vehicle in which they were travelling had slowed down to allow a car pulling a trailer to turn left off State Highway 3. They said that the bus driven by the Appellant passed them on the wrong side of the road and around a right hand bend just immediately to the north of the particular intersection the car with the trailer was turning into.

The evidence varied slightly between the witnesses for the prosecution, but it was basically of the same nature - that there was a right hand bend, and that it was a relatively sharp bend, that the Appellant pulled out to pass both the car and the trailer and the witnesses' car, and that it was on the wrong side of the road as it went around the bend. There was some dispute about the speed of the vehicle and the

visibility that the Appellant might have had. The witnesses in the motor vehicle accepted that they were giving evidence as to their visibility from the level of their seats in the motor vehicle and accepted that the Appellant, who was driving a bus, was at a different level from the road with a different opportunity for visibility.

The second incident upon which the District Court Judge relied was an incident in Kihikihi. The evidence of the prosecution witnesses was in substance that the Appellant overtook another vehicle on an intersection in Kihikihi. The evidence was that at the time this occurred the witnesses were some 100 metres or more behind the bus driven by the Appellant. The evidence was that the bus again went over the middle line of the road at the time of the overtaking manoeuvre. In respect of that incident there was no real evidence of the speed of the Appellant's bus. The witnesses for the prosecution varied in their estimates and it was clear that they could be no more than estimates. The District Court Judge said that he accepted the estimates of speed but when the evidence of the prosecution witnesses is examined, there was no clear estimate of speed given by any of the witnesses for the prosecution.

There was no evidence before the Court of any road user being put at risk or inconvenienced in any way by the driving of the Appellant. That is not to say that it was incumbent upon the prosecution to prove any such matter as it

clearly is not, having regard to the various cases in respect of dangerous driving, to which aspects of the law I will turn again in a moment.

The District Court Judge chose to accept the evidence of the prosecution's witnesses in preference to that of the Appellant. He took the view that so far as the Otorohanga incident, to which I have referred, was concerned, that there was a blind bend and that the bus overtook on its incorrect side of the road as it went into the blind bend.

The District Court Judge referred to the issue of visibility. He referred to the Appellant's evidence that he had approximately 300 metres visibility at the time of overtaking, but appears to have rejected that estimate, although there was no evidence before him of the visibility from a bus of the type driven by the Appellant at the point of overtaking. The Appellant gave uncontradicted evidence of his height from the roadway at the time of driving his vehicle and the prosecution's witnesses, when questioned in respect of that, accepted that he may have had a different viewpoint from theirs in the car.

So far as the Kihikihi incident was concerned, the District Court Judge found that, like the overtaking in the area north of Otorohanga, was a potentially dangerous incident.

In respect of those two matters he found the charges established and convicted the Appellant. Before making such findings he had addressed the elements of dangerous driving in a manner consistent with the law. He had stated:-

> "What must be established to the criminal standard is driving which caused a real and actual potential harm to road users who are, or might reasonably have been, expected to have been affected by the driving of the defendant. It is not a case of actual danger, it is proof of a real potential risk to road users whether an accident occurred or not. One must therefore look at the driving. One must look at all the circumstances that look at whether there has been proof of a real harm if the unexpected occurs."

That statement is consistent with the decisions of this Court referred to me by Mr O'Neill for the Appellant, namely Transport Department v Giles, [1965] NZLR 726 and Transport Ministry v McIntosh & Anor, [1974] 1 NZLR 142.

The onus in this Court in respect of the appeal against conviction is on the Appellant to satisfy the Court that in all the circumstances the District Court Judge was not warranted in entering a conviction or at least that his mind should have been left in a state of reasonable doubt. Thus the onus is upon the Appellant to show the decision was wrong. Any advantages the District Court Judge may have had in seeing or hearing the witnesses have to be borne in mind.

At the conclusion of the Appellant's case in this Court I was left with the uneasy feeling that the Appellant in this matter, who is a professional bus driver and is dependent upon his driving record for his occupation, may have been

convicted in reliance upon evidence which was not sufficiently detailed in its facts, particularly in respect of the Otorohanga incident, but also in respect of the Kihikihi incident, for a conviction to be safely entered. I do not mean by that that I believe that the District Court Judge had necessarily reached the wrong conclusion on the evidence before him, but rather that the evidence as it stood was perhaps inadequate for such a finding to stand against the Appellant in the particular circumstances in which the case was run before the District Court Judge. In particular, it was not put to the prosecution's principal witness, the driver of the motor vehicle concerned, a Police Constable with considerable driving experience, the distance between the intersection and the bend north of Otorohanga or the nature of the topography or vegetation on the righthand side of that bend to enable the evidence of the Appellant, as to his visibility at the point of overtaking, to be objectively assessed.

Correspondingly, in respect of the Kihikihi incident, the evidence of the prosecution witnesses was that the Appellant's vehicle was 100 metres or more in front of them at the time of the overtaking manoeuvre on the intersection. There was no evidence, however, which disclosed that there was any other traffic about the intersection at that time and no evidence as to the visibility of the Appellant from his vehicle or of a corresponding vehicle as he approached that intersection. It may well have been that, viewed objectively, the overtaking

by him was a safe and proper one. However, as I have indicated, it was not a matter where the evidence was of such a nature that I feel it appropriate to quash the convictions, because on the evidence before the District Court Judge I regard it as reasonable for him to have reached the conclusion that he did.

However, the evidence as a whole left me with the uneasy suspicion that a possible injustice had been done to the Appellant and that in regard to a charge of dangerous driving and having regard to its seriousness, the appropriate course was for me to refer the matter back to the District Court for rehearing. However, having heard counsel and having regard to the practicalities of a rehearing, with the Appellant out of the country for a considerable period of time, I was invited to consider an alternative course, namely to exercise the powers which this Court has under Section 132 Summary Proceedings Act 1957 namely that if the evidence appears insufficient to support a conviction for the particular offence but appears to be sufficient to support a conviction for some other offence to which the defendant has not been prejudiced in his defence, this Court may, on such terms as it thinks fit, amend a conviction by substituting the other offence for the offence mentioned in the conviction, and if it thinks fit, quash the sentence imposed and either impose any sentence that the convicting Court could have imposed, whether more or less

severe, or deal with the defendant in any other way that the convicting Court could have dealt with him on the conviction as amended.

I accept the invitation of counsel to deal with the matter in that way and I accordingly amend the conviction by substituting the offence of driving carelessly, so that the conviction will relate to the Appellant having, on the 10th day of August 1986 at State Highway 3, Hamilton, committed an offence against Section 60 of the Transport Act 1962, in that he drove a motor vehicle on a road namely State Highway 3 carelessly. I should record that Mr O'Neill raised no objection to that course.

I will accordingly quash the sentence imposed and substitute for the sentence imposed a sentence of a fine of $250 leaving the order as to costs imposed by the District Court to stand. I understand those costs to have been $38.50 but I stand liable to correction on that and should it be some other amount imposed by the District Court, it is that amount that I intend to impose.

The appeal will accordingly be allowed to the extent indicated. I should record that I do not intend my judgment to be a reflection upon the District Court Judge as, if circumstances had been different, I would have referred the matter back to the District Court for rehearing.

J.

Solicitors for the Appellant:	O'Neill Allen & Co Hamilton
Solicitors for the Respondent:	Crown Solicitor Hamilton