IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

23/4

AP 38/93

474

NOT RECOMMENDED

BETWEEN

WILLIAMS

Appellant

AND

NEW ZEALAND POLICE

Respondent

Hearing: 16 March 1993

Counsel: C Peryer for the Appellant
Mrs A E Kiernan for the Respondent

Judgment: 16 March 1993

ORAL JUDGMENT OF HAMMOND J

This is an appeal against sentence by Mrs Williams. Early on Tuesday the 3rd November 1992 she was driving a Holden motor vehicle down a steep hill in Mt Roskill, Auckland. Mrs Williams is aged 49 years of age, and is a nurse. She was in fact going home after working the night shift. Simply put, she fell asleep at the wheel of her vehicle. It mounted the kerb and struck a concrete street-light pole. Although it is not apparent precisely how it happened, it is agreed on all fronts that in the course of this accident a pedestrian, who was walking his dog on the footpath, was struck and suffered two broken ribs, and his dog was killed.

After the initial impact, the appellant's vehicle continued on for quite some distance because it then had no brakes as a result of the accident.

The appellant was charged with causing bodily injury to this pedestrian by the careless use of a motor vehicle under s.56(1) of the Transport Act 1962. She was convicted and fined $1,800.00, Court costs of $95.00 were imposed, and she was disqualified from holding or obtaining any motor driver's licence for a period of one year commencing on the 9th February 1993.

There are no sentencing notes available to me on this matter. In accordance with the usual principle, I therefore consider this matter *de novo*. However, I am advised from the Bar by both the Crown and counsel for the appellant that their respective files show that in the Court below, the learned District Court Judge intended that $900.00 of the $1,800.00 "fine" should be reparation to the pedestrian who was struck. The Court file does not note this order.

In the normal case of an appeal to this Court the appellant has to demonstrate, as was said in ***Ministry of Transport v Graham*** [1990] 3 NZLR 249, 254, that the individual case is one in which the sentence is manifestly excessive, or inappropriate. Without sentencing notes, as I have said, I have to consider the matter *de novo*. But one also, in fairness to the learned Judge in the District Court below, endeavours to grasp in a general way what it is that the District Court Judge was seeking to achieve.

The essential question here, as both counsel in very helpful submissions have properly reminded me, is the degree of carelessness which was involved in this particular incident. Mr Peryer helpfully put before me the decision of the English Court of Appeal in ***Boswell*** [1984] 3 All ER 353. That case identified a

number of aggravating and mitigating factors in cases of this kind. That list has been adopted by our own Court of Appeal in ***R v Skerrett*** (CA 236/86, 9 December 1986). I was also reminded of a decision of Lord Lane in ***R v Krawec*** [1985] RTR 1 at page 3 in which His Lordship said, "The primary considerations are the quality of the driving; the extent to which the appellant on the particular occasion fell below the standard of the reasonably competent driver; in other words the degree of carelessness and culpability."

Counsel also helpfully took me through a number of comparative decisions in New Zealand, including ***Fisher v MOT*** (High Court, Auckland; AP 280/89; Henry J); ***Heenan v MOT*** (1989) 5 CRNZ 229 (Holland J); ***Davies v MOT*** (High Court, Timaru; AP 86/88; Tipping J); ***Mavor v MOT*** (High Court, Timaru; AP 21/89; Williamson J); and ***Coleman v MOT*** (High Court, Auckland; AP 40/91; Smellie J) which, as counsel noted, is probably the most apposite in this particular instance.

Of course, every case turns on its own circumstances. In this particular case I do not view the degree of culpability as having been high. It is always a matter of concern when a vehicle runs off the road because the driver who is responsible for the control of it falls asleep. But the plain facts of this matter are that none of the aggravating factors referred to by Lord Lane in ***Boswell*** were present, and a number of the mitigating factors were.

This appellant appears before me with a previously unblemished record. She is plainly a responsible citizen. The occurrence of this particular event has occasioned her great distress as to her actions and the impact of those actions on the pedestrian. I have not the slightest doubt, if I may again adopt the language of Lord Lane, that this was a "one-off" type of incident involving this appellant. She

has reinforced that impression by subsequently voluntarily taking part in a Defensive Driving Course.

Before I turn to the question of appropriate penalty in a case of this kind, it may be as well to say something here as to the question of reparation. With respect, I agree with the observations of Holland J in ***Heenan*** and in ***Sole*** that Courts ought to be careful in these post-Accident Compensation days not to confer upon the unfortunate victims of road accidents a form of compensation which is not available to their fellow citizens. In particular, I adopt his statement in ***Heenan*** that s.28 of the statute is directed essentially to victims of assaults and of deliberate acts causing physical harm, rather than careless ones.

In this particular case, in my view the fine imposed was manifestly excessive. Neither do I consider this was a proper case for reparation. And, in my view the period of disqualification imposed was excessive.

The sentences in the Court below will be quashed. I substitute instead a fine of $500.00, and the appellant is disqualified from holding or obtaining any motor driver's licence for a period of six months commencing from the 9th February 1993.

R G Hammond J

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