IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP.229/97

BETWEEN PHILLIP GORDON REID

Appellant

AND THE POLICE

Respondent

Hearing: 15 October 1997

Counsel: J B Samuel for Appellant
K M Williams for Respondent

Judgment: 17 October 1997

RESERVED JUDGMENT OF RANDERSON J

Solicitors:
John B Samuel, P O Box 105-205, Auckland for Appellant
Meredith Connell, Auckland for Crown

This is an appeal against conviction and sentence imposed in the District Court at Otahuhu on 18 September 1997. The appellant was convicted of a charge under s 55(1) of the Transport Act 1962 in that he caused the death of a 13 year old girl by driving a motor vehicle in a manner which, having regard to all circumstances of the case, was dangerous to the public. The offence was alleged to have occurred on 5 June 1996 at the intersection of Walmsley Rd and Mangere Rd, Mangere. The learned District Court Judge sentenced the appellant to 18 months imprisonment and disqualified him from holding or obtaining a driver's licence for a period of three years.

In a careful decision, the District Court Judge analysed the evidence from a number of witnesses and concluded that the appellant had breached a red light in making a right turn from Mangere Rd into Walmsley Rd in his large truck and trailer unit and had also failed to keep a proper look out. The victim and her younger brother were crossing a pedestrian crossing in Walmsley Rd and it was undisputed that they were, at the time, using a fully protected pedestrian crossing and were crossing with the benefit of the green light on the crossing. It was also undisputed that the weather conditions at the time were fine although overcast. Traffic conditions were moderate to heavy and the accident occurred shortly after 3 pm at a time when a number of school children were in the vicinity.

Appeal against conviction

Principles

When exercising the general right of appeal under s 115 of the Summary Proceedings Act 1957, this Court proceeds by way of rehearing in terms of s 119. As Lord Atkin stated in *Powell v Streatham Manor Nursing Home* (1935) AC 243, 255:

> "The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial Judge. But the Court is still a Court of Appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognise the onus upon the appellant to satisfy it that the decision below is wrong : it must recognise the essential advantage of the trial Judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of

> witnesses and the belief to be reposed in them an appellate Court can never recapture the initial advantage of the Judge who saw and believed."

This passage from the speech of Lord Atkin was cited with approval by McGregor J in *Toomey v Police* [1963] NZLR 699. More recently, Fisher J in *Herewini v Ministry of Transport* [1992] 3 NZLR 482, 489 summarised the principles in the following terms:

> "On a rehearing the appellate Court can come to its own decisions on questions of fact and law but the onus still lies upon the appellant to satisfy the appellate Court that the decision given in the Court below was wrong: *Powell and Wife v Streatham Manor Nursing Home* [1935] AC 243, 249, 255, 265; *Toomey v Police* [19673] NZLR 699, 700; *Page v Police* [1964] NZLR 974; *Reilly v Police* [1967] NZLR 842; D W McMullin, "Appeals from Magistrates: Principles Applicable" (1985) 34 NZLJ 183, 201, 263, [1964] NZLJ 54. The way in which the appellant must show that the decision was wrong will differ according to whether the ground for the appeal is:
>
> (i) a factual error in the assessment of the evidence upon which the conviction was based;
> (ii) a legal error in the application of the law to the facts as found;
> (iii) an error in the manner of exercising a judicial discretion; or
> (iv) a deficiency in the procedures which led to the conviction."

The present appeal

This appeal is concerned solely with factual error in the assessment of the evidence. In such a case, it is particularly important that weight is given to the assessment and findings of fact made by the District Court Judge including any inferences properly drawn from proven or accepted facts. There are no allegations of error of law and I am satisfied that the learned Judge properly directed himself as to the standard of proof and any other legal matters which he was required to address in relation to the ingredients of the offence. In that respect, the Judge referred to *R v Evans* (1963) 1 QB 412, *R v Gosney* (1971) 2 QB 674 and *R v Jones* [1986] 1 NZLR 1. On the issue of causation, the learned Judge referred to *R v Lewis* (1981) CRNZ 659 and *R v Storey* (1931) NZLR 417.

In his statement to the police and in evidence, the appellant had denied breaching the red light. He said that he had slowed to about five kilometres per hour and that there were

three or four vehicles in front of him as he approached the lights. He said that the lights were still green when he went over the double white lines and he noticed the lights change to amber as he did so. He thought that his maximum speed was about 25 kilometres per hour by the time he had negotiated the intersection. He conceded that he was accelerating through the intersection but said that he had started from a very slow speed at the lights. He did not see the children prior to the impact.

The critical point taken on appeal by Mr Samuel on behalf of the appellant was that there was no or no reliable evidence that the appellant had breached the red light. It was also argued on the appellant's behalf that the speed at which the appellant's truck and trailer unit was travelling through the intersection was the critical factor. It was argued that the evidence, particularly of the witness Miss Cammidge, established that the truck was only travelling at a slow speed and, for that reason, it was quite possible that the appellant's version of events was correct and that he had not breached the red light.

In order to analyse the evidence, it is important to understand the phasing of the lights at this particular intersection. The critical factors are:

(i) Westbound traffic turning right from Mangere Rd into Walmsley Rd may do so when there is a green arrow. The traffic signals are clearly visible from an overhead gantry and two other locations at the intersection.

(ii) For the appellant, there would have been a three second amber light before the arrow governing his turn, changed to red.

(iii) The pedestrian phase for the victim and her brother did not commence until a further one second had elapsed after the appellant's red light had shown, ie, four seconds in total after the end of the green phase in the appellant's direction of approach.

(iv) For traffic travelling east on Mangere Rd in the opposite direction to the appellant, the green light shows one second after the red light would have appeared for the appellant.

It was common ground that the impact occurred just over half way across the pedestrian crossing and that the victim and her brother would have taken between 2.2 and 5 seconds to reach the point of impact, depending on how quickly they moved. It was also common ground that the appellant's truck and trailer unit would have taken approximately three to six seconds after the light turned red to travel the distance of approximately 30 metres from the traffic lights to the point of impact depending on the speed of the truck (adopting for these purposes a speed of between 15 and 30 kilometres per hour). There was some debate as to exactly where the point of impact was but the preponderance of evidence indicates that it was part way along the right hand side of the truck as distinct from the trailer unit.

In argument, Mr Samuel outlined a number of different scenarios designed to show that the appellant's version of the events was likely to be correct based on various speeds, time and distances. The difficulty with this approach is that much depends on the variables - particularly the speed of the appellant's vehicle. I prefer the approach, as did the learned Judge, of considering the detailed evidence of the eye witnesses to the accident. In this respect, the Judge concluded that there was overwhelming evidence that the appellant had indeed breached the red light. Having carefully reviewed all the notes of evidence and the submissions made in this Court, I have no hesitation in accepting that conclusion.

There were some seven eye witnesses to the accident, all in motor vehicles waiting at different parts of the intersection. While it is true that none of these witnesses could be said to have reliably witnessed the appellant's truck and trailer unit crossing the double white lines while the light was red, nevertheless taken as a whole, the evidence clearly establishes by necessary inference from the phasing of the lights that the appellant must have breached the red light. This was the conclusion and finding of fact reached by the

It will be recalled that Mr Campbell would not have been able to move off on the green light for some four seconds after the end of the green light phase for the appellant. In view of Mr Campbell's description of the sequence of events, the learned Judge was perfectly entitled to draw the inference, as he did, that the appellant must have breached the red light.

There was solid support for Mr Campbell's version of events from a Mr Murphy who was a professional driver with some 31 years of experience and further corroboration from a Mr Ilton. The latter was making a left turn into Walmsley Rd from Mangere Rd and, in his case, it will be recalled that there was a delay of some six seconds in his light turning green after the appellant's light turned red. At that point, Mr Ilton placed the appellant's truck and trailer unit in the middle of the intersection.

There was some criticism on behalf of the appellant of the learned Judge's failure to make a definitive finding about the speed of the appellant's vehicle. At page 12 of his decision, the Judge summarised his findings in that respect. It is true that there were a variety of speed estimates ranging from 20 to 25 kilometres per hour to 50 to 60 kilometres per hour. Miss Williams properly accepted on behalf of the Crown that there was no reliable evidence that the appellant was exceeding the speed limit. Such evidence as there is suggests that the appellant was travelling more slowly than that although he did concede that he was accelerating as he moved across the intersection. Against that, the Judge noted that there were a number of subjective statements by witnesses suggesting that the rig was moving reasonably quickly. Had it been moving at the very slow speed suggested by the appellant, it seems unlikely that these witnesses would have spoken in the terms which they did. For present purposes, I consider it is reasonable to conclude that the appellant was not exceeding the speed limit but was travelling at a moderate speed as his vehicle came through the intersection.

In summary, I consider that the learned Judge was fully warranted in concluding on the clear evidence of the eye witnesses that the appellant had breached the red light and had also failed to keep a proper look out in not seeing the children at the crossing when they were clearly there to be seen. The Judge was also right to conclude that, in the

circumstances, the appellant's driving constituted dangerous driving within the meaning of s 55 of the Transport Act.

Appeal against sentence

In approaching this aspect of the appeal, I must be reasonably satisfied that the sentence is manifestly excessive, wrong in principle, or that there are exceptional circumstances calling for its revision. Again, the learned Judge carefully considered the various competing factors and concluded that although the particular circumstances did not constitute the high end of the scale of dangerousness, neither was he persuaded that it fell at the lower end of such driving. I agree with that assessment. There is a higher standard of care expected from a professional driver, particularly when operating a large truck and trailer unit of some 60 feet in length on a busy highway in circumstances where children were known to be in the area. The circumstances disclosed a clear breach of the red light and the failure to keep a proper look out. The consequences were tragic and one can imagine the distress to the victim's family which is noted in the victim impact report considered by the learned Judge.

Moreover, the appellant's previous driving record is poor to say the least. He has some three convictions for careless driving, one for driving dangerously, one for exceeding the speed limit and nine for driving while disqualified. While it is true that he has not had any driving convictions since the dangerous driving charge in July 1991 and is now 27 years of age, I cannot overlook the previous record and the seriousness of the accident which occurred.

In the appellant's favour are his apparent remorse for the accident and its consequences, the fact that there was no question of alcohol involved, and the fact that there was no evidence of excessive speed.

The maximum penalty for the offence is five years imprisonment. The Court of Appeal held in *R v Yatri* (CA.72/92, 13 July 1992) that the range of circumstances for a

dangerous driving charge precludes any pattern being set. Delivering the judgment of the Court, Casey J said:

> "The maximum sentence is five years reflecting the gravity of the consequences where death or injury has resulted. The Court must take that into account and endeavour to arrive at a sentence which will mark the concern of society for the loss of innocent life but at the same time allow for the degree of fault by the offending driver."

In that case, a sentence of 18 months imprisonment was upheld. The Court regarded the sentence as lenient in the circumstances where three adults were killed and two children injured in the other car. In *R v Lynn* (CA.137/88, 12 July 1988) a term of two years imprisonment was upheld for a conviction for dangerous driving causing death where the appellant had breached a stop sign at 50 kilometres per hour striking a motorcyclist. In that case, the Court referred to its earlier decision in *R v Skerrett* CA.236/86, 9 December 1986 in which the Court had stated:

> "These cases indicate that sentences imposed in cases of death by reckless or dangerous driving, whether prosecuted as manslaughter or under s 55 of the Transport Act, may cover a wide range. Because so many factors have to be taken into account the discretion of the sentencing Judge must be recognised. Nevertheless the public interest requires that the penalties imposed by the Court for bad cases of driving, with the consequences of bodily injury or death, should reflect the concerns that the public have in the preservation of proper standards of driving on our roads."

Despite all that was said on the appellant's behalf, I am not persuaded that a sentence of 18 months imprisonment was manifestly excessive or wrong in principle or that it should be interfered with on any other ground. It was contended by the appellant that the appropriate sentence would have been one of periodic detention. Not only was there evidence of previous breaches of periodic detention by the appellant, but I consider and respectfully agree with the view of McGechan J expressed in *Police v Palemene* (Wellington Registry, AP.328/95, 28 February 1996) that dangerous driving causing death will normally result in imprisonment. I also agree with His Honour's remarks that there is a need for social condemnation of such offending and for deterrence. There is ample support for McGechan J's view that the attitude to death caused by road accidents

is hardening in the community. There is nothing in the appellant's personal or other circumstances or the circumstances of the offending which would have warranted the learned Judge in taking a different view in the present case. The Judge considered and rejected a plea for a suspended sentence. That plea, properly in my view, was not pursued in this Court.

Accordingly, the appeal against conviction and the appeal against sentence are both dismissed.