48/86

SUPREME COURT OF QUEENSLAND — FULL COURT

R v WEBB

Connolly, Williams and Ambrose JJ

4 July 1986 — [1986] 2 Qd R 446; (1986) 3 MVR 302

MOTOR TRAFFIC – DANGEROUS DRIVING – OPEN ROAD – DRIVER BLINDED BY HEADLIGHTS OF ONCOMING VEHICLE – DRIVER VEERING ACROSS DOUBLE LINES ONTO INCORRECT SIDE OF CARRIAGEWAY – IMPACT WITH ONCOMING VEHICLE – WHETHER DANGEROUS DRIVING – TESTS TO BE APPLIED.

1. In dealing with a case of dangerous driving, the Court must consider objectively whether the driving in the circumstances was dangerous to the public and whether there was some fault on the part of the driver causing the danger.

***R v Coventry* [1938] HCA 31; (1938) 59 CLR 633; [1938] ALR 420;**
***R v Gosney* (1971) 2 QB 674; (1971) 3 WLR 343; (1971) 3 All ER 220; 55 Cr App R 502, applied.**

2. Where a driver blinded by lights of an oncoming vehicle made an error of judgment in crossing double lines and collided with the oncoming vehicle, it was open to the Court to find fault on the part of the driver and when viewed objectively, guilty of dangerous driving.

WILLIAMS J: (with whom Connolly and Ambrose JJ agreed) **[1]** The applicant, Maxine Webb, was convicted of the offence of dangerous driving in the Gladstone Magistrates' Court on 15th July 1985. Apparently there was some confusion as to whether the appeal lay to this Court or to the District Court, and in consequence the notice of appeal was not lodged within 14 days (the then applicable time limit). In fact a notice of appeal, containing grounds, was filed on 21st August 1985 and in consequence it became necessary for there to be an application for extension of time within which to appeal. The Crown did not oppose the granting of such leave, and in the circumstances time should be extended in this case.

The charge of dangerous driving arose out of a collision between a motor car being driven by the applicant and another being driven by a man named Lewis which occurred on Benaraby Road, Gladstone at about 6.30 pm on 2nd July 1984. The collision occurred on what the Magistrate described as a "relatively straight section of highway", though there was a curve to the left in the applicant's direction of travel. It was open road, and a speed limit of 100 km/h applied. Lewis's vehicle had come over the crest of a hill some 100 metres prior to the point of impact. The bitumen carriageway was 7.35 metres wide, divided by a double continuous white centre line. The lane in which Lewis was travelling was 3.65 metres wide. On the applicant's left there was a gravel shoulder (relatively narrow) before concrete kerbing, and then a cliff face – the road had been cut into the side of a hill at that point.

The Magistrate found that Lewis's vehicle was travelling at about 100 km/h, wholly within its correct laneway, and that he dipped the headlights on his vehicle when he observed the other approaching. In making those findings the Magistrate rejected certain evidence given by the applicant, namely that Lewis's vehicle was straddling the centre line to the extent of some 3 ft. and that its headlights were on high-beam. The applicant's explanation for the collision was that she was blinded by the oncoming headlights (she placed the car straddling the centre line) and that she could not "go left because there is a big cliff on the side" so she put her foot on the brakes and "turned the other way". There was no dispute that the collision occurred on Lewis's side of the double centre line.

[2] Though the Magistrate rejected some of the applicant's evidence as indicated above, he stated that he considered "the explanation of the defendant has elements of consistency in that she was blinded by the headlights of Lewis's vehicle and I feel obliged to accept such evidence". He pointed out in his reasons that the headlights of some vehicles, even when dipped, interfere

with the visibility of oncoming drivers; he could not say that Lewis's vehicle fell into that category but "on the evidence of the defendant it may well have been such a vehicle". The Magistrate also observed that when the applicant made her election to swerve to the right there was still some distance separating the vehicles which could well have been utilised by her in braking and veering left - where there was ample carriageway even if Lewis's vehicle was straddling the centre line. He then proceeded to make critical findings in the following passage:

> "On those accepted facts then the question posed is did the defendant drive her vehicle in a manner dangerous to the person and property of Lewis and that question can only be answered by adopting the objective test in the light of the conduct of an experienced driver in like circumstances. Would an experienced driver then, blinded by headlights of an approaching vehicle in the attendant circumstances as presented to this defendant, adopt the course of driving conduct by endeavouring to escape Lewis's vehicle in transgressing marked double lines to its incorrect side of the road way. In all the circumstances I am unable to accept an experienced driver would have so reacted. Accordingly therefore I am satisfied beyond a reasonable doubt that the defendant did drive in a manner dangerous to an actual member of the public per medium of one Lewis. On the evidence I do not consider the defendant could rely on any mistake of fact relative to the area of road way available to her nor for any other reason as in the circumstances the accepted facts clearly show the position to the otherwise, and therefore any such belief could not be held to be reasonable. Accordingly therefore I find the defendant guilty ... "

It should also be noted that in the course of argument on the question of sentence the Magistrate indicated that he regarded what happened as "an error of judgment" on the part of the applicant – "she's taken the wrong course". She appeals against conviction on the following substantive grounds:

> "(a) the Stipendiary Magistrate having found that the appellant was blinded by the light of an oncoming vehicle, should have had a reasonable doubt at least as to the appellant's guilt.
>]
> (b) the Stipendiary Magistrate having found that the appellant made an error of judgment should have had reasonable doubt as to her guilt in the circumstances of the particular case."

There are two steps involved in determining that a driver should be convicted of dangerous driving. Firstly, the driving (that is what actually occurred) must be considered objectively by the tribunal of fact and be held to be dangerous. (*R v Coventry* [1938] HCA 31; (1938) 59 CLR 633; [1938] ALR 420, *R v Warner* (1980) Qd R 207; 1 A Crim R 18, *R v Gosney* (1971) 2 QB 674). Secondly, there must be some fault on the part of the driver which caused that danger to the public. (*R v Gosney*, *R v Warner*, *R v Hinz* (1972) Qd R 272 and *R v Smith* (1976) WAR 97). **[3]** It was submitted on behalf of the applicant that something more than an "error of judgment" was required before either question could be decided against the driver. But that does not appear to be the law. The classical statement is still that of Latham CJ, Rich, Dixon and McTiernan JJ in *R v Coventry* at p638:

> "... speaking generally, the expression 'driving at a speed, or in a manner, which is dangerous to the public' describes the actual behaviour of the driver and does not require any given state of mind as an essential element of the offence. It is, in our opinion, wrong to exclude an act or omission from 'manner of driving' because it is casual or transitory in some senses in which these somewhat flexible words may be understood ... Sudden, even though mistaken, action in a critical situation may not, in all circumstances of a case, constitute driving to the danger of the public. But casual behaviour on the roads and momentary lapses of attention, if they result in danger to the public, are not outside the prohibition of that provision merely because they are casual or momentary. Further, 'manner of driving' includes, in our opinion, all matters connected with the management and control of a car by a driver when it is being driven."

To that can be added the often quoted observation of Atkinson J in delivering the judgment of the Court of Criminal Appeal in *R v Evans* (1963) 1 QB 412 at 418; (1962) 3 All ER 1086; (1963) 47 Cr App R 62:

> "It is quite clear from the reported cases that if a driver in fact adopts a manner of driving which the jury thinks was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best."

If further authority be needed I would refer to the unreported decision of this Court in *R v Flaherty: Attorney-General* – Appellant (CA No. 166 of 1982, judgment delivered 20th September, 1982). That was an appeal by the Attorney-General against the sentence imposed for the offence of dangerous driving causing grievous bodily harm. In dismissing the appeal Sheahan J (with whom Macrossan J agreed) after referring to a number of cases said:

> "However, those guidelines clearly recognise – and with respect I consider rightly – that there is a vast difference in culpability between momentary inattention and reckless or deliberate course of driving over an appreciable interval of time in a manner dangerous to the public ... I prefer to regard the collision as a result more of momentary inattention than of reckless or deliberate disregard for the safety of others."

The Court of Criminal Appeal clearly recognised that momentary inattention could result in a finding of dangerous driving, but such was a very relevant circumstance when it came to penalty.

The Magistrate clearly held that regarded objectively the course of driving (that is travelling across the double centre lines on to the incorrect side of the carriageway) constituted dangerous driving. It is difficult to see how, given the authorities referred to above, he could have come to any other conclusion. But the real point for his determination was whether or not there was fault on the part of the applicant causing that situation. In *Warner's case* (at p210) the Court of Criminal Appeal held that on a charge of dangerous driving the tribunal of fact may have to consider defences under s25 in combination with s24 of the *Criminal Code*. Section 25 deals with "extraordinary emergencies" and in broad terms provides that a person is not criminally responsible for an act done "under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise." The existence of the emergency could either be factual or the product of an honest and reasonable, but mistaken, belief.

[4] In my view the Magistrate directed his mind to those considerations. It was contended for the applicant that she had an honest and reasonable, but mistaken, belief that because the other vehicle was straddling the centre line she could not pass safely between it and the cliff face. The Magistrate held, for sound reasons which he gave, that such belief was not reasonable. He also held that an "experienced driver" who was "blinded by headlights of an approaching vehicle" would not cross the double centre lines to the incorrect side of the road way. In so reasoning, in my view he applied the objective test laid down in s25 of the Code.

No point was taken during argument as to the Magistrate's use of the term "experienced driver". One finds the expression "competent and careful driver" used most extensively in the authorities. But it is interesting to note that Megaw LJ in delivering the judgment of the Court of Appeal in *R v Gosney* at 680 appears to equate the "competent and careful driver" with a "competent and experienced driver". It is worth quoting the passage:

> "We would state briefly what in our judgment the law was and is on this question of fault in the offence of driving in a dangerous manner. It is not an absolute offence. In order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some fault on the part of the driver, causing that situation. 'Fault' certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame. Thus there is fault if an experienced or naturally poor driver, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver. Fault involves a failure, a falling below the care or skill of a competent and experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case. A fault in that sense, even though it be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient. The fault need not be the sole cause of the dangerous situation. It is enough if it is, looked at sensibly, a cause. Such a fault will often be sufficiently proved as an inference from the very facts of the situation."

I am satisfied that the Magistrate correctly directed himself as to the law to be applied, and considered the relevant questions. The evidence supported the findings which he made. In those circumstances the appeal against conviction should be dismissed. There was also an appeal against sentence but that was not argued. In the circumstances I would extend the time for appealing, but dismiss the appeal. I would strike out the application for leave to appeal against sentence.
[Judgment supplied courtesy of CSM Queensland.]