10/72

SUPREME COURT OF VICTORIA

JOHNSEN v MELNIK

Gillard J

19 June 1972

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – TWO VEHICLES COLLIDED AT AN INTERSECTION – DAMAGE CAUSED TO BOTH VEHICLES – MAGISTRATE PREFERRED THE VERSION GIVEN BY THE DRIVER WHO ENTERED THE INTERSECTION ON THE RIGHT OF THE OTHER DRIVER – ORDER MADE BY MAGISTRATE IN FULL – COUNTERCLAIM DISMISSED – WHETHER REASONS FOR JUDGMENT SUFFICIENT – MAGISTRATE NOT IN ERROR.

HELD: Order nisi discharged.
1. Merely because the Magistrate did not specifically say that he did not take into account the fact of the denial does not mean that be did not take into account that fact. Over and over again it has been stated in the Supreme Court that merely because a Magistrate does not specifically refer to some matter that had emerged in the course of the evidence or the course of addresses by counsel, that he failed to take the matter into account merely because he did not say something about it. It might be of such trivial effect upon the overall judgment that the Magistrate refrained, either from politeness or for some other reason, expressly making some reference to it.

2. The only reasonable conclusion to draw from these proceedings, if one accepts the complainant's evidence, was that drawn by the Magistrate in his findings. In the affidavit they are rather ambiguously phrased, but giving the best attention to his decision that one can give, remembering the difficulties of taking down a complete note of what is expressed, it would appear that the Magistrate, being as polite to the litigants as he could, deliberately accepted the complainant's version of the collision.

3. Accordingly, the Magistrate's decision that the defendant was negligent, that is that Mrs Johnsen the driver of the defendants' car was negligent, clearly was a correct one.

GILLARD J: This is the return of an order nisi granted upon the 8 November 1971, by Master Bergere to review a decision given by the Magistrates' Court, Elsternwick on 24 September 1971, when Joseph Melnik recovered a sum of $378.69 from the defendants Kell and Laila Johnsen.

It appeared that on the 23 April 1971, a motor vehicle driven by Melnik collided with a motor vehicle driven by Laila Johnsen at the intersection of Glenhuntly Road and Kean Street, Glenhuntly. It appears that Melnik was driving his Hillman car northerly in Kean Street to the intersection whilst Mrs Johnsen was driving her car going east in Glenhuntly Road and the cars collided somewhere near the most easternmost tram rail, the right-hand front corner of Mrs Johnsen's car making contact with the left-hand front corner of Mr Melnik's car. There is some conflict of evidence as to where the precise contact was made but taking the evidence generally that is a fair description of the nature of the contact.

It is not an infrequent experience in the Courts to find that in these simplest of accidents there are two conflicting and quite irreconcilable versions of what happened. The complainant says that he stopped at the intersection, looked to his right but his view of traffic coming from his right was obstructed by the presence of a truck. He therefore edged out very slowly until he could get a view past the truck and says that he then decided to cross as there was no danger of traffic from his right. He looked to his left at some stage and had noticed the defendant's motor car travelling at about 35 miles an hour approaching the intersection and he started to cross the intersection slowly at one to two miles per hour. He kept on looking both ways, taking glances both ways, and he did not notice any variation in speed or course of the defendant's car so he stopped giving her plenty of room to move across his front between the kerb line and the front of his motor car. She did not veer to the left but at the last moment apparently attempted to avoid him but made contact.

The defendant's story is quite different. She says that she saw the complainant's motor car stationary at the intersection and in order to comply with the regulations she stopped at the intersection to allow the other car to cross. But instead of it moving off, it remained stationary presumably to allow westbound traffic to cross. She therefore commenced to cross the intersection and at that moment the complainant drove his motor car into the intersection and the two vehicles collided. It may be seen that these two-versions are quite irreconcilable with one another, and the Magistrate was faced with the problem that many judicial bodies these days are faced with, which of those two versions should be accepted remembering of course the complainant had the onus of proof in relation to his claim whilst the defendant had the onus of proof in relation to the counterclaim. The Stipendiary magistrate preferred the complainant's version, and in the ultimate, he was faced with a question of credibility of various witnesses.

Nevertheless, the defendants sought to review his decision because involved in his decision was that the defendant Laila Johnsen was negligent and the complainant Joseph Melnik was guilty neither of negligence in relation to Kell and Laila Johnsen nor of contributory negligence in relation to his own claim.

Judgment apparently was given against both Mr and Mrs Johnsen and, accordingly they seek to have that judgment set aside and seek a finding of contributory negligence or of negligence against Joseph Melnik.

In granting the order nisi to review, the Master permitted it on two grounds. The first ground is as follows:–

> "That in determining the facts and circumstances at least between the two motor vehicles the Magistrate was wrong law in taking into account the nature and extent of the damage to the vehicles and their movements after the collision in the absence of any expert or other evidence as to such damage and as to the forces necessary to produce such damage and such movements."

A good deal of confusion has arisen as to the use of testimony despite what was said by the High Court in *Clark v Ryan* [1960] HCA 42; (1960) 103 CLR 486; [1960] ALR 524; 34 ALJR 118. Here evidence was given of damage to the vehicles; here evidence was given of their movements, but there was a conflict in that evidence, in particular the conflict was between the two basic versions which I have narrated above. The complainant says, in effect, that Mrs Johnsen drove her motor car at thirty five miles an hour without either deviating in course or varying in speed, and the vehicles came into collision. On the other hand, Mrs Johnsen together with her daughter, gave testimony that she had stopped at the intersection and had just started off again moving into the intersection when the collision occurred.

What damage would be the more likely result in each event? Applying one's commonsense and experience of ordinary men, one would expect that damage caused by a vehicle travelling at 35 miles an hour would be far greater than damage caused by a vehicle which had just moved off from a stop, and it is in this sense and in this sense only I believe the Magistrate was applying his mind. He had come to the conclusion that Mrs Johnsen had not stopped her car. He rejected the evidence of Mrs Johnsen and her daughter and one of the matters which supported that view was the extensive damage to the cars. It would appear that the parties had agreed upon the amount of the cost of repairs, and from the amount involved, one may very well deduce the extent of the damage to the two vehicles. It is in this context, and in this context only, that the Magistrate used the evidence, and he was not wrong in law in taking into account the nature and extent of the damage to the vehicles, or of their movement after the collision. The evidence was there before him, and the sole question is what are the proper inferences to draw from the testimony? In my view, it was open to the Magistrate to draw the inference he did.

It must be remembered that the rule in relation to reviewing questions of fact in this Court is quite a strict one, and it is stated by the Full Court in *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at p351; (1961) 19 LGRA 232, in this passage:

> "We have come to the conclusion that we should adopt the view that the Supreme Court on appeal from Petty Sessions by way of Order to Review should with regard to any question of fact act according to long-established practice, and treat the matter in the same way as an appeal from the verdict of a jury. ... It is a very long established practice and appears to have been adopted by the Full Court in

> the early days of the colony by analogy to the practice followed in England under earlier procedures whereby decisions of magistrates were called into question... The rule which prevails with respect to appeals from the County Court or from a single judge of the Supreme Court to the Full Court or from this Court to the High Court and which is stated in *Dearman v Dearman* [1908] HCA 84; (1908) 7 CLR 549 therefore does not apply. Accordingly, it is not for this Court to make up its own mind upon the evidence, though giving weight if necessary to the fact that the tribunal below has seen the witness. This Court had merely to see whether there was evidence upon which the magistrate might as a reasonable man come to the conclusion to which he did come."

In my view there was evidence available to the Magistrate of the nature and extent of the damage to the vehicles, and he did have some description of the damage.

Perhaps I should here interpolate, it is with reservation I accept Mr Tebbutt's assurance that the affidavit before this Court gives a complete account of the evidence of some of the witnesses. I believe that the evidence is too cryptic in its form in the affidavits and I would be surprised to find that it came out in that way before the Magistrate.

Nevertheless, I am bound by the evidence which appears in the affidavit, and therefore I do not presume to go beyond the testimony set out in the affidavit. Taking that evidence it appears to me that it was open to the Magistrate to use the evidence of the nature and extent of the damage to the vehicles, and their movements after the collision, as some indication of where the truth lay in relation to the two versions. As a reasonable man he adopted a test which I believe was quite open to him to do, to prefer the complainant's version having regard to the evidence he heard as to the nature and extent of the damage to the vehicles and their movements after the collision. That is all I want to say on the first ground.

The second ground reads as follows:

> "That the Magistrate's findings were contrary to the evidence in that;
> (a) there was no evidence the defendant driver Laila Johnsen saw nothing until the emergency arose, nor that Mrs Plummer was too concerned with her own driving prior to the collision to be able to give reliable evidence, nor that Miss Wencke Johnsen did not notice anything until the accident happened, and
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> (b) that in determining the reliability of the evidence of the complainant, the Magistrate did not take into account the fact that the complainant denied seeing Mrs Plummer's car or any other car and did not take into account whether or not the complainant was obliged to allow the car driven by Mrs Plummer, or any other car, right of way at the intersection."

It may be accepted as Mr Shatin, who appears to uphold the Magistrate's findings, conceded that those findings were contrary to some of the evidence given: but it was evidence given by witnesses in conflict with evidence given by the complainant and his witness. It is said in the ground there was no evidence that the defendant driver Laila Johnsen saw nothing until the emergency rose. It is true there was no direct evidence of that, but if the Stipendiary Magistrate accepts the complainant's evidence, then he is letting Mrs Johnsen down quite politely by saying not that she was a liar, but that she could not have seen anything until the emergency arose. It was said that the evidence did not establish that Mrs Plummer was too concerned with her own driving prior to the collision to be unable to give reliable evidence.

Once again, when one looks at the account in the affidavit of Mrs Plummer's evidence it is so cryptically worded that the evidence is of no practical value in the adjudication of determining which of the two versions was accurate. Nowhere does it set out clearly where Mrs Plummer was at any material time. She was in the locality, undoubtedly, but how far from the point of collision and how good was her position to see, and at what precise time, never appeared clear in the evidence. The only piece of evidence that might have in any way affected the position was that she said that the complainant's motor car was moving at the time of collision. This piece of evidence was contrary to the complainant's evidence but obviously the Magistrate had accepted the complainant's account of his movements at this period.

Furthermore, Miss Wencke Johnsen gave no evidence at all material, save and except that she supported her mother's testimony that Mrs Johnsen had stopped at the intersection. Again, this was denied by the complainant and his witness and the Magistrate had seen fit to accept

the complainant and his witness, and accordingly he must accept that Miss Wencke Johnsen was either committing perjury or that she had not seen anything. The Magistrate chose to take the more polite view, that she did not notice anything till the accident happened. This part of the ground falls and can avail Mr and Mrs Johnsen very little.

Looking now at part (b), this part of the ground touches upon the credibility of the complainant. It is said that in testing the credibility the Magistrate did not take into account the fact that the complainant denied seeing Mrs Plummer's car. I am not certain how it could be used. But assuming the Magistrate did keep it in mind, it could have affected his judgment, there is nothing in the affidavit filed in this Court to show where Mrs Plummer's car was and how his failure to see her car could have affected either the credit of the complainant as a witness, or as to his conduct as a driver. There is nothing precisely stated in her evidence which any rational inference might be drawn from Mrs Plummer's evidence or of the complainant's denial of seeing Mrs Plummer's car. If the Magistrate did not take into account that fact of the denial, I cannot see that it in any way would have brought about a different result than if it did.

In any event, merely because the Magistrate did not specifically say that he did not take into account the fact of the denial does not mean that be did not take into account that fact. Over and over again it has been stated in this Court that merely because a Magistrate does not specifically refer to some matter that had emerged in the course of the evidence or the course of addresses by counsel, that he failed to take the matter into account merely because he did not say something about it. It might be of such trivial effect upon the overall judgment that the Magistrate refrained, either from politeness or for some other reason, expressly making some reference to it.

Finally it is said that the Magistrate did not take into account whether or not the complainant was obliged to allow the car driven by Mrs Plummer, or any other car, right of way at the intersection. Looking at the Magistrate's reasons I find it extremely difficult to know what support Mr and Mrs Johnsen can get for their complaint on this matter. I repeat that the evidence is quite ambiguous as to where Mrs Plummer's car was, or for that matter any other car, east of the intersection. The complainant was only obliged to give that traffic the right of way if there was danger of collision with it. In most cases when one comes to apply this rule to give way to the man on the right, there is a collision, and consequently it can be readily implied there must have at all material times been a danger of collision, because a collision did occur. In this case, a collision did not occur, and secondly, there is no evidence of the precise position on the roadway for one to determine whether or not the complainant was bound in the circumstances to give a right of way to the traffic on his right.

It may be considered in two ways. First, that he should have given way to that traffic. I repeat, there is no evidence to justify such an assumption, but assuming that he was bound to give way to the traffic on the right, it could have only been of value to the complainant if she could show that she had been misled by the traffic from the right getting the right of way. It is true that she said she stopped at the intersection and that she only proceeded onwards when the complainant's car remained stationary, presumably giving way to traffic on his right. But there is no proof whatever from her that traffic on the right proceeded. On the contrary, she says the complainant moved across and collided with her. It is therefore very difficult to see why the complainant can be said to have done something contrary to using due care for his own safety.

Looking at it that he was not in any danger from traffic from the right; and was not bound to give way to that traffic, then the foundation for this particular ground completely disappears.

The only reasonable conclusion to draw from these proceedings, if one accepts the complainant's evidence, is that drawn by the Magistrate in his findings. In the affidavit they are rather ambiguously phrased, but giving the best attention to his decision that one can give, remembering the difficulties of taking down a complete note of what is expressed, it would appear that the Magistrate, being as polite to the litigants as he could, deliberately accepted the complainant's version of the collision. If he did that, and I believe he did, then his decision that the defendant was negligent, that is that Mrs Johnsen the driver of the defendants' car was negligent, clearly was a correct one. Equally, it would appear that it is difficult to see what course the complainant could have adopted once it is accepted that Mrs Johnsen was negligent. He can either proceed at the speed with which he was going, he could stop, or he could accelerate. This

was essentially a decision to be made in the agony of the collision, and if he made the wrong decision, then in my view that cannot be properly characterised, either as a want of care for his own safety or as a breach of duty of the care which he had to Mrs Johnsen in relation to her motor car.

I therefore am firmly of the opinion that the Magistrate's decision was a correct one, and the order nisi will be discharged with the usual order as to costs. In giving such order as to costs I want to make it clear that those costs are not to include either the instructions for preparation of any answering affidavit.

APPEARANCES: For the applicants/defendants Johnsen: Mr JH Tebbutt, counsel. Messrs Barlow & Fieldman, solicitors. For the defendant/complainant Melnik: Mr MR Shatin, counsel. Mr EE Dorovitch, solicitor.
