**47/89**

## SUPREME COURT OF THE NORTHERN TERRITORY

# *WALDIE v COOK*

**Martin J**

**6, 19 July 1988 — (1988) 91 FLR 413; [1988] 8 MVR 191**

**MOTOR TRAFFIC – CARELESS DRIVING – DRIVING ONTO INCORRECT SIDE OF ROADWAY – VEHICLE COLLIDING WITH TREE – DRIVER UNABLE TO REMEMBER HOW ACCIDENT OCCURRED – NO EXPLANATION GIVEN UPON HEARING OF CHARGE – WHETHER DOCTRINE OF *RES IPSA LOQUITUR* APPLIES – WHETHER REASONABLE HYPOTHESIS CONSISTENT WITH INNOCENCE EXCLUDED – WHETHER CHARGE PROVED BEYOND REASONABLE DOUBT.**

A vehicle being driven by W. travelled onto the incorrect side of the roadway, then travelled 75 metres on the dirt edge then went diagonally across the roadway over two embankments and collided with a tree. When W. was later interviewed at hospital, he said he could not remember how the accident occurred except that he was driving and the next thing he knew he flipped the car. W. was subsequently charged with driving a motor car without due care. At the hearing, W. did not give evidence. The magistrate applied the doctrine of *res ipsa loquitur* and convicted W. Upon appeal—

**HELD: Appeal upheld. Conviction set aside.**
**1. The civil doctrine of *res ipsa loquitur* has no application in criminal proceedings and the mere happening of an accident does not give rise to an inference of driving without due care.**

**2. Whilst the erratic course followed by the motor car may have indicated that it was not being driven with due care, the prosecution was required to exclude any reasonable hypothesis consistent with innocence. Extraordinary things occur in every day life including whilst a person is driving a motor vehicle. Given the driver's lack of explanation and his professed lack of recollection of how the accident occurred, it was not open to the magistrate to be satisfied beyond reasonable doubt that the vehicle was driven without due care.**

**MARTIN J: [413]** On 7 April 1988 a learned magistrate constituting the court of summary jurisdiction at Darwin, found that the appellant had driven a motor vehicle on a public street without due care, contrary to s6 of the *Traffic Act (NT)*. Without proceeding to conviction the court directed that the appellant be discharged upon his entering into a recognisance in the sum of $100 to be of good behaviour for a period of twelve months: *Criminal Law (Conditional Release of Offenders) Act (NT)*, s4(1). This appeal is against both the finding and the sentence. Particulars of the charge endorsed on the complaint were that the appellant fell asleep whilst at the wheel of the motor vehicle and lost control causing an accident. On opening the case the prosecutor said:

> "Your Worship, in this matter the prosecution will be alleging that on 3 November 1987 the defendant drove his motor vehicle, a Toyota four- **[414]** by-four, from Darwin along the Stuart Highway towards Katherine when at about 11 pm about 23 kilometres north of Katherine, we allege that he fell asleep at the wheel and drifted off to the right of the road, and the vehicle proceeded along the dirt shoulder, and then after about 75 metres on the dirt shoulder the defendant pulled the wheel of the vehicle back to correct sharply and the vehicle speared into the dirt shoulder on the other side of the road, running down an embankment and hitting a large tree."

The evidence of the circumstances of the alleged offence comprised the observations of a senior constable and a sergeant of police. The sergeant said he had investigated a lot of accidents, attended a traffic accident course conducted by Territory police, and had held the position of traffic sergeant at Katherine. At about 1.50 am on Wednesday, 4 November 1987 the two policemen attended at the scene of a motor vehicle accident about 23 kilometres north of Katherine on the Stuart Highway. They found a Toyota motor vehicle on its wheels adjacent to a tree on the eastern side of the road, which at that point runs in a north-south direction. The vehicle was badly damaged and it appeared that it had rolled over. The appellant was lying nearby. He had a large laceration to his face, and was either unconscious or semi-conscious. Anything he said was completely incoherent. Another person was present, but it seems that person had not been in

the vehicle and the police established, to their satisfaction, that there had been no other person in it. The reasonable inference was that the appellant was the driver.

The evidence before the magistrate, and not sought to be impugned in any way before this Court, showed that the vehicle had been travelling in a southerly direction, left the road on the western or incorrect side, travelled 75 metres on the dirt edge, then diagonally across the road surface, leaving skid and gouge marks, off the road surface on the eastern side, over two slight embankments and may have then collided with a large tree, and came to rest facing north. There was no evidence as to the time of the accident nor that the appellant had fallen asleep whilst driving.

The appellant was taken to the Katherine hospital and another policeman spoke to him there on the same day. He gave evidence that the appellant said to him, before any statement was attempted to be taken, "well, let's get it over and done with", and then that he could not remember how the accident occurred, except that he was driving through hills and the next thing he knew he flipped the car. The appellant did not give evidence and none was called on his behalf. The magistrate thus only had evidence of the erratic path followed by the vehicle.

The prosecutor then drew the court's attention to authorities dealing with drivers who fall asleep, including *Virgo v Elding* [1939] SASR 294. Although he did not expressly say so it is likely that, in accordance with the opening, the prosecutor was inviting the magistrate to draw an inference that the appellant had fallen asleep and that that was the cause of the vehicle's behaviour. Counsel for the appellant pointed out that there was no evidence that his client fell asleep, and that there are a number of reasons which could cause a vehicle to leave the road. The magistrate indicated that he agreed that there **[415]** was no evidence to establish that the appellant had fallen asleep, and that he should not speculate as to other possible causes where there was no evidence to suggest them.

The magistrate then referred to *Virgo v Elding* (*supra*) and in particular to a passage in the judgment of Angas Parsons J (at 296). The appellant in that case had fallen asleep and his car had run off the road into a watercourse. The passage referred to by the magistrate, is as follows:

> "In my view, this method of driving is driving without due care, and is a case of *res ipsa loquitur*. A motor car, in the ordinary course of things, does not behave in this way if the driver is exercising due care. I should infer as a fact, want of due care on the part of the driver unless there is an explanation which I regard as probably true and consistent with the exercise of due care."

The magistrate then went on:

> "It seems to be that the crux of the matter is contained in the earlier part of that passage that I cited; namely, is the evidence before me from the prosecution, is that – should I be able – am I able to infer, as a fact beyond reasonable doubt that there is a want of due care on the part of the driver in this particular act of driving, which demands an explanation which I would regard as consistent, true and consistent with the exercise of due care, and I think on the facts in this case (a) I can infer as a fact on the relevant burden of proof that it was a lack of due care, which inference, or which conclusion requires explanation from the defendant, which there is none, that is consistent, none at all in this case, and in those circumstances I have no difficulty in finding the charge proven."

Counsel for the appellant then addressed a plea in mitigation, informing the court, *inter alia*, that his client "suffered considerable injury, resulting in brain damage, which has led to continuous haemorrhage of the brain...". Nothing was before the magistrate, prior to his finding the offence proved, relating to the brain injuries suffered by the appellant. No application was made to tender evidence in this Court.

With respect I am unable to accept that what fell from Angas Parsons J. His Honour cited as authority for what he said, the reasons for decision of Napier J in *McKenzie v Hoskins* [1939] SASR 410, (the same volume) which was a civil action for damages for negligence. Even though the offence is not regarded as being serious, the maximum penalty is $200 or imprisonment for six months, the law relating to the onus and standard of proof in criminal matters applies. The civil doctrine of *res ipsa loquitur* has no application in criminal law and the mere happening of an accident does not give rise to a presumption of driving without due care: *R v Hinz* [1972] Qd R 272 at 278.

Any presumption, (which I would prefer be called an inference) in criminal law must be arrived at beyond reasonable doubt if the alleged offence is to be found proven. In a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence: *Chamberlain v R* [1984] HCA 7; (1984) 153 CLR 521; 51 ALR 225; (1984) 58 ALJR 133 per Gibbs CJ and Mason J (at 536), Murphy J (at 570), Brennan J (at 599). Here the circumstances were that the motor vehicle followed an erratic course, which was indicative that it was not at that time being driven with due care. Can it be inferred beyond reasonable doubt that that was so? Do the known circumstances exclude reasonable hypotheses consistent with innocence?

**[416]** It is no doubt reasonable to observe, as Angas Parsons J said, that a motor car, in "the ordinary course of things" does not behave in the way which the vehicle driven by the appellant behaved, but it does not follow that if a motor vehicle does behave in such a way, the course of such things out of the ordinary leads to a conclusion beyond reasonable doubt that the driver was driving without due care. Extraordinary things occur in every day life including whilst a person is driving a motor vehicle.

The onus of proof rests upon the prosecution and there is no rule of law that where the facts are peculiarly within the knowledge of the accused, the burden of establishing any defence based on those facts shifts to the accused, (statutory provisions excepted). However, the failure of a defendant to give evidence or offer an explanation may well be treated as sufficient to convert a *prima facie* case proved as a matter of probability, into a case proved beyond reasonable doubt: per Chamberlain J in *Sanders v Hill* [1964] SASR 327 at 329. His Honour then referred to the "classic authority" of *R v Burdett* [1814-23] All ER 80; (1820) 4 B & ALD 95; 106 ER 873 in which Abbott CJ (at 898 of the English Reports) said:

> "A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained, by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft, is rarely seen to break the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the *prima facie* case tends to be true, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily..."

To the same effect see Best J (at 883), Holroyd J (at 890) and Bayley J (at 894); see also, P Gillies, *Law of Evidence in Australia*, p591.

What then if the defendant is unable to give an explanation? In *Sanders v Hill* (*supra*) the appellant had been charged with driving a motor vehicle without due care, the vehicle driven by him having collided with the rear of a stationary vehicle parked in a suburban street. The magistrate held that a *prima facie* case had been made out and the appellant gave evidence, which the magistrate accepted, that he had suffered concussion in the collision and was unable to remember anything of the circumstances of the accident. There was no other evidence to explain how the collision occurred. He was **[417]** convicted. Chamberlain J held that the magistrate had properly held that a *prima facie* case had been made out, which called upon the appellant to offer an explanation and that although he had been unable do so, he had proved that there was no explanation within his knowledge and that this removed the inference which could have been drawn from a failure to offer any answer. After considering what was known, and showing that speculation as to how the accident might have occurred does not assist, his Honour pointed out that the case illustrated the difference between proof on the balance of probabilities and proof beyond reasonable doubt and allowed the appeal.

That it is not necessary for a defendant to give evidence himself, by way of a call for

explanation, is demonstrated in *Butler v Livitt; Ex parte Livitt* [1969] QWN 93. The defendant told a policeman that he had bumped his nose and did not know what happened. That was given in evidence by the policeman as was further evidence, in cross-examination that the defendant had made it clear that he had been forced off the road by a vehicle travelling in the opposite direction. The opinion of Hart J, upon consideration of the policeman's evidence, was that there was no evidence on which the magistrate could have convicted. Lucas J went further and said that even if the defendant's explanation was entirely discounted, all that was left was that the car went from its correct to its incorrect side of the road and those facts were not sufficient to convict for driving without due care. Douglas J agreed.

That the defendant said he did not know what happened and yet gave an explanation, seems to me to have been inconsistent, but the defendant did not give or call evidence on his own behalf. Those statements of his went in through the evidence of the policeman in the prosecution case. Burt J referred to *Butler v Livett* in *Duckrell v Lee* [1972] WAR 48, although that case had not been referred to in counsels' arguments before him. The appellant had been convicted of careless driving after his vehicle had left a bitumen road and overturned. The appellant had given an explanation out of court and did not give evidence upon the hearing of the charge. His Honour found that the magistrate had misapprehended the facts and had been thus led to draw an inference which could not be sustained. Reference is also made to errors in law made by the magistrate in equating the notion of a case to answer with the ultimate conclusion of guilt, and in transferring the onus of proof to the accused, in requiring him to set up an innocent explanation and prove it. After referring to the facts his Honour said:

> "All that one knows is what one can infer from the marks left by the vehicle on the road, but if one reaches that point, you may then by legitimate inference be able to say how the vehicle as a physical object behaved – if I can use that word with reference to an inanimate object – but that does not, I think, in the particular circumstances of this case, enable me to draw any legitimate inference as to the quality of the behaviour of the driver as a driver, and it would not enable me to sustain a conclusion that he had been guilty of careless driving ..."

The respondent referred to some decisions of the High Court of Justice, Queen's Bench Decision, reported in short form in [1972] Crim LR under the heading "Road Traffic", but I can find nothing in the limited information available in those reports which would cause me to think that the law which **[418]** I accept, as set out in the Australian authorities, is not to be followed. I have also considered *R v Hinz* [1972] Qd R 272 but it is distinguishable on the facts, there was an independent witness to the accident, and it was an appeal concerning the directions of the trial judge to a jury.

The learned magistrate fell into error in the following respects:

1. By applying the civil doctrine of *res ipsa loquitur* to a charge for a criminal offence.
2. Holding that the appellant was required to give an explanation.
3. Finding the offence proven upon the basis that there was no explanation from the appellant.
4. Not paying sufficient or any regard to the distinction between a *prima facie* case and proof beyond reasonable doubt.
5. Failing to pay any regard to the appellant's professed lack of recollection of the critical events, as given in evidence by one of the prosecution witnesses. That might well have been coupled with the evidence that the appellant had suffered an injury to his head and was unconscious or semi-conscious at the scene of the accident.

Looking at the matter for myself, (excluding from consideration what was said in mitigation regarding the appellant's injuries), the evidence does not show beyond reasonable doubt that the path followed by the vehicle was caused by the appellant's driving of it without due care. The appeal is allowed. The finding that the offence was proven and the penalty arising therefrom are set aside.

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