47/92

SUPREME COURT OF VICTORIA

BAFFSKY v MANGOS and ANOR

Hayne J

24 August 1992

MOTOR VEHICLE COLLISION – ROUNDABOUT – TWO VEHICLES ENTERING AT SAME TIME – RIGHT OF WAY – WHETHER VEHICLE MAKING RIGHT HAND TURN – VEHICLE MOVING LATERALLY WHEN UNSAFE – COLLISION BETWEEN VEHICLES – WHETHER DRIVER NEGLIGENT.

1. Where 2 vehicles enter a roundabout from the same point of entry, neither is to be regarded as approaching the other from the right nor doing a right hand turn.

2. Where, in a roundabout, 2 vehicles entered at the same point, one moved laterally and collided with the rearward right hand side of the other, it was open to a magistrate to find that the driver of the vehicle moving laterally was liable for the damage caused.

HAYNE J: [1] This is an appeal under s109 of the *Magistrates' Court Act* 1989, brought against an order of the Magistrates' Court at Melbourne, made on 24th September 1991. By that order, the Court dismissed the claim by the appellant (who was the plaintiff below) and on the defendant respondents' counter-claim ordered the plaintiff to pay $310 with $575 costs. The proceeding below arose out of a collision on 4th March, 1991 between two motor cars, at the round-about in Toorak, where St George's Road, Alexandra Avenue, Grange Road, and the MacRobertson Bridge meet.

The facts giving rise to the proceeding were said to be agreed, but as the matter unfolded it was apparent that there were at least some aspects of the matter which were not agreed. Counsel for the plaintiff below opened the case to the magistrate saying that it was agreed that "The plaintiff was driving west down St George's Road intending to proceed straight ahead. The road is divided into two lanes for westbound traffic, and she was in the righthand lane. There is a round-about at the intersection and as she approached the intersection she came almost to a complete stop, saw no vehicle in the round-about, or waiting to enter it, and she proceeded through the round-about in the righthand lane towards Alexandra Avenue. When she was about halfway into the round-about, she saw a white van on her left, and almost immediately after first seeing the van she saw it made a righthand turn from the lefthand lane towards MacRobertson Bridge" that is, I interpolate, the fourth exit of the round-**[2]**about, counting inclusively from her point of entry. "Realising there was danger of collision, she applied her brakes and turned as far right as she could without hitting the round-about, but the vehicles collided". Counsel for the plaintiff then went on in his opening to describe what happened after the collision.

The plaintiff's evidence in-chief below was very short. She was asked whether she agreed with counsel's summary of the matter, which she did, and was then asked if she wanted to add anything, but she did not. Counsel for the defendant cross-examined the plaintiff. She agreed that the defendant's vehicle had remained in the lefthand lane, and that she had crossed that lane attempting to exit from the round-about. The defendant's account of the matter was that he entered the round-about, also from St George's Road, and entered in the lefthand lane, showing his right indicator. He did not see the plaintiff's vehicle until the collision. The parties agreed that there were no signs or arrows on the pavement at the round-about, but they are now agreed that there were markings indicating division into lanes within the round-about.

The magistrate's findings were very brief. The parties' versions of those findings differ. According to the plaintiff (the appellant) he said:

> "I do not know whether she was in the round-about first or he was in the round-about first. The plaintiff would have no cause for complaint had she been in the left lane. It is my opinion that the plaintiff left her lane at some stage, and I find that the plaintiffs claim be dismissed, that the defendant

be awarded 100 per cent; that there be an order on the defendant's counter-claim for the sum of $310 with $575 costs, and there be a stay for payment of one month."

[3] Central to these very brief findings, was the finding that the plaintiff "left her lane at some stage". The defendant's version of the magistrate's findings was that:

"The defendant was in the round-about first, and it was fair for him to assume that the plaintiff was doing a righthand turn. If she were going straight, she should have given way to him. Even if she had entered the round-about first, and she saw him, it would not be reasonable for her to assume that he would be going straight through the round-about. I dismiss the plaintiffs claim and find in favour of the defendant 100 per cent."

While it may be clear that I should prefer the version of the proceedings below that would support the decision appealed from, I do not consider it necessary to resolve any conflict that may exist between the parties' accounts of the magistrate's findings, and I proceed on a basis that assumes that the plaintiff/appellant's version is correct. It is of the first importance to emphasise that this appeal is an appeal on questions of law. It is not an appeal on the facts, and I am not to substitute my view of culpability for that of the magistrate. The questions of law that were stated in the order made under Rule 58.09 are:

"(a) Whether any reasonable magistrate could have concluded on the evidence before the court that—
(1) The collision was caused by the negligence of the appellant.

(2) The collision was not caused by or contributed to by the negligence of the respondent.

(3) The respondent did not fail to keep a proper lookout.

(4) The respondent did not turn right from a lane designated for vehicles turning left and crossing the intersection.

(b) Whether or not the respondent turned right at the intersection in breach of regulation 802(1)(a) of the *Road Safety (Traffic) Regulations* 1988."

[4] The test to be applied is a stringent one. It is for the appellant to show that the only possible decision to which the magistrate could have come was a decision contrary to that which in fact the magistrate reached. (See *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38 at 41; [1956] ALR 301. *King v McLellan* [1974] VicRp 92; [1974] VR 773 at 783). There was much debate in the hearing before me about the operation of the *Road Safety (Traffic) Regulations* 1988, and in particular, the application that was to be given to the facts of this case of regulations 402.19, 507, 602.3(a), and 802.

In essence, the appellant made two points in support of the general proposition that the respondent's negligence caused or contributed to the accident, and that no other finding was reasonably open to the magistrate on the evidence below. Those two points were: first, that for the purposes of regulations 402.19, and 602.3(a), the plaintiff's vehicle was to be regarded as approaching the respondent's vehicle from the right, and that, therefore, the respondent should have given way to the plaintiff; secondly, that the respondent was making a righthand turn and should therefore have done so from as close as possible to the centre of the road.

I interpolate that both parties conceded that the bare fact that there was demonstrated to have been a breach of the regulations did not of itself demonstrate negligence. (See *Tucker v McCann* [1948] VicLawRp 40; (1948) VLR 222). However that may be, I am of the view that the analysis contended for by the appellant is flawed in both respects. Both vehicles having entered the round-about from **[5]** the same entry, once in the round-about, I do not consider that either is to be regarded as having approached the other from the right. Nor do I consider that it is correct to say that within the round-about one vehicle is to be regarded as doing a righthand turn simply because that vehicle sought to exit from the round-about at exit four. Within the round-about, which was where this accident occurred, I consider that the conduct of the parties could be regarded by the magistrate as being governed by regulation 507. That is to say, as being governed by the obligation not to move laterally out of their lane, or line of traffic, unless it was safe to do so.

I do not say that the magistrate must have reached such a conclusion, I say only that it was open to the magistrate to reach such a conclusion on the evidence before him. As I said when describing the magistrate's findings, as recounted by the appellant, the magistrate found that the appellant left her lane at some stage. In my view, that finding was open to the magistrate on the evidence below.

I should add that that finding was open if only because the uncontroverted evidence below was that the respondent's vehicle was struck on the righthand side towards the rear. It may then have been open to a magistrate to conclude that the appellant had tried to turn into the path of the respondent when the respondent was ahead of her. In any event, in all the circumstances, I do not consider that it can be said that the appellant has shown **[6]** that no reasonable magistrate could have found that the accident was caused wholly by the appellant.

Accordingly, I consider that the appeal should be dismissed. The order will be appeal dismissed with costs.
