07/70

SUPREME COURT OF VICTORIA

BETTINGTON v STEPHENSON

Anderson J

7 April 1970

MOTOR TRAFFIC – CARELESS DRIVING – FAILING TO GIVE WAY WHILE MAKING A U-TURN – DEFENDANT'S VEHICLE TRAVELLED ONTO THE INCORRECT SIDE OF THE ROADWAY THEREBY FORCING AN ONCOMING VEHICLE TO RUN OFF THE ROAD – DEFENDANT'S VEHICLE PROCEEDED AND TURNED SHARPLY AND COLLIDED WITH AN ONCOMING VEHICLE – JUSTICES ACCEPTED THE SUBMISSION OF THE DEFENCE SOLICITOR THAT THERE WAS NO CASE TO ANSWER – IT WAS SUBMITTED THAT IT WAS POSSIBLE THAT THE CAUSE OF THE COLLISION COULD HAVE BEEN DUE TO MECHANICAL FAILURE, THE BLOWING OF A TYRE OR A BLACKOUT – SUBMISSION ACCEPTED BY THE JUSTICES – CHARGES DISMISSED – WHETHER COURT IN ERROR: *ROAD TRAFFIC REGULATIONS*, R603(1).

HELD: Order nisi absolute in respect of the careless driving charge. Charge remitted for determination by another court. Order nisi discharged in respect of the charge of not giving way when doing a U-turn.
1. While the Crown in fact has the ultimate burden of satisfying the court beyond reasonable doubt as to the guilt of an accused person, nevertheless it is improper for the court to embark upon a consideration of matters as to which there is no evidence.

2. There was no evidence before the Justices which would have entitled them to give attention to the submissions made by the solicitor for the defendant that there may have been a blackout, or that there may have been a tyre blown out or any ether circumstance which, it had been proved, might have exonerated the defendant. The justices had before them the case of a motor car which had behaved in an erratic way, and the defendant was the driver of that motor car. The various suggestions and submissions made at the Bar Table were not evidence but it seemed that the Justices in effect took them to be evidence or to be explanations which were appropriate to be considered by them. The defendant gave no evidence as to his own condition before the accident or as to what he knew of events leading up to the accident, nor was there any effort made by the defendant to show that the cause of the accident was something for which he could not be held responsible.

3. There was no evidence before the magistrates which would justify them giving consideration to the defence of non-culpability because of some extraneous circumstance taking the control of the situation out of the hands of the defendant.

4. Accordingly, the magistrates were in error in holding that there was no *prima facie* case established and the order which the magistrates had made was set aside and the matter sent back to the Court of Petty Sessions at Frankston for re-hearing by a differently constituted Court from what it was on the earlier occasion.

5. In relation to the U-turn charge, there was no evidence before the Court as to whether the car was doing a U-turn. One of the elements of the offence would be to prove that it was doing a U-turn, and to that extent the evidence before the magistrates was insufficient to justify a finding that the vehicle was doing a U-turn. There was a deficiency in the proof tendered by the Prosecution, and while this point was not taken before the court below, the defendant was entitled on review to rely upon it.

6. Consequently, it was not proposed to disturb the magistrates' decision in respect of the charge of not giving way when doing a U-turn.

ANDERSON J: This judgment relates to two matters – the two informations which were before the Court of Petty Sessions at Frankston on 5 August 1969. The defendant was charged on one information that on the 28 March 1969 he drove a motor car on the Point Nepean Highway carelessly and on the second information he was charged under the *Road Traffic Regulations* r603(1) with driving a motor car in such a way that while making a U-turn he failed to give way to a vehicle travelling along the highway. The two cases were heard together in the Court of Petty Sessions and the orders to review which were before me yesterday were likewise argued together.

Now dealing first with the evidence that was before the Court of Petty Sessions, a composite version of the evidence of the witnesses for the prosecution before that court, that composite version being told from the affidavits in support of the Order Nisi, and the answering affidavits of the defendant's solicitor relates to the defendant driving his car at about 11 o'clock in the evening on the 28 March 1969 northward along the Point Nepean Highway in the vicinity of Carrum. The evidence rather suggests that he was travelling at about 35 miles an hour. His car was following another car proceeding in the same direction along the Highway at about the same speed. Suddenly the defendant's car was seen to swing to its right onto its incorrect side of the roadway and it forced a car travelling in the opposite direction to run off the surface of the roadway into an earth section on the eastern side of the highway. The defendant's car appears then to have proceeded northerly along the highway, whether on its correct side or not does not clearly appear from any of the evidence, but there is evidence that it then turned apparently sharply to the east and collided with another motor car which was proceeding south along the highway in the traffic lane near or about the centre of the road, at all events, not the traffic lane which was nearest to the eastern edge of the highway.

There was evidence that the left hand front of the defendant's car was damaged and it was said that the damage done to the defendant's car generally was extensive. Shortly after the collision, and at the scene of the collision the defendant was seen by a police constable to be lying in an ambulance and he appeared to be unconscious.

At the close of the case for the prosecution before the two Justices who constituted the Court of Petty Sessions, the solicitor for the defendant submitted that there was no case for the defendant to answer in respect of either of the charges, and he further submitted in the alternative, that the informant had not discharged the onus which was upon him of satisfying the court beyond reasonable doubt of the guilt of the defendant. The Solicitor told the court that the defendant had been very badly injured in the collision and had been at death's door for a number of weeks. He pointed out to the court that a number of conclusions could be drawn from the police evidence, such as that the defendant had suffered a blackout, or that a tyre had blown out. The affidavit on behalf of the informant referred also to a submission by the solicitor for the defendant that the car may have developed a mechanical defect. In the answering affidavit by the solicitor for the defendant no reference is made to the suggestion that there may have been a mechanical failure. Nothing really turns upon this circumstance as the mechanical failure or the blowing of a tyre or a blackout are all of a similar order, and are, to my mind, as I will mention later, conjectural or hypothetical matters as to which, in my view, there was no evidence before the court on which the court could act.

The solicitor for the defendant also drew the court's attention to the evidence of the witness who had been driving his car just in front of the defendant's car, such evidence being to the effect that for some appreciable time this particular motorist had observed the defendant's car in his rear vision mirror and that it was being driven in a perfectly normal manner. The defendant's solicitor further told the court that the defendant would not be able to throw any light on the matter as he was suffering from amnesia and that therefore it was pointless to put him in the witness box, and he further reminded the court of the standard of proof required in the cases, they being criminal ones, and concluded by again submitting that the case for the informant had not been established.

At this point the Justices adjourned and on returning to the court the Chairman of the Justices announced that the submissions put forward on behalf of the defendant had been accepted and that next the court thereupon found that no case had been established against the defendant on either information, both of which were thereupon dismissed. Now consequent upon those dismissals the informant obtained an Order Nisi to review each of the orders of the Court of Petty Sessions on the following grounds:-

(1) That there was no evidence on which the court could find, or from which it could infer that the course of the defendant's vehicle was either caused or affected by its mechanical condition.

(2) That on the evidence the court should have convicted the defendant of the charge.

(3) That on the evidence the court was wrong in dismissing the informations.

It is clear, I think from the judgment of the High Court in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671 that a Court of Petty Sessions may find that the informant has established a *prima facie* case, that is, that on the evidence as it stands, the defendant could lawfully be convicted of the offence charged, but that the court even without evidence being led by the defendant may not be satisfied beyond reasonable doubt of the guilt of the accused.

The submission on behalf of the defendant, made by his solicitor, was twofold and the Justices gave no reason for their decision, other than to say that they accepted the submissions made on behalf of the defendant. The order in which the submissions would properly be considered would be first; has a *prima facie* case been made out? And only if the answer to that question was "Yes" would it be proper or relevant for the Justices to consider the second or alternative submission, namely that though there is a *prima facie* case made out, the Justices should not be satisfied beyond reasonable doubt of the guilt of the defendant.

On the material before me it appears that the Justices in accepting the first submission found that no *prima facie* case had been established in respect of each information. That being so, it was, I think, an act of supererogation on their part to consider, if indeed they did do so, the second submission. There was no proper basis for their so doing for the only basis on which they could consider it, that is the second proposition, or the second submission, was if they had found that the informant had established a *prima facie* case, and if indeed they were so to consider the question whether the informant had satisfied them of the guilt of the defendant they could then only come to one conclusion based necessarily on their finding that there was no *prima facie* case established: not on the basis that though a *prima facie* case had been made out they were nevertheless not satisfied beyond reasonable doubt of the guilt of the accused.

I think therefore that the only question which arises for determination in each of these cases is whether the Justices were entitled to hold that the informant had not established a *prima facie* case for I do not think that the matter gets as far as the situation envisaged in *May v O'Sullivan* to which I have referred. I propose therefore to deal first with the information charging the defendant with having driven carelessly.

Mr Charles for the informant in submitting that on the evidence before them, the Justices should have held that there was a case to answer referred to *R v Burge* (1961) 2 QB 205; [1961] 2 All ER 688; (1961) 45 Cr App R 191; *Hill v Baxter* [1958] 1 QB 277; [1958] 1 All ER 193; (1958) 42 Cr App R 51; *Sanders v Hill* [1964] SASR 327. He conceded that while the ultimate onus was on the informant to satisfy the court of the guilt beyond reasonable doubt of an accused person, no obligation rested upon the prosecution, so he submitted, to negative a number of possible or hypothetical exculpating matters of which there was not, at the time when the submission was made of no case to answer, any evidence, and he contended that the present case before the Magistrates was such a case. He relied on the *dicta* of Devlin J in *Hill v Baxter* at pp264-5 which is in the following terms – the relevant quotation starts at the top of p284, but I do not propose to read the way in which His Lordship leads into what is the material passage, which, to my mind, is.

> "It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively, and beyond a reasonable doubt, that the accused was at the time of crime sober or not sleepwalking or not in a trance or blackout. I am satisfied that such matters might not be considered at all until the defence has produced at least *prima facie* evidence."

That passage in its context is equally applicable to the case before me here, and my view is that there was just no evidence before the magistrates which would entitle them to embark upon a consideration of whether there was a circumstance which would exculpate the defendant in the way in which it was suggested by his solicitor that it might do so. By using the word "exculpate", I do not wish to convey the impression that the onus is upon the defendant to prove, on any basis, the existence of a condition or circumstance which would exonerate him. The court may, after considering such evidence as is placed before it, be left in sufficient doubt, but this is a case in which there was in my view, no evidence before the court which would justify the magistrates in considering any of the suggestions made by the defendant's solicitor as being matters which they should take into account.

Mr Charles also referred to *Sanders v Hill* [1964] SASR 327 as an illustration of a case

where the defendant had gone into evidence and had done all that he could to explain the incidence of alleged careless driving. There is a contrast, I think, to be drawn so far as the facts are concerned between *Hill v Baxter* on the one hand and *Sanders v Hill* on the other. So far as the facts are concerned they may be a little difficult to reconcile, but both cases, I think, illustrate the principle that while the Crown in fact has the ultimate burden of satisfying the court beyond reasonable doubt as to the guilt of an accused person, nevertheless it is improper for the court to embark upon a consideration of matters as to which there is no evidence and both cases at least are consistent, in principle, as to that.

I did mention earlier that some reference had been made in the course of the submission to the Magistrate of there being possible mechanical defects. Whether or not that is ultimately the position which I should consider probably does not matter because, as I said, a mechanical defect or a blackout or some other circumstance as to which there was no evidence, but as to which the accused might lead evidence, are all of the same order, but it is interesting that in the case of the mechanical defect which was raised in the case of *R v Burge* (1961) 2 QB 205; [1961] 2 All ER 688; (1961) 45 Cr App R 191, the court there lays down which I believe is the true basis for the consideration of alleged exculpatory matters, and it is at p691 of the All ER that the following passage appears. In that case the Crown was submitting that the onus was on the defendant of establishing the defence that the mechanical defect of the car excused the driving and made it not careless, and it is Salmond J, who delivered the judgment of the Court of Criminal Appeal, and the relevant passage reads this way;

> "It has been argued by counsel for the Crown that even if a mechanical defect can operate as a defence, yet the onus of establishing this defence is on the accused. It is of course conceded by the Crown that this onus is discharged if the defence is made out on a balance of probabilities. In the opinion of this court the contention made on behalf of the Crown is unsound, as in cases of dangerous driving the onus never shifts to the defence. This does not mean that if the Crown proves that a motor car driven by the accused has endangered the public the accused can successfully submit at the end of the case for the prosecution that he had no case to answer on the ground that the Crown had not negatived the defence of mechanical defect. The court will consider no such special defence unless and until it in put forward by the accused. Once, however, it has been put forward it must be considered with the rest of the evidence in the case. If the accused's explanation leaves a real doubt in the mind of a jury then the accused is entitled to be acquitted. If the jury rejects the accused's explanation, the jury should convict. It has been suggested by counsel for the Crown that the onus of establishing any defence based on mechanical defect must be on the accused because necessarily the facts relating to it are peculiarly within his knowledge. The facts, however, relating to a defence of provocation or self-defence in a charge of murder are often peculiarly within the knowledge of the accused since only the persons present at the time of the killing are the accused and the deceased. Yet once there is any evidence to support these defences the onus of disproving them undoubtedly rests on the Prosecution."

That of course is the case when there is any evidence to import these defences, but that onus dose not arise until there is such evidence and that I think is the tenor of all the authorities that I have considered and it seems to be in line likewise with what is proper.

Now my view then, and I will deal with Mr Bayliss' arguments in a moment, is that there was no evidence before the Justices which would entitle them to give attention to the submissions made by the solicitor for the defendant that there may have been a blackout, or that there may have been a tyre blown out or any ether circumstance which, it had been proved, might have exonerated the defendant. The justices had before them the case of a motor car which had behaved in an erratic way, and the defendant was the driver of that motor car. The various suggestions and submissions made at the Bar Table of course were not evidence but it seems to me that the Justices in effect took them to be evidence or to be explanations which were appropriate to be considered by them. The defendant gave no evidence as to his own condition before the accident or as to what he knew of events leading up to the accident, nor was there any effort made by the defendant to show that the cause of the accident was something for which he could not be held responsible.

Mr Bayliss submitted that the Justices were, however, justified in finding that there was no *prima facie* case. He argued that there was no way in which the defendant could have assisted the court because first of all he had been rendered unconscious at the accident and secondly he was critical – I do not mean in an improper sense – but he was critical of the police in the matter

because they had not led any evidence as to an inspection which they may have made of the motor car to ascertain and to possibly negative any suggestion that there was defective mechanism, and that therefore, since it was possible that the car might have had a defect, the defendant was entitled to have that aspect considered. He also submitted that there was evidence on which the Justices could have relied and that was the evidence of the driver of the motor car who was preceding the defendant along the highway, that evidence being to the effect that in the rear vision mirror he had observed the defendant's car which appeared to be driven normally. Well that was much the same circumstance that existed apparently in the case of *Hill v Baxter* where the Justices had before them indeed evidence, the defendant gave evidence and his evidence was to the effect that he only remembered incidents up to a certain point a certain distance back from where the accident happened. The Justices then concluded from that that because he had apparently driven the motor car from that point to the point where the collision eventually occurred, therefore he must have driven carefully in that intervening distance, and there was no evidence in effect that he had driven otherwise than carefully. That was not accepted by the Court of Appeal, and in my view too, the fact that at most times a person is driving carefully is no evidence that in a particular instance of where apparently there is careless driving, he is therefore to be held not responsible for it.

Mr Bayliss referred me to the case of *R v Roseblade* (1943) 3 DLR at p733 as illustrating how the defendant was entitled to an acquittal because all that the prosecution had proved was that an accident had occurred, and at p754 he read part of the judgment of Judge Harvey who was a County Court Judge in Ontario and what he read was this passage at p734;

> "As for the application for non-suit or dismissal, I feel bound to grant the same and to do otherwise would, in my judgment be a denial of the application of one of the most important principles in our jurisdiction, namely the necessity of burden of proof. Under the *Highway Traffic Act*, applying to this section, there is no onus on the accused to explain or even to disprove the accusation against him. The onus is on the prosecution and in this case all the evidence that is before me is the testimony of two witnesses who merely found the bus in the ditch, that the same was in charge of the accused in arriving at that position, but without any evidence or explanation as to how it got there. As far as I am concerned the bus might have been towed there or pushed there, or forced in there by some other vehicle colliding with it, or by any number of means, and the fact that some of the passengers in the bus were injured is not necessarily evidence of the careless or even incompetent driving on the part of the driver. To permit a traffic officer or a constable to prosecute for careless driving on mere assumption would be absurd and make a travesty of justice."

The facts in that case which the Judge was at that stage considering was evidence that the accused was the driver of a bus which was found by the police, lying on its side in a ditch beside the highway, and there was a tyre mark leading from the rear of the bus up onto the shoulder of the road and along the shoulder for a distance of 115 feet, to the edge of the pavement. His Honour in the headnote is described as finding "That the position of the bus in such circumstances is consistent with many reasonable hypotheses other than careless driving on the part of the accused."

I mention this case at some little length for two reasons; first of all, when one looks at the whole of the report one finds that the proceedings before the Judge were in effect by way of appeal, much the same as we would have in our County Court from a conviction before a magistrate, and at the close of the case for the prosecution where the evidence was as scanty as has been set out, a submission was made by counsel for the accused for a non-suit and dismissal. The Judge in that case, however, followed a course which we would find strange, he reserved his decision on that particular submission and proceeded then to hear such evidence as the defence desired to call, and the defence proceeded to call quite a number of witnesses and those witnesses, including the bus driver and two passengers, gave evidence that in effect – and I am summarising this – the bus had been forced off the road by a small green sedan which had cut in front of them and the driver in an attempt to avoid the green sedan had turned to his right and finished up on the bank. His Honour finishes his judgment in these terms:

> "If it is any comfort to the parties concerned, I may say I would also have allowed the appeal on the merits in any event as I am satisfied with the evidence of the driver of the bus and the two independent passengers as being a reasonable explanation of a normal act on the part of this driver when suddenly confronted with what appeared to be a dangerous situation fraught with possible serious consequences. The bus was not only not speeding, but not even going fast. It merely got out

of control due to an unforeseen result of a normal, genuine effort on the part of the driver to avoid an accident."

Why His Honour did not found his judgment upon the evidence rather than, in a reserved judgment, give a ruling which would seem quite unnecessary, is a little surprising. Be that as it may. But the reason I mention this case at some length is because it was later considered by the Court of Appeal in Ontario in 1965 and was over-ruled, and that occurred in the case of *R v McIver* (1965) 4 CCC 182 and in that case it was held that "the fact of an accident itself without any direct evidence of the manner of driving may constitute sufficient circumstantial evidence to justify a conviction for careless driving, and the Crown is not required to negative suggestions or hypotheses of innocence which are not founded on proven facts." Moreover, "With respect to the offence of careless driving the Crown need only prove that the accused committed the prohibited act and unless he can show that such act was done without negligence or fault on his part, he will be convicted." That is almost in line incidentally with the remarks of Lord Goddard in *Hill v Baxter* that it is the objective test which is applied and not the subjective test where careless driving is the charge. And in the course of the judgment, and it consisted of five Judges in the Court of Appeal in Ontario, they agree with the Chief Justice when he says that he would over-rule *R v Roseblade*.

Well from what I have said it is clear that I am of the view that there was no evidence before the magistrates which would justify them giving consideration to the defence of non-culpability because of some extraneous circumstance taking the control of the situation out of the hands of the defendant. And I therefore am of the view that the magistrates were in error in holding, as I believe they did, that there was no *prima facie* case established. As to what should be done with that, I feel I should set aside the order which the magistrates have made there, and should send the matter back to the Court of Petty Sessions at Frankston for re-hearing. The Court, I think, should be differently constituted from what it was on the earlier occasion.

The second charge that was against the defendant was a charge in respect of a breach of r603 of the *Road Traffic Regulations*, and the offence with which he was charged was when driving a motor car and making a U-turn he did fail to give way to other vehicles on the roadway. The charge is laid under, as I say, r603 of the *Road Traffic Regulations*, sub-section (1) of which reads:

"A driver making a U-turn shall give way to all other vehicles and to all pedestrians."

A U-turn is defined in r102 as being "a turn which causes a vehicle facing or travelling in one direction on a highway to face or travel in the opposite direction".

In the course of argument yesterday I did indicate that I consider that an element of the offence is that the vehicle in question is doing a U-turn, and that if a vehicle, placed as the defendant's vehicle was doing a U-turn, it was only doing a U-turn because the driver intended to do a U-turn. It had not made the U-turn by any means; it had proceeded in an irregular way along the highway and had then turned from a northerly course to an easterly course, though how far easterly it had gotten does not clearly appear. And as it was its lefthand headlight which was most substantially damaged, that particular corner of the car, it would seem most probably that it had not got around even to a quarter of a circle. So that as there was no evidence before the Court, there was no evidence as to whether the car was doing a U-turn. And one of the elements of the offence would be to prove that it was doing a U-turn, and to that extent I am of the view that the evidence before the magistrates was insufficient to justify a finding that the vehicle was doing a U-turn. This is really the reverse side of the other case of careless driving. In the present case there is a deficiency in the proof tendered by the Prosecution, in my view, and while this point was not taken before the court below, the defendant is entitled on review to rely upon it, and Mr Bayliss sought to rely upon it.

Consequently, I do not propose to disturb the magistrates' decision in respect of the charge of not giving way when doing a U-turn. Which means that one order nisi is made absolute and one order nisi is discharged.

APPEARANCES: For the informant/applicant Bettington: Mr SP Charles, counsel. State Crown Solicitor. For the defendant/respondent Stephenson: Mr CP Bayliss, counsel. Robert C Taylor & Son, solicitors.