CJ/146

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

SUMMARY COURT APPEAL

Heard
JL
8-03-04

CAUSE NO. 1751/2002
S.C.A. NO. 50/02

SHANE CARDIFF SOLOMON

V.

REGINA

Appearances:
Mr. Ramon Alberga, Q.C., instructed by Mr. Shaun McCann of Campbells for the Appellant
Mr. Scott Wilson – Crown Counsel

Before: The Hon. Justice Levers

Heard: February 20, 2004

GRAND COURT CAYMAN ISLANDS

JUDGMENT

Levers, J.

The accused in this matter was charged with careless driving contrary to section 69 of *The Traffic Law (2001 Revision)*. After a full hearing in the Summary Court he was convicted of careless driving and he now appeals against that conviction. Several grounds of appeal have been filed on his behalf by counsel and they are that:

1. The Learned Magistrate erred in concluding that the prosecution had proved beyond a reasonable doubt that the accused was not exercising the degree of care required of a reasonable and prudent driver.

2. The Learned Magistrate having found that:-

(a) the Appellant was driving at a speed of 40 mph which was not in excess of the prescribed speed limit;

(b) the distance between the Appellant's vehicle and the pedestrian with whom he collided when a dragonfly entered his vehicle and flew in his face was between 40-50 ft;

(c) the distance between the point of impact and where the vehicle driven by the Appellant came to rest was 118 ft;

(d) a vehicle traveling at a speed of 40 mph would travel a distance of 58.66 ft in one second;

(e) at that speed a driver would require a thinking distance of 40ft before reaching his brake and could not come to a complete stop before traveling 120ft;

(f) that the tables in Bingham & Berrymans' Motor Claims Cases, 10th Edition at p. 76 were correct and judicial notice should be taken of such tables; and

(g) that she accepted the Defendant's evidence,

ought to have found that the collision constituted in the circumstances an unavoidable and/or inevitable accident and that nothing that the Defendant did or omitted to do amounted to failure on his part to exercise ordinary care, caution and skill.

3. In all the circumstances, the conviction of the Appellant for careless driving was wrong and ought to be set aside.

4. The conviction was unsafe, unreasonable and ought to be set aside.

5. There was no excessive speed, no element of bad driving and nothing that the Appellant could have done once he was confronted with the entry of the dragonfly into his vehicle to avoid colliding with the pedestrian who was walking in the roadway directly in the path of his oncoming car and the Learned Magistrate's conclusion was wrong as a matter of law.

6. Once the Appellant was confronted with the dragonfly, the Appellant did everything that a reasonable person in that situation could have done. He was not in any way careless and the Learned Magistrate should have so found and

acquitted him of the criminal offence of careless driving. She was wrong to have done otherwise.

7. The finding that the time period between the entry of the dragonfly into the car and the collision had to be longer than 3 seconds and that the Appellant had sufficient time to execute a manoeuvre that would have taken him past the pedestrian in safety before the dragonfly flew into his face is farfetched and completely speculative.

8. The conviction of the Appellant for careless driving is generally wrong and should be set aside.

Mr. Ramon Alberga, Q.C., appearing on behalf of the Appellant submits that the facts of this case are a textbook example of inevitable accident. Mr. Scott Wilson for the Crown, on the other hand, submits that although the reasoning of the Magistrate may be faulty the conclusion she arrived at is the correct one and that is that the accused is guilty of careless driving.

The Facts

The facts in this case are simple. The Appellant was driving his vehicle on the 16th December, 2001 at about 6:30 a.m. along the Crewe Road by-pass when a dragonfly entered his vehicle and as a result of the disruption caused thereby in the manner of

driving he was unable to avoid a pedestrian who was walking in the middle of the road. It is admitted that he had previously seen the pedestrian before the fly had entered the vehicle, and had it not been for the fly, the pedestrian could have easily been avoided.

The Crown's case was that the Defendant was not driving in a manner that was careless prior to the accident. They accept the Defendant's evidence that had the fly not entered his vehicle he could have manoeuvered around the pedestrian.

Having carefully reviewed the evidence the Learned Magistrate went on to find that:

> "The defendant stated clearly that at first he used his right hand to try and get the insect out of his car, thereafter it flew into his face. I find the time period between the entrance of the insect and the collision had to be longer than three seconds."

Another of her findings was:

> "I am of the view that having observed an obstacle proceeding directly ahead, the Defendant had a greater duty of care to observe. Any driver has to expect the unexpected while travelling on the road and be suitably prepared to deal with it. Travelling at the speed limit and taking one's eyes off the road briefly can be unreasonable if the circumstances confronting a driver on the road indicate that this would be dangerous."

She further went on to find that:

> "While I accept that the incident with the dragonfly occurred fairly quickly, I am of the view, however, that the Defendant had sufficient time to execute the maneouvers referred to before the insect flew into his face. I base this on his evidence that he would have been able to proceed around the pedestrian. The alternative would be that he would have hit the pedestrian in any event.
>
> The time the Defendant spent swatting at the insect should have been spent repositioning the vehicle and the execution of any other necessary preventative measures. It is my finding that the Defendant's actions after observing the pedestrian in the road and in dealing with the insect as he did, prior to it flying into his face, were the reasons that the accident took place.

I consequently find the Defendant guilty of careless driving."

Section 69 of *The Road Traffic Law (2001 Revision)* states:

> "Whoever] drives a vehicle or animal on a road without due care and attention or without reasonable consideration for other persons is guilty of an offence."

The onus of proof is on the Crown to prove that the driver drove without due care and attention. When accidental harm is done it is not for the doer to excuse himself by proving that the accident was inevitable and due to no negligence on his part. It is for the person who suffers the harm or in this case the Crown to prove affirmatively that it was due to the negligence of the driver that the accident was caused. If the Crown fails to adduce any evidence of negligence or gives only a mere scintilla of evidence of negligence there is no case against the accused.

The defense in this case has raised inevitable accident and Mr. Alberga, Q.C., relies on *Dowsing v. Goodwin Matter* Court of Appeal 40423/95 (10th of November 1997), at page 4 :

> "Negligence Law in Australia remains wedded to the fault principle and the requirement that the plaintiff bears the onus of proof. A plea of inevitable accident is a simple denial of negligence.
>
> (1) a sudden and unheralded incapacitating event such as a bee sting or a stroke may preclude a finding of negligence where the driver had insufficient time to avert the ensuing accident."

This I find is the crux of this appeal. Did the driver have sufficient time to avoid the accident? Are there the facts on which the Magistrate could conclude as she did that he

had sufficient time, to take the steps a reasonable man would have done to avoid the accident?

As Lord Wright put it in *Caswell v. Powell Duffryn Associates Collieries Ltd. [1939] 3 All ER. 722 at p. 733:*

> "inferences must be carefully distinguished from conjecture or speculation. There can be no inference unless there are object facts from which to infer that the other facts which it is to be sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proof facts from which the inference can be made the method of inference fails and what is left is mere speculation or conjecture."

There are certain undisputed facts in this case. That the Appellant was the driver. That he was driving on the 16th of December at 6:30 a.m. and that had the dragonfly not entered the car the Appellant could have avoided the pedestrian at the speed he was driving. No negligence was established on the part of the Appellant until the dragonfly entered the car. The manner in which the Appellant dealt with the dragonfly as it would appear caused the Magistrate to come to the conclusion that he was driving carelessly. Is this therefore a fair conclusion and has it been established beyond a reasonable doubt? The Magistrate stated that:

> "The defendant stated clearly that at first he used his right hand to try and get the insect out of his car. Thereafter it flew into his face. I find that the time period between the entrance of the insect and the collision had to be longer than three seconds."

It is regretted that I cannot find any evidence to support the Magistrate's conclusion on such a crucial aspect of the case.

It would appear that the Magistrate concluded that the three seconds time limit which heavily supports the Defendant's argument that he could not have avoided the accident was too short basing it on no factual evidence. She goes on to find:

> "I am of the view that having observed an obstacle to proceeding directly ahead, the Defendant had a greater duty of care to observe. Any driver has to expect the unexpected while travelling on the road and be suitably prepared to deal with it. Travelling at the speed limit and taking one's eyes off the road briefly can be unreasonable if the circumstances confronting the driver on the road indicate that this would be dangerous."

The Defendant gave evidence that driving at the speed he did taking into account all the conditions of the road he would have easily been able to avoid the pedestrian. The Magistrate accepted this. Therefore the greater duty of care to observe which she places on the Defendant cannot be explained. The question that has to be asked without the burden of the greater duty of care is: Did the driver deal with the unexpected suitably and could he have avoided the accident? Did he take his eyes off the road voluntarily or was it an involuntary act due to the advent of the dragonfly?

The Magistrate also goes on to find:

> "In any event if the collision with the pedestrian was one second away as the defense argues, the Defendant was not travelling at a speed which was reasonable in all the circumstances. The stopping distance from the point of the impact suggest that the insect flying into his face and the collision with the pedestrian occurred almost simultaneously."

The Learned Magistrate comes to the conclusion that the Defendant was not travelling at a speed which was reasonable in all the circumstances although the Crown's case is that he was not speeding. In all the circumstances of the case the road was clear, the road was good and 40 miles an hour gave him adequate time to avoid the pedestrian. Therefore, if

she found that the stopping distance from the point of impact suggests that the insect flying in his face and the collision occurred almost simultaneously as she appears to have done it would mean that the Appellant not having driven in any manner careless or negligent and without due care and attention was forced into this accident by the dragonfly flying into his window. The Learned Magistrate also comes to the conclusion that the Defendant had sufficient time to execute the manoeuvers referred to before the insect flew into his face. If those manoeuvers were in fact not necessary before the insect flew into his face the burden being placed on the Defendant is an erroneous one. I find that there are no facts on which the Crown can challenge the fact that the Defendant used ordinary skill, care and caution.

The evidence is clear that the Appellant could have avoided the pedestrian had the dragonfly not flown into his face. An error of judgement in dealing with an unexpected occurrence while driving is not always negligence and on the facts of this case one of the possible conclusions could be that the accident which occurred on this day as the result of the dragonfly flying into the man's vehicle could not possibly have been prevented by the exercise of ordinary care and caution by the Appellant. I therefore allow the appeal and set aside the conviction.

Dated this 8th day of March, 2004

GRAND COURT CAYMAN ISLANDS

Levers, J.
Judge of The Grand Court