IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 5/17
(CR NO. 423/16)

BETWEEN	**CHARLES JOSEPH BOYLE**, businessman of Matavera, Rarotonga
	Appellant
AND	**THE CROWN**
	Respondent

Coram:	Fisher JA (presiding) White JA Grice J A
Counsel:	Mr N George for Appellant Ms A Mills for Respondent
Hearing:	22 November 2017
Judgment:	24 November 2017

JUDGMENT OF THE COURT OF APPEAL

A. The appeal against conviction is dismissed.

B. The sentence is confirmed.

Solicitors: N George, Barrister & Solicitor, Rarotonga
A Mills, Crown Law Office, Rarotonga

Introduction

[1] Mr Boyle appeals against his conviction in the High Court on 25 July 2017 on one charge of careless driving causing injury.[1] He also appeals against the sentence imposed on 27 July 2017.[2]

Factual background

[2] At the defended judge alone hearing it was not disputed that sometime after dark on the evening of 31 March 2017 there was a collision between a car driven by Mr Boyle and a motorcycle driven by Mr Pekepo near Matavera. There was some disagreement about the exact time but it was sometime around 7.00 to 7.30 pm. Mr Boyle was making a right hand turn into the driveway leading to his home on the seaward side of the road when he collided with the motorcycle coming in the opposite direction. Mr Pekepo was thrown from his motorcycle and suffered serious injuries.

[3] Justice Doherty found that Mr Pekepo had been riding his motorcycle in his correct laneway with the head light on. Mr Boyle suddenly turned across Mr Pekepo's laneway without properly checking for oncoming vehicles which caused the collision and Mr Pekepo's injuries.

The High Court judgment

[4] In the High Court evidence was given by the driver of the car, Mr Boyle, as well as the rider of the motorbike, Mr Pekepo. Three other witnesses who were in the vicinity of the accident also gave evidence. Of these, Mr Miro and Mr Tatakaio supported Mr Pekepo's version of events. Mr Miro saw the accident. Mr Tatakaio had seen the motorcycle and Mr Boyle's car immediately before the collision. The third witness present in the vicinity of the accident, Mrs Tauu did not see the accident and could not identify the motorcycle or the rider. She said she had heard and observed a motorcycle at an earlier time and had assumed it was the same motorcycle as was involved in the accident.

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[1] Section 26 Transport Act 1966 (as amended by s 4 of the Transport Amendment Act 2007).

[2] *Crown v Boyle,* CKHC CrN423/16, Doherty J, Decision, 25 July 2017; and *Police v Boyle,* CKHC CrN423/16, Doherty J, Sentencing Notes, 27 July 2017.

[5] The police who attended the scene after the accident and took statements also gave evidence. The medical evidence about Mr Pekepo's injuries sustained as result of the accident was not in dispute.

[6] Mr George accepted that the Judge had adopted the correct test for careless driving causing injury. Justice Doherty had noted that the Crown must prove the driver of the motor vehicle failed to exercise the care and attention required of a reasonable and prudent driver in the circumstances and that the failure must be a material or substantial cause of the accident. It was common ground that Mr Pekepo's injuries were sustained in the accident.

[7] In his judgment Doherty J rejected Mr Boyle's principal contentions that Mr Pekepo was speeding and had only switched on his headlight after Mr Boyle had commenced his turn. Therefore when Mr Boyle commenced the right-hand turn into his driveway he could not see Mr Pekepo's motorbike in the darkness.

[8] The judge accepted the evidence of Mr Pekepo that his head light had been on at all times and it was Mr Boyle who was at fault by turning across his laneway. Mr Pekepo said he was unable to avoid the collision although he tried to veer away.

[9] The judge found support for Mr Pekepo's evidence in the evidence of Mr Tatakaio and particularly that of Mr Miro. His Honour said:

> [21] So where does that leave me with the defence witnesses? What I intend to do is to actually put both (sic) the evidence of both of them aside. I do not think Mrs Tauu actually adds much to it – there is no identification merely the inference that because of timing and proximity it was Mr Pekepo on this motorbike.
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> [22] How then do I assess his evidence and him as a witness? It seemed to me that he was both honest and reliable. He remembered exactly why he was going and where he was going, and to have invented that he was going to get a mosquito coils and a single cigarette seems to me to be a bizarre suggestion, not that anyone has, bar me.
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> [23] He knew the bike. He knew about the lights, because he had installed the switch. He is mindful of how it works and said that he had turned it on and left it on. I do not see any reason to doubt that. He also was someone who was prepared to make concessions where concessions were properly due. He admitted he did not have a helmet on. He admitted that he was going initially between 40 and 50 kilometres per hour which may have been above the speed limit for someone without

> a helmet. He made the concession that he could not rightly exclude the possibility that the defendant or that the car turning in front of him did have an indicator light on, just when he saw the car in front of him he thought it was an angle that might have obscured his view. Nor did he dispute that the car might have been turning at 5 kilometres per hour rather than 40 kilometres per hour. So he made proper concessions. He seemed to me to be a straightforward young man who was telling it how it was. He was also able to say that his first and only immediate reaction to attempt to veer to the left at the last minute. Seems to me to be a natural reaction and one which was likely to have happened.
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> [24] When I couple that with the independent evidence particularly of Mr Miro of a bike travelling at 40 to 50 kilometres per hour initially, a headlight on coming straight past the Seventh Day Adventist church and thereafter, and then lawfully being in the centre of the road then I actually believe and accept the evidence of Mr Pekepo.
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> [25] And that leaves me with the view that I have to reject that of the defendant.

[10] The Judge found that Mr Pekepo was lawfully driving on the road with his light on and that Mr Boyle did not see him. His Honour said:

> [26] ...A reasonable and prudent driver would have stopped, looked, ensured that the way was clear and then commenced his manoeuvre if it was.

[11] He went to on to say that Mr Pekepo was there to be seen, he was not seen. Therefore Mr Boyle's evidence fell below the care and attention required of a reasonable and prudent driver and that failure was a material or substantial cause of the accident.

The appeal

[12] In summary Mr Boyle's grounds of appeal are:

a) The Judge erred in law when he accepted the evidence of two independent witnesses that the motorcycle had the headlight on.

b) There were major flaws in His Honour's conclusion on the law based on the evidence that was before the Court.

c) Lack of corroboration of the evidence accepted by the Judge.

d) The judge failed to accept Mrs Tauu's evidence.

The final ground reads:

> e) All of his Honour's conclusions on the evidence lacked credibility which on careful analysis was legally and technically impossible to reach the conclusions he made.[3]

[13] In his submissions on behalf of Mr Boyle, Mr George advanced reasons that pointed to Mr Boyle's version of events being the correct one. These were based on the timing of the accident, inferences he made as to speed as well as the credibility of the witnesses. No scientific or technical evidence had been called to support Mr George's inferences.

[14] He submitted that corroboration was a legal requirement to support Mr Pekepo's evidence and that neither Mr Miro nor Mr Tatakaio should be believed as they were not independent due to previous associations or connections with Mr Boyle.

[15] Corroboration is not a legal requirement in these circumstances. The matters that Mr George put before us in support of the appeal were before the judge who found both the witnesses to be honest in recounting what they think they saw.[4] His Honour found that they supported the evidence of Mr Pepeko which he accepted in any event.[5]

[16] While there was some variation in the precise times speeds and movements recalled by particular witnesses, there is little point in analysing those details, as at the end of the day in accident cases judges often hear differing accounts from witnesses.

[17] The Court of Appeal in *Loomes v Police*[6] put it succinctly:

> "18... Humans are not accurate measuring devices to start with and distortions in their observations become magnified with the passage of time. The question is not whether there were variations in the precise details given by these witnesses but whether there was credible evidence upon which the Judge could have reached the conclusions he did.

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3 Notice of Appeal dated 2nd August 2017.

4 *Crown v Boyle* supra at [10].

5 *Crown v Boyle* supra at [21].

6 *Loomes v Police* CKCA CA No 4/2006, 1 December 2006.

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> 20. With exceptions which are not material here it is the exclusive province of the trial Judge to assess the credibility of witnesses. It is not for this Court to interfere in a matter of that kind in the absence of compelling reasons for doing so...."

[18] Those comments apply equally here. Counsel agreed that the role of the Court of Appeal in relation to findings of fact was set out in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*[7] as follows:

> "While not purporting to set out an exhaustive test, there are two conventional circumstances in which an appellate Court may differ from the trial Judge on a matter of fact. They are: (a) if the conclusion reached was not open on the evidence, ie where there was no evidence to support it; and (b) if the appellate Court is satisfied the trial judge was plainly wrong in the conclusion reached."[8]

[19] More recently the Court of Appeal has confirmed this approach:

> "[43] Second, it is well established that the appeal court will not lightly revisit credibility findings of this kind made by a judge who had the significant advantage of having seen and heard the witnesses..."[9]

[20] In this case the Judge traversed the evidence in a manner which could not be faulted. There was ample evidence for him to rely on in reaching his conclusion. There are no good reasons for revisiting the credibility findings of the Judge and we can see no grounds for interfering with the judgment.

Appeal against Sentence

[21] On 27 July 2017 Mr Boyle was sentenced to 12 months' probation with the first 3 months on community service and a condition that he not leave Rarotonga without approval of the Court. He was also ordered to pay reparation in the vicinity of $5,000. This included $550 for medical costs, the cost of the bike (at the time it was written off) of $2,700 and reparation

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7 *Rae v International Insurance Brokers (Nelson Marlborough) Limited* (1998) 3NZLR 190 (CA).

8 *Rae v International Insurance Brokers (Nelson Marlborough) Limited* at p 197 per Tipping J.

9 *Attorney General for Ministry of Justice (Survey Department) v Kokaua* (2017) CHHC 3; CA 1/2017 (6 July 2017) citing in a footnote the New Zealand Supreme Court case of *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2NZLR 141 at [5] and [13].

of $2,000 for emotional harm to Mr Pekepo. Mr Boyle was disqualified from holding or obtaining a motor vehicle driver's license for a period of 9 months.

[22] Mr Boyle submits that the sentence was manifestly harsh and unjustified considering the circumstances. In his oral submissions counsel indicated that the Judge had failed to take into account Mr Boyle's state of health.

[23] There was no medical evidence provided to the sentencing Judge concerning Mr Boyle's health. The Judge mentions that Mr Boyle is not in good health in general terms in his sentencing notes so to that extent the issue has been taken into account. However neither the nature of Mr Boyle's health problems nor their severity was before the Court. In those circumstances we do not take this matter any further.

[24] Careless driving causing injury or death carries a maximum term of imprisonment of 5 years or a fine not exceeding $5,000. This penalty was raised from 3 months imprisonment and a $100 fine in 2007. Comment has been made in the High Court that driving related offences continue to be a major concern in the Cook Islands and that a custodial sentence is usually warranted in cases of careless driving causing injury.[10]

[25] The Crown made written submissions at the sentencing hearing. It listed the aggravating factors as:

a) The cause of the accident rested entirely with Mr Boyle;

b) The victim's injuries were serious with ongoing complications. A medical report was produced.

[26] In mitigation the Crown noted that it was Mr Boyle's first appearance. The pre sentence report noted that Mr Boyle failed to show genuine remorse or take responsibility for his actions.

[27] The Crown submitted that the appropriate sentence was one of imprisonment for a term of between 6-12 months followed by 12 months probation and an order for disqualification from holding or obtaining a drivers licence of 12 months. If a non-custodial sentence was considered the Crown suggested a significant fine and a lengthy period of probation or community service be imposed along with reparation orders.

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[10] see *Police v Paterson CKHC CrN81/17, 4 May 2017, Potter J, at [10];* and *Police v Reichardt, CKHC CrN257/17, 25/7/17, Doherty J, at [11*].

[28] A wide range of circumstances might give rise to a charge of careless driving causing injury or death. At the lower end of the spectrum would be instances where the offender has caused an accident through a moment's inadvertence. More serious cases might involve such factors as excess speed, alcohol/other substances or serious carelessness. The consequences are also an important factor to be taken into account by the sentencing judge. These may range from minor injuries to the victim to more serious injuries or death.

[29] The Court may also take into account factors such as an early guilty plea, reparation made to the victim, remorse as well as matters relating to the personal circumstances of the offender. While not prescribed these are factors which are generally taken into account in sentencing by the Court.

[30] The sentencing Court must reach a conclusion as to the appropriate penalty after the weighing up all of the relevant factors.

[31] The range of sentences that has been imposed for this offence is wide. This is demonstrated in recent cases.

[32] In *Police v Reichardt,* the offender was imprisoned for a term of 6 months and ordered to pay reparation of $1,668 for the motorcycle together with $1,000 to the victim for emotional harm. An order for disqualification from holding or obtaining a drivers licence for 2 years was imposed. In that case the driver had been drinking and had earlier been convicted on a charge of excess breath alcohol at a level of three times over the limit allowed.[11] The offender had pleaded guilty, and expressed remorse. The victim suffered serious injuries.

[33] In *Police v Bartley* a motorcycle driven by the offender made a U turn causing a motorcycle following to collide with it. [12] The injuries of the two victims were serious. The offender entered an early guilty plea and showed remorse as well as making an ex gratia payment to the victim of $10,000. A fine of $750 together with an order for disqualification of 12 months was imposed by way of penalty.

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[11] *Police v Reichardt, CKHC CrN257/17, 26/7/17, Doherty J.* The conviction and sentencing had occurred earlier when a fine was imposed. The judge expressed the view that the fine was a lenient penalty and that it was not good practice to have separate sentence hearings for offences relating to the same incident. At [2] and [8].

[12] *Police v Bartley, CKHC CrN463/15, 11/3/16, Potter J.*

[34] In *R v Teiti* due to the youth of the offender and his inability to pay reparation or a fine, he was sentenced to 2 years' probation together with disqualification from holding or obtaining a driver's license for a period of 2 years. [13] The collision had occurred when the offender fell asleep on his motorcycle and collided with another motorbike. He pleaded guilty and his family offered assistance to the victim who had suffered injuries which disabled him for 3 to 6 months.

[35] In this case a non-custodial sentence was imposed and the level of reparation was within the range that had been recognised or imposed in similar cases. While Mr Boyle had no previous offences, the sentences in the cases mentioned were approached on the basis that the offenders had no previous offences. In contrast with the cases mentioned Mr Boyle did not qualify for a discount for a guilty plea. He has expressed no remorse nor offered reparation to the victim. Those factors were matters appropriately taken into account by the sentencing Judge.

[36] In these circumstances the sentence in this case was well within the range of appropriate penalties.

[37] In passing we note that there is no term of mandatory disqualification prescribed in the Transport Act 1966 (as amended by the Transport Act Amendment 2007). Counsel were unable to direct us to any relevant provision. The maximum period of disqualification that can be imposed for this offence is 3 years.[14] The sentencing judge referred to a minimum mandatory disqualification period for holding or obtaining a drivers licence of 9 months. This was the period of disqualification imposed. We are of the view that this was an appropriate period of disqualification in this case. Even if the Judge had been under the impression that this was a mandatory minimum period it does not affect the appropriateness of the period of disqualification. It was within the range available to the sentencing Judge.

[38] Accordingly we can find no basis upon which to interfere with the sentence.

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[13] *R v Teiti, CKHC CrN 347/12, 29 June 2012, Williams J.*

[14] S 31 of the Transport Act 1966

Conclusion

[39] The appeal against conviction is dismissed. The sentence is confirmed.

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Fisher JA

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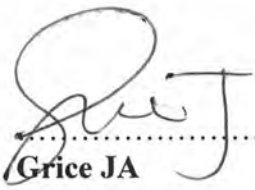
White JA



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Grice JA