

CROWN

v

CHARLES BOYLE

Date: 25 July 2017

Counsel: Mesdames A Mills and A Herman for the Crown
Mr N George for the Defendant

DECISION OF DOHERTY J

[11:51:49]

[1] At about 7.20 on the 31st March last year at or about Matavera a collision occurred between a car driven by the defendant and a motorcycle ridden by Memory Pekepo. As a result the driver of the car, namely the defendant, has been charged with careless driving causing injury to Mr Pekepo. There is no doubt that as a result of the collision Mr Pekepo suffered serious injuries which continue to trouble him to this day.

[2] The Crown allege that the defendant failed to exercise a degree of care and attention of a reasonable and prudent driver and did so by turning across the laneway in front of Mr Pekepo thereby causing the collision and the subsequent injury.

[3] The law is clear that the Crown must prove that the defendant failed to exercise a degree of care and attention of a reasonable and prudent driver in the circumstances but also that that failure was a material or substantial cause of the accident. I refer there to the New Zealand case on point, the *Police v Keen*¹, which was a High Court decision in Masterton on 26 June 1973, it is an old case.

¹ Police v Keen SC Masterton M33/72 [1973] NZHC 5 (26 June 1973)

[4] I remind myself that the defence does not have to prove anything. Mr Boyle does not have to prove he is innocent but in this case he has set out to show that the cause of the accident was not his driving but that of Mr Pekepo and that indeed the roles are reversed, it was Mr Pekepo's failure to exercise the degree of care and attention of a reasonable and prudent driver that caused the accident.

[5] I remind myself also that contributory negligence of another is not a defence but the actions of another may well lead to the view that the Crown have not left me sure of the guilt of the defendant.

[6] Evidence was given by Mr Pekepo as to his version of events and also by the defendant as to his version of events. Each of them were supported by other witnesses; Mr Pekepo by two witnesses who were adjacent to the site of the accident and who said they observed what had happened immediately beforehand as well as during and after. The defendant had called a witness who lived nearby and she too gave evidence about certain behaviours of a motorcyclist at about, and leading up to the time of, the collision.

[7] If I accept the evidence of Mr Boyle, the defendant, and his witness or accept that it might reasonably be true then of course the prosecution will have failed in that I would not be able to be sure that the elements of the charge had been proved. So the place to start then is with that evidence.

[8] It, of course, has to be put in the context of all of the evidence that I heard and before going directly to the defence witnesses it is as well to recount what Mr Pekepo says happened. He said that sometime between 6 and 7 o'clock he went to the shop, he went directly there, he was there for 5 minutes and he came directly back. And I see no reason not to accept that he had a particular mission – he was going to get mosquito coils and a single cigarette and there was only a certain shop that sold those cigarettes singularly and that was where he was going. If indeed his evidence is accurate then he probably left around 7 o'clock that night because there is not really any dispute that the accident happened around 7.20. It would have been dark – he said it was dark. He was riding his friend's motorcycle. He knew the motorcycle because he had personally made some modifications to the light switching on it. Because of the difficulties his friend was having with bulbs blowing under the automatic system he changed the system for him to a manual on/off switch. He recalled that he turned

his light on when he went to the shop, a matter corroborated by his friend who said that the light was on when Mr Pekepo left their home. His evidence was that he got to the shop, left the bike running, left the light on, did his business and then came back towards his home. He had to pass the driveway of the defendant to get there. He said that he had been travelling at around 40 to 50 kilometres per hour but had slowed down a little just before he came to where this accident happened and that was because the local church hall and church had people there and there were cars parked on the sides of the road. He described a car passing him going the other way and then immediately another car turning into his lane and he had no time to avoid it although he tried to by swerving his bike to the left. The impact threw him some distance from the vehicle and he sustained a badly fractured leg. His evidence was that he did not see any indicator light on the car that was turning in front of him. He did see headlights but no indicator light although conceded that there may well have been one on, he just did not see it, it all happened so very quickly.

[9] It happened so quickly that he, Mr Pekepo, thought he was only about a metre away before he saw the vehicle. He explained that he was travelling pretty much in the middle of the road, I think he put it halfway on my side of the road which would be a normal carriageway. So that is what he said happened.

[10] I will come later to some independent witnesses, two of whom were standing on the road, but in the meantime all I need say is that they generally corroborate firstly that Mr Pekepo had his light on, and secondly that he would have been travelling around the 40 mark perhaps, or a bit more at 40 to 50K speed.

[11] The defendant's evidence was that he had entered onto the main road adjacent to where the collision occurred only 73 metres beforehand. He had been visiting a business associate on a side road – that he came to the main road, stopped, turned left, and then was proceeding in the left hand lane intending to turn right into his driveway. He said that he was travelling slowly, that he intended to turn right, stopped at the centreline, said there was no one on the road that he could see coming the other way and then proceeded to turn slowly into his driveway.

[12] It was during that manoeuvre that suddenly, about 10 metres away, he saw the bike which would have to have been Mr Pekepo, and the only reason he saw it was that the light was immediately turned on and that was the first that he had seen of the motorcycle.

[13] There were a number of differences between the defendant's evidence and that of the two independent witnesses. Both of whom thought that he was travelling at various speeds. One them, Mr Miro, who was standing on the opposite side of the road to Tex Mart, thought that perhaps the car was doing 60 to 70 kilometres, earlier in a statement he had said 80 kilometres per hour.

[14] Mr Tutakiao, he was at Tex Mart and he thought the car was travelling at about 40Ks per hour. Both of them however said that the car did not stop at all at the centreline but merely attempted to cross the road, and go into the driveway without any indication at all.

[15] Estimates of speed are always difficult to make for those who are not experienced in it. Generally, witnesses are asked to convert their impressions into metrics and that is difficult to do. In my view it does not particularly matter how fast Mr Boyle was going – he has not been charged with speeding or any dangerous driving. He is merely being charged with carelessness.

[16] I have to say that in terms of the independent witnesses, I found them to be honestly telling me what they think they saw. The question also is whether they are reliable. They may not have been reliable about where this car came from because they both thought that Mr Boyle's car came from well down the road and not out of the adjacent side road. But to me, in assessing their evidence that is not a major point. The major point is they both had a clear view of what was going on at or about the point of impact.

[17] Mr Miro was certain and unchallenged in cross-examination, well unmoved in cross-examination about seeing the motorbike come from far down the road with its headlight on. He is also adamant that there was a turning in front of that motorbike.

[18] I have referred to them because I need to make an assessment of what the independent witness called for the defence said, and that was Mrs Tauu. She lives adjacent to this area and she that evening had been upset by hearing a motorbike, highly revving and creating and

executing manoeuvres up and down the road past her house at around where the Seventh Day Adventist church and the Sunday School is. She was annoyed with the sound of this because it went on for some time. Of importance is that just prior to the collision occurring she said that this motorbike left the Seventh Day Adventist premises and travelled again in a high revving manner along the grass verge and onto the road and then moments later she heard an impact.

[19] She assumed that that motorcycle was the one that was involved in this collision, and in effect is asking the Court to draw an inference that that was so. She could not identify or was not able to identify either the bike or the rider. She could not describe the bike, she could only describe the rider as someone who just looked big. That of course could describe a good proportion of the population of the Cook Islands. And I have got no doubt that she did observe these things but she has leapt to the conclusion that this was the complainant Mr Pekepo. But that flies in the face of the independent evidence of Mr Miro and Mr Tutakiao, both of whom said, certainly Mr Miro had said that he observed the motorbike coming from some distance away and he too was unmoved in that.

[20] Mr Pekepo was cross-examined at length as to his movements and whether or not he had been stopped at the Seventh Day Adventist premises and had been going up and down the road. He was adamant that he had not.

[21] So where does that leave me with the defence witnesses? What I intend to do is to actually put both 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.

[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.

[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.

[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.

[25] And that leaves me with the view that I have to reject that of the defendant.

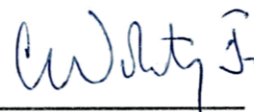
[26] As I have said, the speed that he turned with is of no moment in this case. If he had been travelling at a high speed he would have been charged with dangerous driving causing injury. It seems to me that what is likely to have happened here is that Mr Boyle was anxious to get home, he was proceeding along the road, he may have indicated, he may not have, but he looked and as he said “there was no one on the road that I could see”. But there was someone that he could see and that was Mr Pekepo who I find was lawfully driving on the road with his light on. And what Mr Boyle ought to have said, “there was no one on the road that I saw”. A reasonable and prudent driver would have stopped, looked, ensured that the way was clear and then commenced his manoeuvre if it was.

[27] Mr Pekepo was there to be seen, he just was not seen. And the light that Mr Boyle thought was turned on immediately before the accident was actually his realisation that there was a bike there with a light on. I am sure that his driving on this night 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.

[28] I find the charge proved.

[29] Mr Boyle you are convicted. You will be remanded at large for a probation report and sentence and that will be at 9am on the 27th of this month, which is Thursday, and I direct that you immediately go to and make an appointment with the Probation Service for an interview.

[30] Thank you.



Colin Doherty, J