[1999–00 Gib LR 130]

RODRIGUEZ v. ATTORNEY-GENERAL

SUPREME COURT (Pizzarello, A.J.): March 22nd, 1999

Road Traffic—driving without reasonable consideration—inconvenience to other road user—proof required of inconvenience as perceived by other road user—physical injury not per se evidence of inconvenience—court may draw appropriate conclusions from facts if victim unable to remember accident

The appellant was charged in the magistrates' court with dangerous driving.

The appellant drove into the Cathedral Square early in the morning on New Year's Day as two pedestrians were crossing the square, talking to one another. There was light from street lighting. He was driving at 20–25 k.p.h. The appellant sounded his horn to alert a parked taxi to his presence. His own vehicle was a noisy diesel-engined taxi. One of the pedestrians then saw him approaching and moved to push his female companion out of the way. She fell into the roadside, where she sustained injuries, but was unable to recall what had happened. The appellant saw them when they were only a few metres away from him and was unable to stop. The male pedestrian ended up on the taxi's bonnet but was uninjured.

The Stipendiary Magistrate dismissed the charge of dangerous driving and convicted the appellant of driving without reasonable consideration for other road users. He made no finding as to whether the appellant had had his headlights on or whether he had been distracted. He recorded that the female pedestrian had been "badly hurt" and that she was "inconvenienced."

On appeal to the Supreme Court, the appellant submitted, *inter alia*, that (a) the offence of driving without reasonable consideration required that some other road user had been inconvenienced; (b) the fact that the female pedestrian had been injured did not itself mean she had been inconvenienced, since it was her perception which was relevant, and not only had she been engaged in conversation when the accident happened, but she could remember nothing of it; and (c) the Stipendiary Magistrate had failed to consider (i) the nature of the inconsiderate act, (ii) the victim's contribution to the accident in failing to observe the Highway Code, and (iii) the causal link between the appellant's driving and any inconvenience suffered, given that the victim might have avoided the taxi by her own action.

The Crown submitted in reply that the conviction was sound, since the Stipendiary Magistrate had clearly concluded, taking into account the pedestrians' contribution to the accident, that the appellant had fallen below the standard of care required of a reasonably prudent driver and that the injured pedestrian had been inconvenienced.

Held, allowing the appeal:

Although the court approved the findings of fact made by the Stipendiary Magistrate, it was not satisfied that he had applied the relevant law properly to those facts. He had not addressed the issue of whether other road users had perceived inconvenience to themselves from the appellant's driving. Any inconvenience suffered by the male pedestrian had stemmed solely from his concern at the possible danger to his companion, and the physical injury that she had sustained was not itself sufficient evidence of inconvenience caused by the appellant. Her perception of the matter was crucial, and the court would have been entitled to draw its own conclusions from the facts, even though she herself did not remember the incident. The Magistrate had failed to consider the possibility that she might have been aware of the taxi's presence and been about to take evasive action of her own, perceiving no inconvenience in doing so. The conviction would be set aside (paras. 10–13).

Case cited:

(1) *Dilks* v. *Bowman-Shaw*, [1981] RTR 4, applied.

Legislation construed:

Traffic Ordinance (1984 Edition), s.30(1):

> "A person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, is guilty of an offence. . ."

S. Bossino for the appellant;
K. Warwick for the respondent.

1 **PIZZARELLO, A.J.:** The appellant herein appeals against his conviction by the learned Stipendiary Magistrate of driving motor vehicle G61031 without reasonable consideration for other persons using the road at Cathedral Square.

2 The grounds of appeal are that the Stipendiary Magistrate erred and/or misdirected himself in law and on the facts in his determination in that he—

> "(a) wrongly based his findings of guilt on grounds not advanced by the prosecution at any time during the course of proceedings;

(b) failed to consider properly or at all, and/or wrongly applied the correct legal test for determining whether or not the appellant drove his vehicle without reasonable consideration for other persons using the road in question;

(c) failed to apply the proper burden of proof resting upon the prosecution, as evidenced by his comment: 'In my judgment, not a high standard is required to prove [careless driving],' or words to that effect;

(d) wrongly imposed too high a standard of care on the hypothetical reasonable, prudent and competent driver when he stated: 'If, only for a second, you should have seen them, you fell short of what a prudent and competent driver would do';

(e) failed to consider adequately or at all the appellant's defence and all the circumstances prevailing at 5.30 a.m. on January 1st, 1998, including the character and condition of the road;

(f) failed to consider properly or at all the relevant provisions of the Highway Code applicable to pedestrians crossing the road and cited to him by the defence in closing;

(g) wrongly arrived at conclusions of distances not supported by the evidence, and starkly contradicted by Daniel Mauro's evidence on the distance of the appellant's vehicle from him when he first saw it prior to the accident;

(h) failed to consider properly or at all the braking distances provided in the Highway Code, if such were in issue and relevant; and

(i) allowed himself to be wrongly influenced and/or swayed in his determination, or had the appearance of having been so influenced and/or swayed, by Tyrene White's alleged injuries (and, in particular, by her alleged amnesia) when he stated in his judgment that the 'lady was badly hurt,' in the absence of any medical evidence."

3 There does not seem to be much dispute about the facts, which are that Tyrene White, together with Daniel Mauro, had been to a New Year's Eve dance and at about 6.00 a.m. they were at Cathedral Square, where they made use of a telephone booth situated at the south-west corner of the taxi-rank. The appellant was aware that the busiest time on New Year's Day is when people start coming out of dances. Tyrene and Daniel intended to make for the Copacabana, situated in Main Street, for breakfast and, after duly looking to the right to ensure nothing was coming, crossed the square from the telephone booth in a diagonal

manner towards the Main Street (north) junction with the square. There was light from street lighting. Tyrene was walking about a metre in front of Daniel and they were talking to each other. At that time there were parked cars in the taxi-rank and, more importantly, there was a taxi stopped at the south-east corner (by Gache's) facing east to west across the taxi-rank with its lights on.

4 While the couple were crossing, the appellant's vehicle approached the square from the south and the appellant drove his vehicle into the square. The appellant's car is diesel-powered and is noisy. By this time the couple were in the middle of the square. Daniel heard a hoot (which he says came from the car that straddled the taxi-rank), saw a car, saw that Tyrene was in danger and moved forward to push her out of the way. He ended up on the bonnet (the record notes "I jumped on bonnet") of the appellant's taxi. Tyrene ended up on the ground in the parking space for disabled persons situated at the north-east corner of the square between the taxi and the pavement and she suffered injuries. Daniel says that when he first saw the car he noted that the driver was not looking and it was coming fast. Daniel does not drive.

5 The appellant says that when he turned the bend from Main Street into Cathedral Square he noted the parked car with its lights on. This car was to his left and he proceeded on the right-hand side of the carriageway. He thought the car was about to move off and so he hooted to make it aware of his presence, then, 3 metres away, he saw two persons in the middle of the square. He was going at 20–25 k.p.h. and could not stop before he hit them.

6 The learned Stipendiary Magistrate found as a fact that alcohol played no part in the case. He adjourned to hear the sound of the appellant's vehicle. He looked at the area twice: once at night and then the following morning. He calculated the square was 20–25 metres wide. He made no finding that the appellant was talking, as alleged by Daniel, nor did he make any finding on whether the appellant had his headlamps on. The record shows that Daniel stated that the vehicle had lights and that he did not see a beam of light when he saw the vehicle approach. The appellant is not recorded to have said his headlamps were lit up. From the bar, counsel told me that while it is not recorded, Daniel stated in evidence that when he first saw the vehicle it was only 8 metres away.

7 In those circumstances, the learned Stipendiary Magistrate dismissed a charge of dangerous driving and convicted the appellant as above stated.

8 On matters of fact, plainly the trial judge is better placed to come to a view, having heard the evidence and having observed the witnesses, and this court will not disturb any decision which rests on the facts themselves. The facts as I have set them out would, in my view, justify

the learned Stipendiary Magistrate in coming to the conclusion that he did, provided that he had properly applied the relevant law to the facts.

9 Counsel for the appellant rightly conceded that there could be no quarrel with the decision had the charge been one of driving without due care and attention. But he submits that the considerations which apply to a charge of driving without reasonable consideration are different, especially as the charges emanate from the same section. He refers me to 1 *Wilkinson's Road Traffic Offences*, 14th ed., para. 5.28, at 313 (1989), where the difference between careless and inconsiderate driving is considered:

> "Driving without due care and attention may be said to mean departing from the standard of driving which would be exercised by a reasonable, prudent, competent driver in all the circumstances of the particular case. It follows that a person who drives without reasonable consideration for other road users can be convicted of driving without due care and attention, because a reasonable, competent and prudent driver would not drive without reasonable consideration for others. However, the corollary does not apply. A person may be convicted of driving without reasonable consideration for other road users only, seemingly, if other road users were inconvenienced."

In his submission, the learned Stipendiary Magistrate approached this matter as a case of careless driving and did not properly consider the situation that arises when the charge is inconsiderate driving. The factor which, he submits, ought to have been considered by the learned Stipendiary Magistrate is whether Tyrene was actually inconvenienced by the driving of the appellant. Three interrelated matters ought to have been considered, namely (a) What did the appellant do or fail to do in his manner of driving which was inconsiderate towards Tyrene? (b) What was Tyrene's part in the accident whereby she was actually inconvenienced? (c) What was the causal link between the manner of driving and the inconvenience caused, if any, and the strength or otherwise of that link, if any?

10 The learned Stipendiary Magistrate is an experienced judge. Most of the factors put forward by the appellant in the skeleton arguments he produced were put to the Stipendiary Magistrate. He dealt with the case carefully, heard the car and went to the *locus* twice. He would have observed, if he did not already know, that the square slopes down from east to west (which may affect braking distances) and he will have seen how much of the driver's view would have been impaired. It is clear that the Stipendiary Magistrate considered the standard of care owed by the appellant and the proper standard of proof, *i.e.* beyond reasonable doubt. It was before him that the couple were at fault to an extent in crossing the square diagonally and engaged in conversation.

11 However, I am not satisfied that he sufficiently took into account the relevance of this, since he appears to have concluded that the lady was inconvenienced because she was badly hurt. That seems to me to be the effect of the recorded note: "Lady was badly hurt. She was inconvenienced." Obviously she can be both inconvenienced and badly hurt but the charge is one of inconsiderate driving, and the cases that I have been referred to suggest that the perception of the inconvenienced person is a telling factor, as in *Dilks* v. *Bowman-Shaw* (1).

12 It is clear, on the facts, that Daniel was inconvenienced, but the inconvenience suffered by him was due to Tyrene's position of danger as he perceived it, and so it becomes important to consider if and how she was inconvenienced. We do not know precisely, because of her amnesia, how far that inconvenience went, but that she was injured is not inconvenience enough. Equally, the fact that she does not remember is no way out for the appellant because the court may draw its own conclusions from the facts. The point in issue is: Did the learned Stipendiary Magistrate consider this?

13 It struck me, reading the record, that it is possible for Tyrene to have been unwittingly pushed into the path of the vehicle. As counsel for the appellant conceded, if the case were one of careless driving, this might not matter, but the legislature has allowed for two distinct offences and, in my view, it is right to consider whether Tyrene might have seen the appellant's vehicle and was ready to step out of the way. That, of course, may be said to amount to inconvenience but, given the fact that she was in the middle of the road engaged in conversation, she might well, if asked "Were you inconvenienced?" have answered "No problem." As I have mentioned before, the perception of the inconvenienced person is relevant and to the extent that the learned Stipendiary Magistrate did not consider, or does not appear to have considered, this very fine point, it is with some reluctance that I conclude the conviction is unsafe and allow the appeal.

Appeal allowed.
