

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

CA NO. 4/2006

BETWEEN **OWEN MATUNGA TAINGA**
LOOMES

Appellant

AND **THE POLICE**

Respondent

Before:

Fisher JA (Presiding)
Paterson JA
Weston JA

Appearance for appellant by leave: Mr O.M. Loomes
Counsel for respondent: Mr T Elikana
Date of hearing: 27 November 2006
Date of judgment: 1 December 2006

JUDGMENT OF THE COURT

Introduction

1. The appellant appeals against his conviction in the High Court on 21 March 2006 on one charge of dangerous driving causing death and another of dangerous driving causing injury. On 31 March 2006 he was sentenced to concurrent terms of twelve months and six months imprisonment and disqualified from driving for three years. An appeal against that sentence has since been abandoned.

Factual Background

2. At the defended judge alone hearing of the charges it was not disputed that at 3.00pm on Tuesday 28 October 2003 the appellant was driving a motorcycle on the main island perimeter road in a northerly direction

towards the Kavera Store. The road was six metres wide, had a marked centre line, and was dry. The speed limit in that area was 60 kilometres per hour. The weather was fine and sunny with good visibility.

3. The appellant was following a motorcycle and two cars. The motorcycle was driven by an Australian who did not give evidence. The first car was a grey Nissan driven by a Ms Samuel. The second was a green Hyundai, driven by a Mr Ataera.
4. Approaching the appellant from the north was a red motorcycle driven by Mr Pokoroa Pauka. Mr Pauka had a fourteen-year-old pillion passenger, Niki Smith.
5. The appellant overtook the motorcycle and the first of the two cars. He was in the process of overtaking the second when he encountered Mr Pauka's motorcycle coming from the other direction. A head-on collision occurred on Mr Pauka's side of the road.
6. As a result of the collision the appellant, Mr Pauka and Mr Pauka's passenger Niki Smith, were admitted to hospital. Ms Smith died of her injuries three days later. The appellant and Mr Pauka were treated for their injuries and later discharged.

High Court Proceedings

7. At the defended hearing in the High Court before Nicholson J, evidence was given by the appellant, Mr Pauka, the drivers and passengers of the two overtaken cars, a number of by-standers, the Police who attended the scene, the Officer in Charge of the case and a privately consulted crash investigator.

8. In a comprehensive judgment Nicholson J traversed all the relevant evidence. He rejected the appellant's principal contention which was that Mr Ataera accelerated as the appellant was attempting to overtake. The Judge pointed out that Mr Ataera's evidence to the contrary was supported not only by his wife, who was in the car with him, but three independent witnesses – the two occupants of the grey Nissan and a bystander, Mr Joel Pokura. The Judge also pointed out that in a prepared written statement provided to the Police by the appellant, he had provided a different explanation for the accident. His explanation at that time was that:

"When I went to overtake the only thing coming in the opposite direction was a bus pulling up to stop approximately 150 metres away. At that point I made the decision to overtake. While proceeding to overtake the car I did not see the other motorbike overtake the bus just prior to the collision where I temporarily froze as I was still in the process of overtaking. The other motorbike rider was not taking any evasive action so to avoid a head-on collision I swerved to the right, unfortunately so did he."

9. The Judge pointed out that in that explanation the appellant made no reference to acceleration by the vehicle that he was attempting to overtake.
10. The Judge traversed the five elements of dangerous driving causing death, namely that the appellant was the driver of the green motorcycle involved in the collision, that the driving was on a road, that the appellant drove in a manner which, having regard to all the circumstances, was dangerous to the public or to any person, that there was fault on the part of the appellant which brought about the risk

of death or injury, and that the dangerous driving caused Ms Smith's death.

11. The Judge accepted that pursuant to *The Queen v Jones* [1986] NZLR 1 (CA) a conviction could be justified only if there was a situation which, viewed objectively, was dangerous and further that there was fault on the part of the driver. He noted that fault was a falling below the care or skill of a competent and experienced driver.
12. In the Judge's view a competent and experienced driver would not have attempted to overtake the green Hyundai unless satisfied that there was no oncoming vehicle which could be endangered. The appellant had said in evidence that he did look ahead and saw only the bus which he thought was approximately 200 – 300 metres away. The Judge found that in fact at that time Mr Pauka's red motorcycle was between the bus and the appellant. The Judge concluded that the appellant simply did not see the red motorcycle until it was too late and that attempting to overtake in those circumstances amounted to dangerous driving. The Judge also found that the appellant was travelling at a speed which was much faster than a competent and experienced driver would have permitted given the two cars ahead of him and that this too amounted to dangerous driving.
13. The Judge concluded that this dangerous driving was the operating and substantial cause of Ms Smith's death. He concluded that all elements of the offence were established.
14. The Judge also concluded that the same elements were established with respect to the charge of dangerous driving causing injuries to Mr Pauka.

The Appeal

15. In this Court the appellant's case was presented by his father, Mr O.M.Loomes. Mr Loomes presented the case with great thoroughness and care.
16. Mr Loomes took us through eleven grounds of appeal. They all led to one basic proposition, namely that as the appellant was overtaking the green Hyundai, its driver, Mr Ataera, having first slowed down, then accelerated in such a way as to preclude the appellant from completing his overtaking maneuver. This prevented the appellant from returning to his correct side of the road and was thus the real cause of the accident. It would be sufficient if there were even a reasonable doubt on that subject.
17. We have studied Mr Loomes's analysis of each item of evidence. The analysis turned primarily on each witness's recollection of the times, speeds, movements and distances involved compared with the position of landmarks and other significant items shown on plans of the area. Mr Loomes submitted that there were inconsistencies in the evidence of some witnesses. These included, for example, Mr Loomes's rejection of a statement earlier made by the appellant himself regarding his return to the correct side of the road before setting out to overtake the Hyundai. Mr Loomes attributed inconsistencies between the appellant's own statement and evidence to retrograde amnesia, albeit unsupported by medical evidence to that effect.
18. We accept that in some cases Mr Loomes was justified in questioning the precise times, speeds, movements and distances recalled by

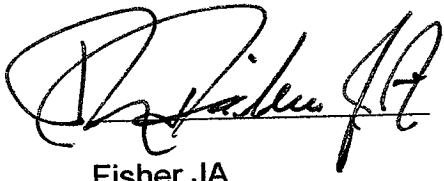
particular witnesses. However in the end we do not think that any purpose would be served by our prolonging this judgment with an analysis of the details. For the reasons which the Judge touched upon in para 26 of his judgment, judges routinely hear differing accounts from witnesses to a motor accident. 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.

19. In our view the Judge traversed the relevant evidence in a manner which cannot be faulted. He specifically considered the possibility that the green Hyundai had accelerated so as to prevent the appellant from returning to his correct side of the road. The Judge rejected that possibility. In doing so he accepted and relied upon the evidence of five witnesses - Mr and Mrs Ataera, the two occupants of the grey Nissan, and the bystander, Mr Joel Pokura. The Judge rejected the evidence of the defence, evidence to the contrary.
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. We can find no such reasons. Nor can we see any other grounds for interfering with the judgment given in the Court below.

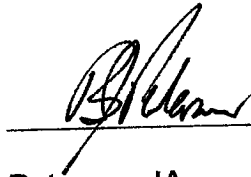
Conclusion

- 21. The appeal against conviction is dismissed. The sentence is confirmed.

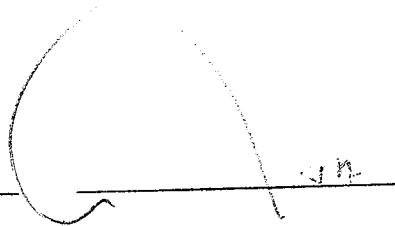
- 22. The appellant has been on bail pending the outcome of this appeal. He must now surrender his bail and commence the imprisonment imposed. The bond provided in support of bail is discharged. The deposit of \$2000 is to be returned to the original provider of those funds.



Fisher JA



Paterson JA



Weston JA