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

CA 1676/24

BETWEEN **JONATHAN ELISA**

Appellant

AND **THE CROWN**

Respondent

Coram: White P, Fisher JA, Asher JA

Hearing: 2 December 2024 (CIT) / 3 December 2024 (NZT)

Counsel: Mr N George for the Appellant
Mr T White for the Respondent

Judgment: 6 December 2024

JUDGMENT OF THE COURT OF APPEAL

A. The appeal against conviction is dismissed.

B. The sentence of two years' imprisonment is confirmed.

Introduction

[1] In accordance with a direction given by the President under s 53(3) of the Judicature Act 1980-81 as inserted by s 2 of the Judicature Amendment Act 2011 [the Judicature Act], this appeal was heard in Rarotonga with the Judges appearing by video link from the Court of Appeal in Auckland, and Counsel, the Registrar, the Appellant and members of the public in the courtroom in Rarotonga. We thank the President of the New Zealand Court of Appeal and the staff of both Courts for their assistance in making the necessary arrangements.

[2] On 6 June 2024, following a trial in the High Court before Chief Justice Keane, a jury found the Appellant guilty on one charge of dangerous driving causing death under s 25(1) of the Transport Act 1966, and one charge of driving with excess blood alcohol under s 28A of the Transport Act 1966.

[3] He was convicted on both charges and on 10 October 2024 sentenced by Chief Justice Keane to two years' imprisonment on the first charge and, concurrently, to four months' imprisonment on the second charge.[1]

[4] By notice of appeal dated 17 October 2024 the Appellant appealed against his conviction on the first charge. He has not appealed against his conviction on the second charge or against his sentences on either charge.

[5] The Appellant also applied for bail pending the hearing of his appeal against his conviction on the first charge. At a criminal call over before the Chief Justice on 25 October 2024, his Counsel, Mr George, accepted that the bail application was premature because the Appellant needed to serve the four months' imprisonment for the conviction on the second charge against which there was no appeal.[2]

Factual background

[6] As recorded in the issues paper given to the jury by the Chief Justice at the trial,[3] the following facts were admitted at the trial –

(a) On 10 June 2023, a blue Honda Wave motorcycle crashed at Kauare, Titikaveka.

(b) At the point of impact, the motorcycle was being driven in a manner that fell below the standard of care of a reasonable and competent driver, and that was dangerous to the public.

(c) The manner of driving caused the death of a 24 year old male named Kaitara Nicholas.

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1 Chief Justice's sentencing notes, 10 October 2024.
2 Chief Justice's Minute (6) dated 25 October 2024.
3 Chief Justice's summing up on 6 June 2024, paras [1](b) and [36].

(d) Mr Nicholas was examined by Dr May Khine Mon at the scene, who concluded the probable cause of death to be cervical spine injury (C2, C3 transverse fracture).

[7] The unchallenged evidence at the trial established that the tragic accident occurred when the motorcycle being ridden at excessive speed failed to turn left at a T junction on Kauare Road, a back road off the Main Road to Muri, and instead went straight ahead clipping a roadside ridge and becoming airborne. On the motorcycle at the time were the Appellant, Mr Elisa, and his friend the deceased, Mr Nicholas, both of whom were under the influence of alcohol. Both men were thrown into the air: the Appellant landing without significant injury, but the deceased landed head and neck first against a coconut tree stump and suffered fatal injuries.

[8] As noted in the issues paper and the Chief Justice's summing up,[4] the sole issue at the trial was whether the jury was sure (convinced beyond reasonable doubt) that just before, and at the point of the accident, Mr Elisa was the driver of the motorcycle. We will refer to him as "the rider".

[9] The Appellant, Mr Elisa, denied that at the point of the accident he was the rider. He said he was the passenger and the deceased Mr Nicholas was the rider. In addition to his own evidence, the Appellant relied on the evidence of six Infrastructure Cook Islands (ICI) road workers who had been working on a culvert some kilometres before the accident that the deceased Mr Nicholas was the rider. Curiously, no evidence was adduced to indicate precisely where the road workers had been located, but there was no dispute they were on Kauare Road some distance before the T junction and without a view of the point of impact. Mr George stated to witnesses without them responding, and to us at the hearing without contest from the Crown, that the distance was approximately three kilometres.

[10] The Crown relied on eyewitness evidence from two witnesses, Ms Rennie and Ms Iro, who said that at the point of the accident the Appellant was riding the motorcycle and the deceased was the pillion passenger. Both eyewitnesses said they were standing outside a house some 20 metres from the T junction and had unobstructed views of the accident. The Crown also relied on CCTV footage showing the Appellant riding the motorcycle with the deceased as the pillion passenger before they turned on to Kauare Road as well as what the Appellant

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4 Chief Justice's summing up, paras [36] and [51]ff.

and the deceased were wearing on the day and on the Appellant's initial statement to the Police which was inconsistent with the CCTV footage.

The trial

[11] At the trial the issue of identification was addressed in the evidence called by the Crown and the defence, the closing submissions of Counsel and the Chief Justice in his summing up.

[12] Prior to the Chief Justice's summing up, he advised Counsel in chambers of the directions he proposed to give to the jury on the issue of identification, noting he would be "modelling [his] direction on s 126 of the Evidence Act 2006 (NZ), which states the *Turnbull* principles."[5]

[13] In his summing up, the Chief Justice then gave the jury the following directions on the law relating to identification evidence –

> "[54] … our law requires me to tell you that there are three reasons why you must be especially cautious.
>
> [55] The first reason for caution our law identifies is that a mistaken identification can lead to a serious miscarriage of justice. The second is that a mistaken witness can also be a convincing witness. The third is that where there are, as here, two identification witnesses, both may possibly be mistaken."

[14] There was no formal application by the defence before or at the trial for the Court to consider discharging the Appellant under s 111 of the Criminal Procedure Act 1980-81 on the ground that the case should not have gone to the jury. Nor was there any suggestion at the trial that the Chief Justice's directions on the law relating to identification evidence were incorrect.

[15] While the jury was initially unable to agree on their verdict on the first charge, they ultimately unanimously found the Appellant guilty on both charges.[6]

The appeal

[16] Having been convicted before a Judge of the High Court of an offence subject to a sentence of imprisonment, the Appellant has a right of appeal to the Court of Appeal under s 67(1)(a) of the Judicature Act.

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5 Chief Justice's Trial Minute dated 6 June 2024, para [4].
6 Chief Justice's Trial Minute dated 6 June 2024, paras [6]-[7].

[17] Under s 74 of the Judicature Act the appeal is by way of rehearing and in the absence of leave is determined on the evidence given at the High Court trial. There has been no application by the Appellant for leave to adduce any further evidence.

[18] From the written submissions for the Appellant, it appears the appeal is brought on the basis there was a miscarriage of justice in terms of s 69(1)(c) of the Judicature Act. As this Court held in *Utanga v R*,[7] the relevant question in this context is whether there was an error, irregularity or occurrence in or in relation to or affecting the trial that has created a real risk the outcome was affected. That in turn requires consideration of whether there is a reasonable possibility another verdict would have been reached

[19] It is submitted for the Appellant that the jury's unanimous guilty verdict created a major miscarriage of justice because –

(a) The evidence at the trial from the Appellant and the six ICI road workers established the Appellant was not the rider of the motorcycle at the time of the crash.

(b) An innocent man was prosecuted for a crime he did not commit.

(c) The Appellant expected the Court to consider discharging him under s 111 of the Criminal Procedure Act. Instead the trial went ahead and despite the trial Judge's warnings the jury convicted the wrong person.

(d) The defence witnesses should have been preferred to the two prosecution witnesses who were "extremely prejudiced and biased".

(e) While the trial Judge's summing up was "fair and reasonable", the prosecution "fell well short of the expected high standards acceptable in our proud and highly reputable court system".

[20] As Crown Counsel helpfully noted in his written submissions in response, the Appellant might also have framed his appeal under s 69(1)(a) of the Judicature Act on the basis the jury's verdict was unreasonable or could not be supported having regard to the evidence. At the

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7 *Utanga v R* [2024] CKCA 1, CA 1802/23, 16 September 2024, at [46]-[47].

hearing of the appeal, Mr George for the Appellant agreed this was an alternative basis for appeal.

[21] We agree it is appropriate to consider the appeal in the context of s 69(1)(a) as well as under s 69(1)(c). As the Crown submitted and Mr George accepted, the approach for an appellate court under s 69(1)(a) has been usefully described in New Zealand decisions on the equivalent provision: *R v Munro*[8] and *R v Owen.*[9]

[22] The question under s 69(1)(a) for the Court of Appeal to answer is whether the verdict was unreasonable. The only necessary elaboration is that a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.

[23] In considering this question, it is helpful to bear in mind –

(a) The appellate court is performing a review function, not one of substituting its own view of the evidence.

(b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.

(c) The weight to be given to individual pieces of evidence is essentially a jury function.

(d) Reasonable minds may disagree on matters of fact.

(e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.

(f) An appellant who invokes [this ground of appeal] must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is

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8 *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [53].

9 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 87 at [12], [13] and [17]; cf *C v R* [2021] NZSC 110, [2021] 1 NZLR 530 at [35] and *Fakaaosilea v R* [2024] NZCA 218 at n 20.

said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[24] At the hearing of this appeal we gave Mr George the opportunity to articulate any further respects in which the jury verdict is said to be unreasonable in addition to those the Appellant relies on in the context of his "miscarriage of justice" appeal under s 69(1)(c). Mr George indicated that the same submissions applied to both grounds of appeal.

Our decision

[25] For the following reasons, which largely follow the submissions for the Crown, we do not agree with the Appellant there was a miscarriage of justice under s 69(1)(c) or that the jury's verdict was unreasonable under s 69(1)(a).

[26] First, there was no basis for the Chief Justice to discharge the Appellant under s 111 of the Criminal Procedure Act. No formal application for a discharge was made by the Appellant before or during the trial. Conflicting identification evidence was adduced at the trial from witnesses for the prosecution and the defence. Assessment of the conflicting evidence was a factual issue for the jury not the trial Judge or this Court on appeal. We note for completeness that at the sentencing hearing, Mr George did submit that the Appellant should not be sentenced on the first charge because the jury's verdict was wholly unreasonable, but this submission was not accepted by the Chief Justice.[10] There was no formal application by the Appellant for a discharge without conviction under s 112 of the Criminal Procedure Act.

[27] Second, the existence of this conflicting evidence did not mean the Police investigation, or the Crown prosecution was deeply flawed. On the contrary, it confirmed the need for the issue to be determined by the jury.

[28] Third, the Chief Justice's directions to the jury on the law relating to identification evidence were correct and are not challenged on appeal, and indeed were endorsed by Mr George. In particular, the directions were in accordance with established authority: *R v Turnbull*[11] and *Police v Vakalalabure.*[12] In the absence of any error or irregularity in the Chief

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10 Chief Justice's sentencing notes, 10 October 2024, paras [25]-[26].
11 *R v Turnbull* [1977] QB 224, 1976) 63 Cr AR 132, 137-138.
12 *Police v Vakalalabure* [2008] CKHC 17, HC Rarotonga CR 322/07, 27 November 2008, at [23]-[30].

Justice's directions on the key issue of identification there was no real risk of the outcome being affected.

[29] Fourth, the Appellant has essentially invited this Court to substitute his view of the evidence for the view of the evidence taken by the jury. This is not the role of an appellate court performing a review function. In this case the jury heard and assessed for credibility and reliability all the relevant identification witnesses. The defence case was squarely before the jury, but it was not accepted. The jury was entitled to prefer the evidence of the Crown witnesses and to find beyond reasonable doubt the Appellant was the rider of the motorcycle at the time of the crash.

[30] In particular, all of the issues raised again by the Appellant on this appeal relating to the credibility of the Crown eyewitnesses and the defence case were raised at the trial and known to the jury. The Crown eyewitnesses gave evidence they saw the crash from 20 metres away, their view of the crash was unobstructed, and they saw the Appellant riding the motorcycle with the deceased as the passenger. Their evidence was correctly summarised by the Chief Justice in his summing up. It was described by the Crown to the jury as "consistent" and "inherently reliable" and safe to accept and convict on.[13] An attempt by Mr George to suggest to the jury on the basis of Crown photographs and other evidence that the view of the Crown witnesses was obscured by trees so they could not have seen the rider at the point of the accident was not permitted by the Chief Justice because this had not been put to either witness.[14]

[31] It was open to the jury to find the evidence of the six ICI road workers of no particular assistance because it related to a time and place before the time and place of the crash, some several kilometres away on Kauare Road before the T junction. Further, although it might have been better if their credibility had been more directly challenged by the Crown when they gave their evidence, the cross-examination of them by the Crown was plainly intended to cast doubt on their credibility. The jury had a proper basis for preferring the evidence of the two eyewitnesses who saw the accident.

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13 Chief Justice's summing up on 6 June 2024, paras [63]-[66].

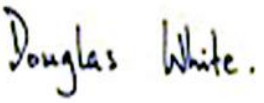
14 Chief Justice's Trial Minute dated 6 June 2024, para [5].

[32] As the Chief Justice noted in his summing up,[15] the Crown also invited the jury to reject the evidence of the Appellant because it involved an inconsistency between his initial statement to the Police that he and the deceased swapped positions on the motorcycle at KAPS Matavera, on the way to Tikioki, while at the trial giving evidence they switched when they stopped on the back road at Tikioki. The jury was entitled to place weight on this change of story, and may have felt that the change was designed to meet the incontrovertible evidence of the CCTV footage, and therefore indicative of a lack of credibility of the Appellant's evidence.

[33] In these circumstances there is in our view no basis for concluding that the jury's verdict was unreasonable or unsupported by the evidence. Indeed, having regard to all the evidence, we do not consider the verdict the jury reached could be regarded as unreasonable or that a miscarriage of justice occurred. If it had been for us to reach a verdict on the evidence, we could well have reached the same conclusion as the jury.

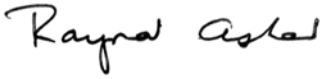
Result

[34] For these reasons the appeal against conviction on the first charge is dismissed and the sentence of two years' imprisonment is confirmed.



Douglas White P

Robert Fisher JA



Raynor Asher JA

[15] Chief Justice's summing up on 6 June 2024, paras [60]-[61].