IN THE SUPREME COURT OF NEW ZEALAND

SC 32/2013
[2013] NZSC 57

BETWEEN	WORTHY REDEEMED (AKA LEE ERROL JAMES SILVESTER) Applicant
AND	THE QUEEN Respondent

Court: McGrath, William Young and Glazebrook JJ

Counsel: L L Heah for Applicant
M F Laracy for Respondent

Judgment: 12 June 2013

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

The proposed appeal

[1] The applicant was found guilty on three counts of manslaughter. He had been the front seat passenger in a Mitsubishi car which veered to the right across the centre line and collided head on with a bus coming in the other direction. There were five people in the car. The driver and two of the three back seat passengers were killed. The other surviving passenger, Reece Dick-Durham, had been on the left hand side of the rear seat (directly behind the applicant). Mr Dick-Durham was the principal Crown witness at trial. He said that the applicant caused the accident by forcing the steering wheel to the right and thus the car to go across the centre line and collide with the oncoming bus. Mr Dick-Durham remained conscious throughout the incident and his remarks in the immediate aftermath of the collision (which were accusatory) were consistent with his evidence at trial. There was also other evidence which supported the Crown case.

[2] The unlawful act relied on by the Crown was breach of s 270(1)(b) of the Crimes Act 1961 which meant that the Crown had to show that the applicant had acted with reckless disregard for the safety of others.

[3] The proposed appeal relies on two grounds:

(a) The admission of, and directions as to, propensity evidence; and

(b) New evidence.

There is also what seems to be a separate complaint about the plausibility of an aspect of Mr Dick-Durham's evidence but this does not come close to raising a point which would warrant leave to appeal.

Propensity evidence

[4] The propensity evidence was directed to another occasion on which the applicant had been a front seat passenger in a car and had grabbed the steering wheel, thereby causing the car to swerve to the right. At trial, an objection to this evidence was withdrawn on the basis that it be led in a pre-approved form, as it was. To some extent this incident was relied on by the defence at trial because Mr Dick-Durham had been aware of it and it was suggested to him that he had confused what he had heard of this incident (perhaps along with what he had seen of yet another similar incident immediately before the collision with the bus) with what had caused the accident. In the Court of Appeal, however, counsel for the applicant challenged the admissibility of the evidence and also the way in which the Judge summed up on it.

[5] The applicant's position seems to be that propensity evidence should only be admitted where it reveals a propensity to act in a way which encompasses all elements of the offending for which the defendant was charged, which in this case included recklessness.[1] This argument, however, is legally unsound. A key (although not the only) issue for the jury was whether the applicant had caused the

[1] The argument assumes that the applicant was not reckless on the earlier occasion, which is far from clear given a remark he allegedly made at the time.

collision by grabbing the steering wheel and turning it to the right. Evidence which tended to show that this is what had happened on other occasions when the applicant was in a vehicle, both from the propensity witness and from the independent witness in relation to events shortly before the accident, was admissible as to that issue, irrespective of whether it also showed that the applicant was in the habit of doing so with reckless disregard for the safety of others.

[6] The complaint about the summing up is simply a variant of the same argument and equally unsound.

New evidence

[7] The new evidence addresses two aspects of the evidence given at trial:

(a) Senior Constable McIntyre, a specialist accident investigator said that the car had deviated by 30 degrees from its original line of travel. He attributed this to a "steering input" which he described in cross-examination as "significant" and which had occurred shortly before (within a second or two) of the accident. In re-examination, he justified this conclusion by reference to his assessment of the angle of deviation. He did not express a view as to whether the steering input had come from the applicant or the driver.

(b) In re-examination, Mr Dick-Durham said that in the aftermath of the accident, the applicant's hand was on the pillar supporting the windscreen on the passenger's side of the car. He saw this as consistent with his recollection of the applicant's arm extending across the front of the car. This was initially something of a throw-away line but, because the prosecutor did not understand the point he was making, there is about a page of re-examination addressed to this issue.

[8] The new evidence comes from Professor John Raine. Professor Raine concluded that the angle of deviation of the car may have been less than five per cent, was probably 5-10 per cent and was unlikely to have significantly exceeded

10 per cent. He said that an angle of deviation of 30 per cent as proposed by Senior Constable McIntyre was not physically possible. In the Court of Appeal, Senior Constable McIntyre did not challenge that assessment. Professor Raine also commented on whether the post-accident location of the applicant's hand on the pillar supported Mr Dick-Durham's evidence. He said he would have expected the applicant's body (which was restrained by a seat-belt) to have rotated in an anti-clockwise direction in the aftermath of the accident. So if his hand had been on the steering wheel at the time of impact, it would be likely to have wound up where it did. But he considered that the position of the hand there did "not necessarily mean ... that his right hand was on the steering wheel at the moment of impact".

[9] There is no reason to think that the jury would have placed any significant weight on Mr Dick-Durham's comment about the position of the applicant's hand, given his lack of any relevant expertise. The Court of Appeal understandably regarded this aspect of the new evidence as being of no practical significance.[2] In any event, if Professor Raine had given evidence at trial on this aspect of the case, it would, if anything, have been seen by the jury as providing some support for Mr Dick-Durham's evidence as a whole, in that the applicant's hand had wound up in a position which was consistent with it having been on the wheel at the point of impact. On the more important aspect of Professor Raine's evidence – the angle of deviation and why the collision happened – the Court of Appeal did not accept that if his evidence had been led it would have resulted in a different verdict because the Professor agreed with Constable McIntyre that the most plausible explanation for the deviation was a significant steering input as opposed to driver inadvertence.[3]

[10] The submissions for the applicant proceed on the basis that the Court of Appeal misunderstood the relevance of Professor Raine's evidence in that it would have supported the proposition that the collision was caused by inadvertence in the sense of "fooling or skylarking" by one or more of the occupants of the vehicle. However, Professor Raine's evidence would not have supported that explanation. Instead, it would merely not have excluded it. And Senior-Constable McIntyre's evidence likewise did not exclude it. In his closing address to the jury, defence

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2 *Worthy Redeemed v R* [2013] NZCA 61 at [24].

3 At [23] and [25].

counsel at trial put in issue the Crown's contention that the applicant had grabbed the wheel and in that way caused the accident. He also suggested that even if the accident had been caused by the applicant steering the car to the right, it did not follow that the applicant had acted with reckless disregard for the safety of others as the collision may have been caused by the applicant "horsing around and playing up".[4] In her closing address, the prosecutor focused primarily on whether the applicant had (a) caused the car to veer to the right and (b) done so deliberately. In respect of these issues she relied primarily on the evidence of Mr Dick-Durham and the evidence of Senior Constable McIntyre was mentioned only in passing. She referred to his assessment of the angle of deviation only as indicating that the car had not drifted. But since Professor Raine also viewed drifting as an implausible explanation for the accident – as the Court of Appeal explained – this is of little moment.

[11] Whether the proposed appeal is looked at in accordance with the standard principles which apply to new evidence on appeal or, alternatively, in terms of whether the failure by defence counsel to obtain an engineering report before trial was an error, there is no indication that either a substantial miscarriage of justice may have occurred or that any point of general or public importance arises.

Disposition

[12] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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[4] A "fooling around" explanation, of course, is not inconsistent with recklessness as "fooling around" can encompass deliberate risk-taking.