IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CR NO. 805/06

POLICE

V

CARYN CHILWELL
Defendant

Mrs K Saunders and Miss M Henry for Police
Mr T Vakalalabure for Defendant
Date: 30 September 2008
01 October 2008

ORAL JUDGMENT OF WESTON J

1. Caryn Chilwell, who I will refer to as Miss Chilwell, is charged with breaching Section 26(1) of the Transport Act 1966 on 6 August 2007 in that she, *"did carelessly drive a motor vehicle, namely a blue Nissan van registration number RA622 at the main road at Nikao thereby causing injury to Robert Ioaba of Arorangi."* Section 26(1) provides that it is an offence to cause bodily injury to any person by carelessly using a motor vehicle.

2. The accident occurred at the exit to the airport. There are two lanes for exiting traffic. Miss Chillwell was in her car in the right-hand lane, seeking to turn right, and then travel to Avarua. In order to do so she needed to cross one lane of the main road before turning into the far lane heading into town.

3. Mr Ioaba was driving his motorcycle along the main road away from Avarua. That is, he was travelling in the lane which Miss Chilwell's car would need to cross. The exit from the airport is controlled by a stop sign. Miss Chilwell was obliged to give way to Mr Ioaba.

4. Mr Ioaba's motor cycle collided with Ms Chilwell's car as it crossed the lane in which Mr Ioaba was travelling. As a result of that collision, he

suffered injuries to his head and to his right knee. He gave evidence that he may need to have a hip replacement as a consequence of that accident.

5. There is no significant controversy between the parties with the narrative set out so far. That leaves the Court two issues to determine. First, whether Miss Chilwell was carelessly driving her car up to and at the moment of impact. Secondly, and assuming that she was, whether that was the cause of Mr Ioaba's injuries.

6. There are some uncertainties as to the exact time when the collision occurred. I find that it occurred some time between 5 and 5.20 pm on 6 August 2007. There is no need to be more precise than that.

7. There was some surprising inconsistency as to the evidence between the two Police officers who attended the accident. For example, they differed as to the place of the ambulance and as to whether Miss Chilwell was driven to the Police Station in her own car or the police vehicle. In the final event, though, nothing turns on these inconsistencies and I say no more about them.

8. Counsel were agreed that the legal test is an objective one and that the most useful reference is the decision of the full Court of the Queen's Bench in *Simpson v Peat* [1952] 2 QB 24. At page 27, the Chief Justice, delivering the judgment of the Court, said: "*It is in our opinion clear that the driver may not be using due care and attention although his lack of care may be due to something which could be described as an error of judgment. If he is driving without due care and attention it is immaterial what caused him to do so. The question for the Justices is, was the defendant thereby exercising that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances. If he was not, they should convict. If on the other hand the circumstances show that his conduct was not inconsistent with that of a reasonably prudent driver, the case has not been proved.*"

9. This was the paragraph from the judgment to which I was primarily referred. But in addition I have gained assistance from various aspects of the judgment on page 28 emphasizing that careless driving (or not) is essentially a question of fact for the Court to determine. Two other points also emerge. First, simply because an accident occurs does not mean that an offence has been committed. Secondly, it is for the defendant, that is Miss Chilwell in this case, to take care to execute the relevant manoeuvre in safety.

10. Mr Vakalalabure also referred me to the earlier decision of *McCrone v Riding* [1938] 1 KB 157 but I do not think that materially adds to the above statement of the law. I note that the earlier judgment was referred to in argument in *Simpson v Peat* but it does not seem to have been mentioned in the course of the judgment itself.

11. I now address a number of relevant issues of fact in relation to whether Miss Chilwell drove her car carelessly. First, there is the question of alcohol. I am satisfied that this issue could be relevant if the facts were made out but I do not consider that to be so here.

12. Constable Makara gave evidence that he smelled alcohol on Miss Chilwell's breath after the accident. Constable Teinangaro did not give similar evidence. It was put to Miss Chilwell in cross-examination that she had drunk half a bottle of vodka but there was no affirmative evidential base established for that proposition. In any event, Miss Chilwell denied the proposition when it was put to her. I accept her evidence on that. I also accept that she had drunk some two or three cans of beer early in the day but there was no evidence before me that that had had any material effect on her driving. In any event, some four or five hours had passed since drinking the beer and I do not believe she was careless just because she had drunk that beer earlier in the day.

13. Mr Vakalalabure cross-examined the complainant on the basis that he had drunk some three or four stubbies of beer just before the accident. In fact Mr Vakalalabure put it to him he had drunk more than that. Mr Ioaba accepted he had drunk some three or four stubbies but said he had drunk no more than that. In any event there is nothing to suggest that this had anything to do with the accident.

14. So I am satisfied as a matter of fact alcohol was not a relevant factor in this case.

15. Secondly, Mr Vakalalabure questioned the complainant on the basis that he was speeding. I am satisfied on the evidence that Mr Ioaba was travelling at between 25 and 30 kilometres per hour and that his speed was not a causative factor in any real sense.

16. Mr Vakalalabure also suggested that Mr Ioaba's manoeuvre when confronted by Miss Chilwell's car, which was to swerve to the left, was causative. Again, I reject that suggestion and in no way do I find that Mr Ioaba contributed to the accident.

17. Thirdly, Miss Chilwell said she stopped at the Stop sign and then looked right, left and right again. The Crown strongly challenged that and built its case around the partially completed statement that Miss Chilwell ultimately refused to sign. Miss Chilwell accepted that her handwriting appeared on the typed statement. I accept that the typed portion of that statement was prepared by Constable Makara.

18. It was put to Miss Chilwell that she had crossed out the typed words: *"I did stopped and I looked both side of the road"* (sic) and replaced them simply with the expression, *"Stopped the car."* In my opinion this is not a strong basis to challenge her evidence. First, she must have said the original words for them to be typed down on the first version of the statement by Constable Makara. Secondly, I accept she was traumatised at the time and not necessarily thinking straight. Thirdly,

Constable Teinangaro gave evidence that immediately after the accident, Miss Chilwell had said she had looked and seen no one coming.

19. Consequently, I accept that Miss Chilwell did look both ways before entering the intersection. However, that does not directly answer the real point. Her obligation was to ensure she could execute the turning manoeuvre safely. It was common ground between the parties that the intersection was a difficult one in that the view is obstructed by a power pole and a hedge of clipped ironwood. Miss Chilwell accepted that this was a difficult intersection and that she needed to take extra care. She says she did. I believe she did not.

20. The Crown argued that in the circumstances she should have edged slowly into the intersection before turning on to the other side of the road. The Crown also says she should have done so in order to get a clear view down the road and ensure there was no oncoming traffic. I do not accept this particular proposition for the following reasons.

21. It seems to me that stopping and then edging out slowly, while at the same time seeing if the way is clear, would be a dangerous manoeuvre. The car would be moving while the driver was trying to see either way. This practice in my opinion would seem to increase the risk of accidents rather than reducing them. However, I am quite satisfied that it is possible to get a clear view of the road, so long as the car stops with its front slightly beyond the double white lines but before a line extrapolated from the grass verge. In this way the car will not protrude into the intersection but the driver will be able to get a clear view. If the road is clear, the driver can then move promptly into the Avarua-bound lane of the main road.

22. I reach this conclusion by repeating that it is for the drivers leaving the car park to do so safely. In order to do so they will need to stop where they can see each way but without in turn creating a dangerous

situation because their vehicle is protruding into the intersection. I find that Miss Chilwell did not do this.

23. I am conscious that in my reasoning as above, I am expecting cars to stop beyond the double white lines marking the stop sign. I return to this topic at the end of my judgment.

24. While I have said that Miss Chilwell did look either way, I find she was not sufficiently far out from the car park to get a clear view to her right. It is not enough just to look, she must also be able to see. She said she did, but on the evidence I find she did not. On her own evidence she did not see the motor cycle coming. I believe the proper inference to draw is that she was not sufficiently far out to be able to see it driving down the road.

25. The Crown argued that because, Miss Chilwell took this route often she was complacent and that habit had dulled her senses. I do not think that is entirely correct. Rather, I think it more accurately captures the situation to say that she did not properly see that the road was clear.

26. This then leads to my fourth point which concerns the hedge. There was a dispute as to its height and width at the time of the accident. I do not believe I need to resolve that. Ultimately, the exact dimensions of the hedge are irrelevant because it is the driver's obligation to ensure that the relevant manoeuvre can be carried out safely. Even in its present form the hedge presents an obstruction. That means there is a higher obligation on drivers dealing with this intersection than may be the case in relation to other intersections.

27. My discussion so far supports a working conclusion that Miss Chilwell did carelessly use her vehicle and that in doing so she caused bodily injury to Mr Ioaba. I then need to stand back and test that proposition by referring to the objective standard of a reasonable and prudent driver. I consider that the relevant standard must acknowledge, but not

necessarily reflect, the general driving standards in Rarotonga. There are a number of practices here that appear to be careless, if not dangerous. I refer for example to the common practice of driving motorcycles at speed without a helmet or the practice of holding babies loosely on the lap in a car but otherwise unrestrained. The fact that such practices are common cannot, in my view, support a lower standard in the Cook Islands when compared to other countries. Either the relevant manoeuvre was safe or it was not. I believe it was not and I am therefore satisfied that the charge is made out.

28, Having reached that conclusion I wish to say something about this intersection. Although I am not a traffic engineer, it is not difficult to see that the intersection is dangerous. First, the double white line is placed in such a way that it is virtually impossible to get a clear view of the main road if the car stops within those marks. Secondly, the view is obstructed by a power pole which, thirdly, is right beside a dense hedge. These three factors combine to create what in my opinion is a dangerous situation.

29. I mention these factors for two reasons. First, while this is not a defence, I believe it is a mitigating factor which will need to be taken into account in relation to sentence. Secondly, I hope that by making these comments the relevant authorities might do something to improve the intersection. I direct that the Court give copies of this judgment to the relevant Ministry or Ministries responsible for the exit from the airport on to the main road.

30. In consequence of the reasoning set out, I now enter a conviction for the charge of careless driving causing injury.

Weston J