IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2019-404-130
[2019] NZHC 1957

BETWEEN	ALEX MERCER Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 23 July 2019

Appearances: Appellant in person
F Gourlay for Respondent

Judgment: 13 August 2019

JUDGMENT OF BREWER J

This judgment was delivered by me on 13 August 2019 at 11:00 am

Registrar/Deputy Registrar

Solicitors:
Kayes Fletcher Walker (Manukau) for Respondent

Introduction

[1] Mr Mercer, who represents himself, appeals a decision of Judge CS Blackie finding proved that he drove a vehicle on a road at a speed exceeding 100 km/h, which was the applicable speed limit.[1] This is an infringement offence.

[2] Mr Mercer did not dispute in the hearing before Judge Blackie that he exceeded the speed limit of 100 km/h. His case was that he had no choice. Mr Mercer said in evidence that a car he was passing increased its speed towards the end of the passing area and he decided the only safe course of action was to exceed the speed limit so as to complete his overtaking manoeuvre safely.

The appeal

[3] Mr Mercer appealed on three grounds:

(1) The Judge erred in his assessment of the evidence.

(2) The Judge erred in delivering an immediate oral judgment.

(3) The prosecutor "used a few leading questions" during examination-in-chief.

[4] There is nothing in the second and third grounds of appeal. This was a simple case. The prosecution called the evidence of the police officer, Constable Carroll, who issued the infringement notice. Mr Mercer gave evidence himself. District Court Judges routinely give immediate oral judgments in simple cases where they are confident of the result.

[5] As to the asking of leading questions, Mr Mercer is correct in his assertion that there were some leading questions asked by the prosecuting police officer of Constable Carroll, and Mr Mercer is correct that s 89 of the Evidence Act 2006 prohibits the asking of leading questions in examination-in-chief or re-examination, subject to

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[1] *Police v Mercer* [2019] NZDC 4592. Judge Blackie dismissed an alleged infringement of failing to keep wholly to the left of a no-passing lane when passing a motor vehicle.

exceptions. However, the asking of leading questions in a first appeal context is significant only if it resulted in a miscarriage of justice. That is to say, the asking of leading questions created a real risk that the outcome of the trial was affected; or resulted in an unfair trial.[2] There is nothing in the examples given to me by Mr Mercer, or elsewhere in the notes of evidence, that give me any concern in this regard.

[6] I return to Mr Mercer's first ground of appeal, namely that the Judge erred in his assessment of the evidence.

[7] Mr Mercer's argument is to the effect that the Judge should have accepted his evidence about his reason for exceeding the speed limit and discharged him accordingly. Mr Mercer, not being a lawyer, advanced his argument on a common sense "it is just not right" basis.

[8] Judge Blackie acknowledged Mr Mercer's argument, but he did not address it. By his decision the Judge rejected the argument, but he gave no reasons for doing so. That is unfortunate because there is at law a legal exception to the prohibition on exceeding a speed limit which might have applied to Mr Mercer.

[9] Rule 5.1 of the Land Transport (Road User) Rule 2004 prohibits a driver from exceeding the applicable speed limit save for exceptions which do not apply here. It is a strict liability offence. However, r 1.8 provides a general exception:

> (1) A person is not in breach of this rule if that person proves that—
>
> (a) the act or omission complained of took place in response to a situation on a road; and
>
> (b) the situation was not of the person's own making; and
>
> (c) the act or omission was taken—
>
> (i) to avoid the death or injury of a person; or
>
> (ii) if the act or omission did not create a risk of death or injury or greater damage to any property, to avoid damage to any property.

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[2] Criminal Procedure Act 2011, s 232.

[10] Judge Blackie in his oral judgment summarised the evidence of Constable Carroll and then the evidence of Mr Mercer. He said of Mr Mercer's evidence:

> [8] Mr Mercer gave evidence on his own account. He accepted that he had got himself into a difficult position and the two other motor vehicles travelling approximately 70 to 80 kilometres an hour less than the maximum permitted on this particular area, were approaching the end of the dual part of the carriageway, he was committed to overtake, he felt obliged to do so as they slightly sped up. He said that he carried out the overtaking manoeuvre not deliberative to flout the law, but rather to avoid what he perceived to be a difficult situation which could have got worse had he tried to intercept, that is trying to intercept the other two vehicles by passing between them.

[11] The Judge then said:

> [9] Having heard the evidence I am quite satisfied that this is a proper case for the issue of the ticket and the infringement notice for the speeding. It is clear that the speed did exceed the regulated 100 kilometres an hour, it is recorded on the handheld radar device, certificates of accuracy have been produced to the Court that the device was operating appropriately, and there is no real challenge by Mr Mercer to any of the evidence in support.

[12] It is entirely opaque as to whether Judge Blackie turned his mind to r 1.8. There is no evidence it was brought to his attention. It might be inferred from his language at paragraph [9] that since the infringement is a strict liability offence the Judge considered proof that Mr Mercer exceeded the speed limit necessarily decided the case. This inference is supported by the Judge telling Mr Mercer immediately before he cross-examined Constable Carroll:

> … I only want questions which are relevant to the issue which I have got to determine, that is whether the speed was as recorded and you were the driver of the vehicle and whether there was a crossing yellow lines, I'm not making any other determination other than that.

[13] Certainly, the Judge said nothing evaluative about Mr Mercer's contention that it was necessary for him to exceed the speed limit in order to safely complete his overtaking manoeuvre. He made no findings of credibility.

[14] The recent history of appeals against conviction in Judge-alone trials is traversed in the Supreme Court's decision in *Sena v Police*.[3] The Court "broadly" accepted the following line of argument put forward by counsel:[4]

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3 *Sena v Police* [2019] NZSC 55.
4 At [35]–[36].

> Put simply, a Judge has to justify their findings. How a decision is reached and what was taken into account (and what was not) is of importance. A global credibility finding (explicit or implicit) is not enough. Reasons are the justification for decisions. If the analysis or reasons are deficient, the conclusion is flawed and unsubstantiated.

[15] This being a first appeal against conviction, my task is governed by s 232 of the Criminal Procedure Act 2011, which provides:

> …
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> (2) The first appeal court must allow a first appeal under this subpart if satisfied that,—
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> (a) in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable; or
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> (b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or
>
> (c) in any case, a miscarriage of justice has occurred for any reason.
>
> (3) The first appeal court must dismiss a first appeal under this subpart in any other case.
>
> (4) In subsection (2), **miscarriage of justice** means any error, irregularity, or occurrence in or in relation to or affecting the trial that—
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> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.
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> …

[16] The Supreme Court in *Sena* related the giving of reasons by a Judge at first instance to s 232 as follows:[5]

> … *Connell* and *Eide* indicate the kind of reasons which judges should provide. They should show an engagement with the case, identify the critical issues in the case, explain how and why those issues are resolved, and generally provide a rational and considered basis for the conclusion reached. Reasoning which consists of a conclusory credibility preference is unlikely to suffice. The language of s 232(2)(b) reflects an assumption that the reasons given by a judge will reflect that judge's assessment of the evidence and why that assessment resulted in a conviction. A failure to provide such an assessment frustrates the operation of s 232(2)(b) and may well engage s 232(2)(c); this on the basis that a reasoned judgment is essential to a fair trial. A failure to

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5 At [36].

> provide a reasoned resolution of a significant evidential dispute may, alternatively, suggest a misapprehension of the effect of the evidence, for instance a misapprehension of the significance of the dispute. As we explain later in these reasons, this case involves such a misapprehension.

[17] In this case, I do not know why Judge Blackie found the speeding infringement proved. It might be he found the general exception in r 1.8 not established by Mr Mercer. It might be the Judge simply regarded the infringement as being an offence of strict liability and did not find Mr Mercer had established a total absence of fault. Given the Judge did not say anything about either possibility I cannot say.

[18] In *Sena*, the Supreme Court held that appeals in criminal cases would be by way of rehearing, setting parity with the approach to civil cases, consistent with *Austin, Nichols & Co Inc v Stichting Lodestar*.[6] In recent cases of this Court following the decision in *Sena*, Judges have looked for themselves to see whether convictions can stand in the absence of reasons by the first instance Judge for their decision.[7] I will now do that.

[19] Mr Mercer's relevant evidence-in-chief was:

> A. There were two cars in front of me and I was driving along, I was behind them, yeah, obviously, they were mainly about 70 kilometres an hour and both, all of us were in the slow lane so I indicated right, wait for at least three seconds, went straight, I went 100 kilometres an hour and I should have easily overtaken them and then the – it appeared that the front car had accelerated at the last second so I believe I was going to hit that car.
>
> Q. Yes?
>
> A. If I slowed down I could've been stuck between those two cars which could've caused an accident as well. If I were to slam the brakes my car could've spun around into the traffic from the other direction, because of that I had to accelerate to make sure I got through uninjured or, there's no accident …

[20] In cross-examination Mr Mercer said that when the passing lane was reached "a lot of the other cars took off, I just stayed behind the other two slow ones and then

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6 At [32], citing *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

7 *Webster v Police* [2019] NZHC 1335, [2019] NZAR 911; and *Marsh v R* [2019] NZHC 310.

realised that they were going too slow so I just decided to go in the overtaking lane and pass them".

[21] Mr Mercer denied there was plenty of room to allow him to merge with the cars he was overtaking so it was unnecessary for him to complete the overtaking manoeuvre. The cross-examination ended with this exchange:

> Q. And what I'm saying to you is that there's plenty of room there?
>
> A. I had to make a snap decision so I'd rather take the safe option which results in no one dying than, yeah, having an accident.

[22] The prosecution's evidence did not bear on Mr Mercer's explanation for his driving. Mr Mercer properly put his explanation to Constable Carroll in cross-examination. The constable was reluctant to speculate on Mr Mercer's suggestions as to the dangers of him braking hard instead of speeding up, but otherwise did not refute Mr Mercer's case.

[23] Mr Mercer did not accept the propositions put to him by the prosecutor in cross-examination. Those propositions, of course, are not evidence if they are not accepted.

[24] Mr Mercer's credibility was not challenged.

[25] I will accept the evidence of both Constable Carroll and Mr Mercer as reliable and credible and apply it to r 1.8.

[26] The act complained of was Mr Mercer exceeding the speed limit. For r 1.8(1)(a), that had to take place in response to a situation on a road. Mr Mercer's argument is that the situation was the speeding up of a car he was overtaking. He responded to that situation. I accept Mr Mercer exceeded the speed limit to overtake a car that increased its speed.

[27] The requirement in r 1.8(1)(b) is that "the situation was not of [Mr Mercer's] own making". It might be said that the overall situation was of Mr Mercer's own making. He chose to overtake towards the end of a passing lane on the assumption

the cars he would overtake would not increase their speed. When that assumption proved wrong, his response was to exceed the speed limit. But the focus of r 1.8(1)(a) is on the act or omission complained of (exceeding the speed limit) and that act being "in response to a situation on a road". So, it is not a matter of reading "situation" as "the overall situation". The situation is the immediate situation to which the act or omission complained of responded. In this case, this was the unexpected increase in speed of the lead vehicle Mr Mercer was overtaking. I conclude that Mr Mercer has satisfied r 1.8(1)(b). The situation was not of his own making.

[28] In reaching this conclusion I have thought about policy considerations. Driving is a dynamic activity. Conditions can change suddenly, and drivers have to react to them suddenly. Rule 1.8 recognises this and excuses (in this case) exceeding the speed limit so long as the person charged proves the criteria in the sub-clauses.

[29] There is no criterion to the effect "and the person's driving immediately preceding their response to the situation was reasonable and prudent". But, if the person's driving preceding their response to the situation was unlawful, then they can be charged with that unlawfulness.

[30] If the person's driving during their response to the situation was unlawful in a way outside the scope of the Land Transport (Road User) Rule 2004 then it cannot be excused by operation of r 1.8. So, for example, if a driver in responding to a situation exceeds the speed limit carelessly or dangerously, then r 1.8 cannot save them from a charge of careless or dangerous driving.

[31] Further, the excuse will not be available if the situation responded to was of the person's making. For example, if a person simply misjudges the speed necessary to complete an overtaking manoeuvre safely.

[32] As to r 1.8(c), Mr Mercer's evidence was he acted (by exceeding the speed limit) to avoid death or injury. There is no evidence to the contrary. It is not necessary for Mr Mercer to prove his act was objectively necessary to avoid death or injury, just that his act was taken (in that he took it for the purpose) to avoid death or injury.

Result

[33] Judge Blackie erred in not giving reasons as to why Mr Mercer's explanation did not amount to a defence to the infringement notice. In light of my analysis of the evidence I have concluded that led to a miscarriage of justice.

[34] The appeal is allowed. The infringement notice is dismissed.

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Brewer J