SHERIFF APPEAL COURT

[2019] SAC (Crim) 18
SAC/2018/000730/AP

Sheriff Principal M M Stephen QC
Sheriff M G O'Grady QC
Sheriff A Cubie

STATEMENT OF REASONS

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

SUMMARY STATED CASE AGAINST CONVICTION

by

CHARLES HENDERSON

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondent

Appellant: C Findlater; Faculty Services Limited
Respondent: D Mullen, AD; Crown Agent

12 February 2019

[1] The appellant was charged by the respondent at Aberdeen Sheriff Court as follows:-

> "(001) on 3rd January 2018 on a road or other public place, namely Guild Street, Aberdeen you CHARLES ALEXANDER HENDERSON did drive a mechanically propelled vehicle, namely motor Bus registered number SV08FHD dangerously in that you did drive said vehicle in such a manner as to fail to leave a sufficient gap between said vehicle and Alexander Morrison, care of Police Service of Scotland, a passing pedestrian, causing him to become pinned against said vehicle and motor car, registration number SH66VMP. CONTRARY to the Road Traffic Act 1988, section 2 as amended."

After trial the sheriff convicted the appellant of the charge under deletion of the words "*causing him to become pinned against said vehicle and motor car registration number SH66 VMP*."

[2] We heard submissions from Mr Findlater, counsel for the appellant and from the advocate depute. We also viewed the CCTV evidence as recommended by the sheriff in her stated case paragraph 34. The CCTV footage came from three different camera positions on the bus driven by the appellant. The first camera position is the front road view (similar to the driver's view); the second view came from a camera positioned on the near side of the bus looking rearwards and the third camera position is on the near side towards the rear of the bus looking forward.

[3] Counsel for the appellant challenged the sheriff's decision to convict of dangerous driving and submitted that the driving as shown on the CCTV footage failed to amount to either dangerous or even careless driving. The sheriff had removed the gravamen of the offence by deleting what was libelled as the effect or consequence of the appellant not leaving a sufficient gap namely the words "*causing him to become pinned against said vehicle and motor car registration number SH66 VMP*". Deletion of that part of the libel left the charge as one of failing to leave a 'sufficient gap' between the bus and the complainer, a passing pedestrian. In these circumstances the question of what constitutes a 'sufficient gap' could become a subjective one. As a matter of fact there was no impact whatsoever between the bus and Mr Morrison nor was he pinned against his vehicle. Although Mr Morrison is libelled as "a passing pedestrian" his presence on the roadway was due to him having parked his van on a double yellow line whilst making deliveries. Mr Morrison had been an unsatisfactory witness who had exaggerated what had occurred on 3 January 2018 and whose evidence could not be accepted by the sheriff in its entirety. The sheriff accepted

there had been no contact between the bus and Mr Morrison. The sheriff however took the view that the CCTV footage corroborated the basic details of his evidence as to what happened on the day in question. The complainer's evidence relating to the serious part of the charge could not be accepted by the sheriff. (Para 33 of the Stated Case). He had exaggerated when asserting his body had been squashed between the bus and the van or pinned against the van. The sheriff was unable to accept his evidence as to damage to his clothing. The sheriff could not accept his evidence after looking at the CCTV evidence. Mr Findlater therefore challenged the sheriff's finding in fact 4 which is in the following terms:-

> "The bus driver at that point was going at a slow speed probably around 15 miles per hour. Mr Morrison, who had stepped round his vehicle to the offside, must have been clearly visible to the bus driver. He was wearing a hi-vis jacket, and it was daylight. The accused had seen the delivery van parked close to the bus stop. The bus did not stop to let Mr Morrison get into his van, but continued to travel past him, passing him so closely that he had to flatten himself against his van to avoid injury, and hold on to the door handle for safety, as the bus passed him. There was no contact between the bus and Mr Morrison. Nevertheless, the bus driver drove his bus in such a manner that there was not sufficient safe space left between the bus and the van. He drove far too close to Mr Morrison. There was a high risk of harm to Mr Morrison."

In particular counsel challenged the proposition that there was insufficient space between the bus and the van when no collision or impact had occurred between the bus and the van or between the bus and Mr Morrison. The finding that there was a high risk of harm to Mr Morrison could not be justified on the evidence.

[4] The advocate depute contended that the appeal should be refused and the question answered in the affirmative. The sheriff had taken a discriminating view of the evidence particularly Mr Morrison's evidence as can be seen in paragraph 34 of the stated case. The sheriff's decision to convict is based on Mr Morrison's evidence and the CCTV footage.

[5] We have some observations and comments to make particularly having considered the sheriff's stated case; submissions and having viewed the CCTV. Obviously, the appellant was found guilty after trial of a contravention of section 2 of the Road Traffic Act 1988 (dangerous driving). The questions that we have to consider are, firstly, and primarily, the question posed by the sheriff, namely is this dangerous driving? Should the answer to that question be in the negative we must also consider the subsidiary question whether the driving meets the test for careless driving or is it a criminal offence at all?

[6] We will not rehearse the facts except perhaps to underline the important fact that the complainer, Mr Morrison, had parked his van, with its hazard lights on, on a double yellow line outside St Magnus House and was in effect impeding or blocking the inside lane in Guild Street. The appellant required to move out to pass that vehicle before returning to the bus stop situated just beyond the parked van. To do that the appellant had to stop his bus almost parallel to the complainer's parked van whilst he waited for buses to move away from the bus stop. We had particular regard to the CCTV, which we would stress is an important part of the factual matrix before the sheriff.

[7] We proceed on the basis that the sheriff has made findings in fact 1 to 5. Finding in fact 4 is challenged by the appellant as it is not supported by the evidence. Further, it is submitted the question of what is a 'sufficient gap' is far too vague to support a conviction for section 2 in light of the evidence. We have discussed finding in fact 6 which is really not a finding in fact at all but perhaps can be more properly described as the sheriff's conclusion on fact and law. However, we observe that finding in fact 6 is capable of supporting a conviction for section 3 (careless driving) and in our opinion does not support the sheriff's conclusion at para 30 that the appellant's driving met the test for dangerous driving as set out in section 2A, of the Road Traffic Act 1988. We have had particular regard to the

deletions made to the charge which leaves the question of what is a 'sufficient gap' in light of the observation that 'sufficient gap', as originally libelled, related to the subsequent part of the charge which sets out that the driving was dangerous as the failure to leave a 'sufficient gap' caused the complainer, a passing pedestrian, to become pinned against said vehicle and motor car (delivery van). However, that was, as we know, deleted by the sheriff having heard the Crown evidence.

[8] We take a different view of the CCTV evidence from the sheriff. The video is important and, as we have said, is part of the factual matrix. We are of the view that, at its highest, the appellant's driving or actings might be considered a misjudgement but that is putting it at its highest. This is not a situation where the appellant has shown a complete disregard for the safety of other road users. On further consideration of the CCTV, we have formed the view that what occurred here, with particular regard to the front facing camera footage, is that there was an unfortunate coincidence between the complainer walking round the front of his vehicle in a fairly normal fashion effectively into the path of the bus as it began to move into the bus stop. Such a situation, (moving vehicles passing close to parked vehicles) which can arise daily on our roads, involves drivers and pedestrians making decisions or assessing risk in a very short space of time. This was, in effect, a dynamic and developing situation where both the driver and the pedestrian, Mr Morrison, required to exercise their own judgement. Crucially, there was no impact between the bus and Mr Morrison.

[9] Having categorised the Crown case at its highest as possible misjudgement on the part of the driver, on careful consideration of the video evidence, we do not consider that there is clear evidence to suggest that the appellant's driving actually constitutes

misjudgement, mainly because of the timing coincidence of the bus beginning its manoeuvre and Mr Morrison emerging round the front of his vehicle.

[10] In these circumstances, we have little difficulty in concluding that the sheriff was not entitled, even on the facts she found proved, to come to the view that the appellant's driving fell far below the standard of the careful and competent driver and accordingly we answer the question posed by the sheriff in the stated case in the negative. The sheriff was not entitled to find that the appellant's driving met the test for dangerous driving (section 2A Road Traffic Act 1988). We are, of course, concerned also to deal with the lesser standard of careless driving and for the reasons we have already given, mainly due to the timing issue we take the view that this was not a situation where a criminal offence was committed at all by the appellant. We are not satisfied that the standard of the appellant's driving in this particular instance meets the lower test for careless driving. In these circumstances clearly the conviction for section 2 (dangerous driving) must be quashed and there is no finding that there has been a contravention of section 3 of the Road Traffic Act 1988.

[11] The status of CCTV and other forms of recorded images was reconsidered recently by the High Court of Justiciary Appeal Court in a reference from this court in the case of *Shuttleton* v *P F Glasgow* [2019] HCJAC 12. The appeal court, following the decision of a bench of five judges in *Gubinas and Another* v *HMA* [2017] HCJAC 59, confirmed the recording to be real evidence which constituted proof of what it showed happening. Once before the fact finder the recording's content is available as proof of fact. Where the *actus reus* is captured on CCTV, as here, it is the fact finder's analysis of the CCTV that counts. In the circumstances of this appeal the CCTV is acknowledged to be crucial and was also available to the appeal court to analyse. In this case the usual advantage accorded to the first instance fact finder in assessing and analysing real evidence falls away and the

appellate court is in as good a position to evaluate the real evidence on the CCTV recording as the trial sheriff.