[VASSILIADES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

THEOPHANIS STYLIANOU,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 3194).

Road Traffic—Conviction for driving without due care and attention and for failing to keep the left hand side of the road in approaching other traffic coming from the opposite direction—Sections 6 *and* 13 *of the Motor Vehicles and Road Traffic Law, Cap.* 332, *and Regulations* 58 (2) (*a*) *and* 66 *of the Motor Vehicles Regulations,* 1959 *to* 1970*—Trial Judge's conclusions and findings unsatisfactory—Appeal allowed by majority—Conviction quashed.*

Cases referred to :

Onassis v. *Vergotis* (1968) 2 Lloyd's Rep. 403.

The facts sufficiently appear in the judgments delivered whereby the Court by majority, holding that the findings and conclusions of the trial Judge were unsatisfactory, allowed this appeal and quashed the conviction.

Appeal against conviction.

Appeal against conviction by Theophanis Stylianou who was convicted on the 3rd August, 1970, at the District Court of Paphos (Criminal Case No. 665/70) on two counts of the offences of driving a motor vehicle without due care and attention and failing to keep the left hand side of the road in approaching traffic, contrary to sections 6 and 13 of the Motor Vehicles and Road Traffic Law, Cap. 332 and Regulations 58 (2) (*a*) and 66 of the Motor Vehicles Regulations, 1959–1970, respectively, and was sentenced by Pitsillides, D.J., to pay a fine of £12 on each count and £2.600 mils costs.

Ph. Clerides, for the appellant.

Cl. Antoniades, Counsel of the Republic, for the respondents.

VASSILIADES, P.: The first judgment will be delivered by Mr. Justice Stavrinides.

STAVRINIDES, J. : This is an appeal against a conviction by a judge of the District Court of Paphos of driving a "pick-up" motor vehicle on a road without due care and attention and also, arising out of the same facts, of "driving (that vehicle) and failing to keep the left-hand side of the road in approaching traffic, *i.e.* a bicycle coming from the opposite direction". The vehicles had been proceeding towards each other on a road sloping in the direction in which the bicycle had been moving. The collision took place on the motor vehicle's off-side of the road ; and the appellant's version was that he had been driving on his near-side of the road when he first saw the cyclist but was compelled to pull out to his off-side because the cyclist was coming at him on the wrong side of the road. The cyclist's story was, in the learned judge's words, that—

> "as he was cycling on the road which was a little downhill for him and keeping his left side almost on the edge of the asphalt he saw accused's vehicle proceeding in the opposite direction, then it moved towards its right side and occupying the cyclist's side and that, whilst both were proceeding and the front wheel of the bicycle was on the berm of its left and its wheel was on the asphalt he was knocked down by accused's vehicle."

There was no eye witness to the accident, and the judge had before him only the cyclist's evidence as against an open statement made by the applicant to the police 1 1/2 hours after the accident and an unsworn statement by him from the dock in which he said, in effect, that he stood by the statement he had made to the police.

The judge said :

> " as to the side of the road on which accused drove when he saw the cyclist, there is only the evidence of the cyclist and the open statement of the accused. (The cyclist) in his evidence stated that he did not remember exactly if accused's car was on its left side or in the middle of the road before it started taking his (*i.e.* the cyclist's) side. In view of this and as accused stated that he was driving on his left side I find that it has not been proved that accused was keeping his right side of the road."

Clearly, by " his right side of the road " the judge meant " his off-side of the road ". Nevertheless the judge found the appellant guilty on count 2 on the ground that he (the appellant)—

> " by driving to his right side did not do so in the agony of the moment because he had amply sufficient distance from the cyclist and also time to decide otherwise ."

This finding is based on an oversight which appears from a careful perusal of this passage from the judgment :

> "The accused, however, admitted in his open statement that when he saw the cyclist coming from the opposite direction and keeping his (*i.e.* the cyclist's) side of the road, the cyclist was about 150 feet distance from the accused and that accused then drove to his right side in order to avoid an accident with the cyclist and applied his brakes. As stated above the longest brake marks of accused's vehicle were 70 feet ; therefore, according to accused, from the time he saw the cyclist, who again according to accused was on his wrong side of the road, up to the time accused applied brakes he covered a distance of about 80 feet and during the time he covered that distance the accused was proceeding towards his right side for the purpose which he stated, *i.e.* to avoid an accident with the cyclist ."

Clearly, since the appellant and the cyclist were not stationary but approaching each other, the distance the appellant covered before applying his brakes was not " about 80 feet " but that distance reduced by the distance covered by the cyclist from the moment the appellant saw him up to the actual collision ; and depending on the speed of the bicycle, which, be it remembered, was proceeding downhill, may have been quite considerable. Thus the conviction on count 2 must be set aside.

I now come to count 1. The passage last cited is immediately followed by this :

> " Accused did *not state that he horned or flashed* his lights in order to warn the cyclist or that he slowed down and the only way he found and followed to avoid an accident was to drive to his right side and find that if the probability of an accident crossed accused's mind his duty was to warn the cyclist by horning or flashing his lights, to slow down and drive

as much as possible towards the left side and, in case by doing these, there was still danger or an accident, to stop " ;

and the concluding paragraph of the judgment reads :

"In view of the excessive speed of accused, of his failure to warn the cyclist by horning or flashing his lights, of his failure to slow down, of his failure to stop and of his driving to the right side from the time he saw the cyclist up to the collision, I find accused guilty of count 1 that he drove without due care and attention ."

In the first of these passages the judge speaks as if he had a doubt about " the probability of an accident " having crossed the appellant's mind, which, with all respect, is amply apparent from the action he took in crossing over to the other side of the road. Then the judge says that it was the appellant's duty to warn the cyclist by " horning or flashing his lights ". But what use would the sounding of a horn or the flashing of lights have been in the circumstances of this particular case ? Earlier in his judgment the judge said that at the time of the accident visibility was " very good ". The appellant saw the cyclist from a distance of 150 feet and therefore the cyclist, for his part, could see him, and indeed must have seen him, from that distance. Accordingly neither of the courses of action referred to was required, and therefore the appellant cannot be faulted for not taking either of them.

Then the judge thought that the appellant should have " slowed down and driven as much as possible towards the left side and in case by doing these there was still danger of an accident, to stop ". Whether such a course of action would have been safer must depend on the speed of the cyclist as well as of the appellant. However, the point is not whether another course would have been wiser but whether the appellant in acting as he did he exercised reasonable care and skill.

It remains to consider the finding of " excessive speed ". This is based mainly on a test made with the appellant's vehicle by a police witness, as to which the judge said :

" On the same day of the accident (the policeman) tested on the road the brakes of accused's vehicle on exactly the same position of the road where accused had applied them and at the same direction and at the speed of 30 m.p.h. The rear wheels of accused's

vehicle left 42 feet brake marks ; from this test I draw the conclusion that the brake marks of 68 feet and of 70 feet left by the rear wheels of accused's vehicle suggest a much more speed than 35 miles an hour."

With all respect to the judge, however, while the difference in the length of the brake marks must mean a difference in speed, I cannot take it upon myself to say that that difference is a substantial one. Such a conclusion must be based primarily on expert evidence ; it cannot rest on judicial reasoning alone.

In all the circumstances I think that the conclusion on either count is unsatisfactory and I would allow this appeal.

VASSILIADES, P.: Early in the morning of January, 1970, on a main road, a car which the appellant was driving collided with a cyclist coming from the opposite direction. The collision occurred on a road slightly downhill for the cyclist and slightly uphill for the car-driver. The latter was charged for driving without due care and attention and that he failed to keep to the proper side of the road.

The trial Judge convicted the accused on both counts. He took the present appeal against both these convictions.

In my opinion it is clear that this collision was due to the fact that both these two persons saw an imminent danger of collision and in their attempt to avoid it they found themselves on the side of the cyclist. Under the circumstances Mr. Antoniades quite rightly conceded that the conviction on the second count cannot stand. Now as regards the first count " driving without due care and attention ". As Mr. Justice Stavrinides has said in his judgment, the trial Judge gave various reasons why he has come to that conclusion. One of them is that the appellant was driving with excessive speed and because of that he was not able to avoid the collision. The trial Judge accepted the evidence that when the vehicles came in sight of each other the appellant was driving on his proper side of the road. So for both of them to form the impression that a collision was about to occur it would seem that the cyclist was not driving on his proper side of the road ; otherwise they would not both try to avoid the collision.

This conclusion is further supported by the fact that the appellant was originally on his proper side of the road. He would have stayed on that side ; and would not have driven his car to the other side, in order to avoid a collision. It is quite possible that the collision may have occurred

because the cyclist was coming downhill in the middle of the road and the driver was travelling rather fast. It is also possible that this may have contributed to the collision. But I cannot come to the conclusion that under such circumstances the driver's speed was dangerous. No such charge was made against him.

There only remains that the trial Judge found negligence. Mr. Justice Stavrinides has explained that finding away. My conclusion is that in his effort to avoid the collision, the driver of the car found himself on his wrong side of the road. The cyclist going downhill and not keeping to his proper side of the road caused the driver to think that in order to avoid a collision he had to take to his wrong side of the road. Under the circumstances I agree that the conviction cannot stand ; and that the appeal should be allowed on this count also.

HADJIANASTASSIOU, J.: In this case I would like to express my regret that I find it necessary to disagree with the majority judgment of my learned brothers.

The appellant in this case appeals to this Court against his conviction by the District Court of Paphos, on August 3, 1970, on two counts, *viz.* of driving without due care and attention, contrary to sections 6 and 13 of the Motor Vehicles and Road Traffic Law, Cap. 332, and of failing to keep the left hand side of the road in approaching other traffic coming from the opposite direction, contrary to Regulations 58 (2) (*a*) and 66 of the Motor Vehicles Regulations, 1959–1970 and section 13 of Cap. 332.

There is only one ground raised by the notice of appeal *viz.*, that—

> "the finding of the Court below that the accused-appellant was guilty as charged *i.e.* (*a*) he was driving without due care and attention ; (*b*) keeping the wrong side of the road is not warranted and/or supported by the evidence adduced as a whole and as such should be set aside ."

On January 17, 1970, at about 6.30 a.m., the accused was driving his pick-up vehicle under Registration DW 138 along Polis Chrysochou road towards Limni, with its small lights on. The complainant who was cycling without lights from the opposite direction of Polis was on his way to his coffe-shop at Limni village. When the accused was still driving within a 30 m.p.h. speed limit area, a collision occurred on a straight road near Mobil petrol station at point ' X ' shown on a plan prepared by

prosecution witness No. 1, Aristides Christou, who visited the scene of the accident and took measurements in the presence of the accused. The width of the asphalted part of the road is 18 ft. 7" with a berm of 4 ft. 7" on the side of the cyclist and 2 ft. on the side of the accused. The brake marks left from the rear right wheel of accused's vehicle were 68 ft.

The accused reported the accident at the police station of Polis and told P.C. 5016, Savvas Philippou Kyriakou, that he was involved in an accident with a cyclist, whilst he was driving and keeping his proper side of the road. The accused and this witness visited the scene of the accident and when the police witness realized that the car of the accused was stationary on the right-hand side of the road, he put this question to the accused : " Since it was your left-hand side why did you go to the right ? " The accused replied : " It was not my side ". In cross-examination the witness said that the accused told him that he saw the cyclist cycling towards his right side continuously and that he kept applying his brakes continuously pulling to the right in order to avoid him, but the cyclist continued coming towards him. He stopped the car but the cyclist fell on him. Questioned further, the witness said that the accused did not say that the cyclist was proceeding on his own right side. On the contrary when P.C.1570 A. Christou visited the scene of the accident the accused told him that he was driving his car on the left-hand side of the road, when from the opposite direction a cyclist appeared, proceeding on the wrong side of his car and that he had to drive to the right side in order to avoid the collision ; but at the same time, the cyclist proceeded to his side and the collision occurred.

The complainant told the Court that on the date of the accident he was cycling without lights on his way to Limni keeping his left-hand side of the road, when he saw the car of the accused driven towards his side, and as a result of his negligent driving the collision occurred at his proper side of the road. Because of the collision his right leg was fractured and he was taken to Polis hospital. In cross-examination he said that he could not remember exactly whether the car of the accused was on its left side or in the middle of the road before it was driven to his side.

The accused made an unsworn statement in Court, adopting the statement he made to prosecution witness No. 1, P.C. Christou, on the date of the accident. In his statement the accused said that whilst he was driving his car towards Limni–Polis road and when he entered Polis near the

Mobil petrol station, at about 6.30 a.m., he saw a cyclist from a distance of 150 ft. coming from the opposite direction. Whilst he was keeping the left-hand side of the road, driving with a speed of about 35 m.p.h. he realized that the cyclist was cycling on the right towards his side. In order to avoid him he drove his car to the right-hand side of the road, he applied the brakes, and stopped the car on the berm on the right-hand side of the road. Because the cyclist kept coming towards the left-hand side of the road speeding, he collided with his car. The accused further explained that when he applied the brakes, his car skidded and landed at the right-hand ditch of the road.

Counsel on behalf of the accused has mainly argued both before the trial Court and in this Court (*a*) that because of contradictions between the evidence of the prosecution witnesses and of the complainant regarding the allegation made by the accused to P.W.2 *viz.* that he kept the right-hand side of the road, the Court should have taken the view that such witness was not reliable evidence ; and that more reliance should have been afforded by the Court to the statement made by the accused to the police ; (*b*) that the accused was not guilty or negligent or driving without due care and attention because he acted as a prudent driver and took evasive action when he was faced with a dilemma by the sudden negligent cycling of the cyclist.

The learned trial Judge, after weighing the evidence given by the prosecution witnesses and after giving his assessment of each witness and taking into consideration the statement made by the accused to the police and later on adopted by him during the trial, made his findings of fact that the accused was guilty of negligence because he was not keeping his proper side of the road, and had this to say :

> " Accused did not state that he sounded his horn or that he flashed his lights in order to warn the cyclist or that he slowed down, and the only way he found and followed to avoid the accident was to drive to his right side, and I find that if the probability of an accident crossed the mind of the accused his duty was to warn the cyclist by sounding the horn or flashing his lights, to slow down and drive as much as possible towards the left side, and in case by doing this there was still danger of an accident, to stop. I also find that the accused, by driving to his right side did not do so in the agony of the moment because he had ample distance from the cyclist and also time to decide and act otherwise ."

Upon this finding of fact, the accused was, in my view, clearly guilty of driving without due care and attention. We were invited by Mr. Ph. Clerides today to say that the learned trial Judge's findings were wrong and should be set aside, but in my judgment, this Court ought not in the circumstances set aside the judge's findings of fact ; because we have not (unlike the learned judge) seen and heard the witnesses. The House of Lords decision in *Onassis* v. *Vergottis*, (1968) 2 Lloyd's Rep. 403 affords a recent and striking illustration of how difficult it is for an Appellate Court to disturb findings dependent on the credibility of witnesses.

The learned trial Judge in this case saw the witnesses, and although it is true that he did not say so in so many words that he believed the evidence of the complainant, nevertheless, in my view, it is clear that he accepted his evidence. Directing myself accordingly as to the correct approach of this Court I regard myself as unable to disturb the conclusions of fact of the learned trial judge, because the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparison and criticism of the witnesses and of their own view of the probabilities in the case. I am also in agreement with the view of the learned trial Judge that the accused was not faced with a dilemma, because there is no evidence at all that the cyclist suddenly appeared in front of him and that the accused was presented with an emergency, because the cyclist cut his path in the road. I am aware of course of the principle that where an accused person is placed in danger by the wrongful act of the complainant the accused is not negligent if he exercises such care as may reasonably be expected of him in the difficult position in which he is so placed. He is not to blame if he does not do quite the right thing in the circumstances, but here the appellant has himself to blame for his own folly.

For the reasons I have endeavoured to explain, I have reached the conclusion that the appellant has failed to persuade me that the reasoning behind the finding of the learned trial Judge is either unsatisfactory or defective and, I would, therefore, dismiss the appeal.

VASSILIADES, P.: In the result, the appeal is allowed by majority, the conviction on both counts is set aside and the appellant is discharged.

Appeal allowed.