EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT HUTT VALLEY

CRI-2017-085-002407
[2018] NZDC 11499

NEW ZEALAND POLICE
Prosecutor

v

[TOBY MCCOY]
Defendant

Hearing: 1 June 2018

Appearances: Sergeant I MacDonald for the Prosecutor
P Mitchell for the Defendant

Judgment: 1 June 2018

ORAL JUDGMENT OF JUDGE A I M TOMPKINS

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[1] This is an application for costs pursuant to the Costs in Criminal Cases Act 1967 following on from the dismissal of a charge of careless driving causing injury.

[2] On 5 August 2017, in Johnsonville in Wellington, there was a collision between a bus being driven by the defendant and a motorcycle being driven by the person named in the charging document who was injured and upon which his wife was also travelling.

[3] It was not in dispute but on that day and near the end of the Johnsonville West route number 53, towards the top of the McLintock Street hill in Johnsonville, the defendant whilst undertaking a right turning manoeuvre, collided with the motorcycle being driven by the injured person.

[4] The identity of the defendant as driver, the fact of the crash and the injury caused to the driver of the motorcycle were not in dispute. As I said in my oral decision delivered on the day of hearing, 20 February 2018:

> The only issue is whether the police have proved to the required high standard that Mr [McCoy]'s (the defendant) driving that day fell below the standard expected of a reasonable and prudent driver so that it can properly be categorised as careless.

[5] A little further on in the same decision, and having described the relative movement of both the bus and the motorcycle, I narrowed the issue down to:

> Whether having carried out the sequence of actions I have just described, the defendant's failure to see [the injured person]'s motor bike overtaking the bus constitutes careless driving.

[6] I then concluded:

> I am satisfied that the police have not proved that it did. It is clear from both the agreed time at which the [bus's] indicator was activated and then the overtaking manoeuvre is shown in the CCTV footage that Mr [McCoy] indicated first, checked his mirrors as he described in his evidence, slightly pulled to the left so as to give himself sufficient space to make the turn, and then initiated the right-hand turn. His omission to discern the overtaking manoeuvre then conducted by [the injured person] [and both [the injured person] and his wife gave evidence that they did not see the right-hand indicator which Mr [McCoy] had activated] was not driving which falls below the standard expected of a reasonable and prudent driver.

[7] Mr Mitchell, appearing at today's application for costs, as he appeared at the defended hearing, asserts that the police, having attended the scene of the accident and perhaps, Mr Mitchell argues, putting the injured motorbike driver into the victim category, first charged the defendant and thereafter refused to countenance not proceeding with the charge despite Mr Mitchell setting out perceived evidential weaknesses extensively in two letters written by him to Police Prosecutions. Mr Mitchell stresses that even after the onboard CCTV footage from the bus was obtained and viewed, there was no change and that what Mr Mitchell characterised as a stubborn and obdurate attitude persisted even after at a case review held on 16 November when the presiding District Court Judge questioned whether the prosecution could succeed, there was no truly independent or outside review of the

police's charging decision, but rather the matter then proceeded to the allocated defended hearing on 20 February 2018.

[8] Mr Mitchell emphases that in both his letters traversing the available evidence and advocating that the charge be discontinued, the explicit reference was made to the likelihood as has now eventuated that in the event of the charge being dismissed costs would be sought.

[9] Overall, and in both his extensive written submissions and in his oral submissions today, Mr Mitchell argues that the police adopted a blinkered and arrogant approach, having taken a fixed view throughout and by doing so they ignored or casually disregarded the reasoned views as set out in Mr Mitchell's two detailed letters to Police Prosecution, the first on 6 October 2017 and then the second on 16 November 2017.

[10] For the police, it was argued that the decision to charge was initially brought in good faith on the basis of the evidence then available to the police and that the passage of time between the initial accident on 5 August 2017 and the decision to charge at the end of that same month, and thereafter, the review which was conducted within the Police Prosecution following the obtaining of the CCTV footage and in response to Mr Mitchell's letter, all established that there are no grounds for the awarding of costs in this case.

[11] In particular, the police point to a detailed review of the evidence conducted by a senior prosecutor and advised to the defence in a lengthy email sent on 15 November 2017 demonstrates that the police both had sufficient grounds to commence the charge and that the decision following the entry of the not guilty plea, pursue the charge to trial was not such as would warrant an award of costs.

[12] Section 5 of the Costs in Criminal Cases Act confers a discretionary jurisdiction on the Court to order such costs as the Court thinks just and reasonable to a defendant who has been, as in this case, acquitted of a charge. Subsection 2 of the same section sets out a non-exhaustive list of factors that the Court should have regard to, albeit without limiting the Court's ability to take into account, "All relevant

circumstances". It is not asserted here that the prosecution acted in bad faith in bringing or continuing a proceeding in the sense that the prosecution were activated by personalised malice of ill-will towards the defendant or in some way acted unlawfully or corruptly in commencing and continuing the proceedings.

[13] Rather, the substance of Mr Mitchell's submissions is that what the defendant says and the failure properly to consider the evidential deficiencies identified both by Mr Mitchell in his letters to the Police Prosecutor and as identified by the president District Court Judge at the case review hearing, means that factors as identified in particular in s 5(2)(b),(c) and (d) warrant the award of indemnity costs.

[14] I have concluded that no costs should be awarded. As indicated in the judgment dismissing the charge, the crucial factor was my assessment of whether the defendant's failure to see the overtaking motorcyclist constituted driving which fell below the standard expected of a reasonable and prudent driver. In the combination of the particular circumstances as occurred, leading up to the crash, I concluded as noted above that the defendant's omission to discern the overtaking manoeuvre was not careless driving given both the manner of the defendant's driving leading up to the initiation of the right turn and the actions of the motorcycle driver in commencing and undertaking the overtaking manoeuvre in circumstances where both the motorcycle driver and his wife gave evidence that they did not see the right-hand indicator which the driver had activated.

[15] The activation or otherwise of the indicator, while identified right from the start as a central factor, was not determinative. It was part of the matrix of facts and in context the omission of the driver to see the overtaking motorcyclist was a more central factor. As the Police Prosecution submit in the context of this application, it was a reasonable view for the police to take that the motorcycle was, "There to be seen," prior to the defendant initiating the right turn and that issue was the central issue for determination at the prosecution.

[16] Mr Mitchell's suggestion that there needed to be an external review by an independent party outside what he terms the police Prosecution "echo chamber" might, in hindsight, have been desirable but it is not an omission which, in my view,

should trigger an obligation to pay costs. I am not satisfied that a consideration of any of the factors specified in s 5(2) are either individually or cumulatively sufficient to warrant costs being awarded because in the end the dismissal of the charge depended on a consideration not only of the evidence given and available from the CCTV footage and the defendant, but also that given by the motorcycle rider and his wife. And in all the relevant circumstances all the factors leading up to the prosecution do not, in my view, establish that there was a blinkered, inflexible or arrogant view, that there was an absence of proper investigatory steps or that there was a failure to respond to evidential concerns identified by counsel for the defendant.

[17] It is also clear from the ruling I delivered at the close of the prosecution case when Mr Mitchell advanced a submission of no case to answer, that at that point I was of the view that taking the prosecution case at its highest, there could be a conviction.

[18] As the High Court noted in *R v Sotheran*[1], a judicial conclusion that a prima facie case is established [which is analogous to the rejection of a no case to answer submission at the end of the prosecution case], "Is likely to support the conclusion that there was sufficient evidence at the commencement of the proceedings". The detailed review conducted by the senior police prosecutor following the evidential concerns raised by Mr Mitchell in his letters in October and November establish, in my view, that the decision to commence the charge and to proceed with the charge to a defended hearing did not exhibit the factors which, pursuant to s 5 of the Act, would warrant an award of costs. Accordingly, the application is declined.

A I M Tompkins
District Court Judge

[1] *R v Sotheran* HC Palmerston North T31/00, 2 May 2002