

SUPREME COURT OF QUEENSLAND

CITATION: *R v Kong* [2010] QCA 195

PARTIES: **R**
v
KONG, Bradley David
(appellant)

FILE NO/S: CA No 322 of 2009
DC No 1479 of 2006

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 30 July 2010

DELIVERED AT: Brisbane

HEARING DATE: 19 July 2010

JUDGES: Muir and White JJA and Douglas J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **The appeal is dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL –
VERDICT UNREASONABLE OR INSUPPORTABLE
HAVING REGARD TO THE EVIDENCE – APPEAL
DISMISSED – where appellant involved in motorcycle
collision – where both parties sustained serious injuries –
where appellant convicted after trial of dangerous operation
of a vehicle causing grievous bodily harm – where
prosecution particularised its case of dangerous driving as
based on speed – whether jury could be satisfied beyond
reasonable doubt by acting on evidence of witnesses about
appellant’s speed

MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53,
cited
R v Duryea (2008) 103 SASR 70; [2008] SASC 363, cited

COUNSEL: A J Glynn SC for the appellant
M B Lehane for the respondent

SOLICITORS: Richardson McGhie for the appellant
Director of Public Prosecutions (Queensland) for the
respondent

- [1] **MUIR JA:** I agree that the appeal should be dismissed for the reasons given by White JA.
- [2] **WHITE JA:** On 9 December 2009 the appellant was found guilty after trial of one count of dangerous operation of a vehicle causing grievous bodily harm to Glenndon Fleming. The appellant was sentenced to two years imprisonment wholly suspended with an operational period of four years, fined \$2,000 to be paid within 18 months, and disqualified from holding or obtaining a drivers licence for a period of two years. He appeals against his conviction on the sole ground that the verdict of the jury is unreasonable having regard to the whole of the evidence. Mr A J Glynn SC, who appeared for the appellant, abandoned the other grounds of appeal.
- [3] The event which led to the charge involved a “side swipe” collision between two motorcycles on Sunday morning, 30 January 2005, on the Kilcoy-Beerwah Road between Woodford and Beerwah in the Peachester Ranges. The appellant was riding a 1,000cc Kawasaki Ninja ZX10R motorcycle and Glenndon Fleming was riding a Harley Davidson Heritage Classic motorcycle. Both men were experienced motorcycle riders and familiar with the road. Each was travelling with other experienced motorcycle riders.
- [4] The trial was a re-trial. The appellant’s conviction on the earlier trial in May 2008 had been set aside by this court on 27 February 2009 and a new trial ordered.
- [5] Admissions were made that Mr Fleming suffered injuries in the collision that amounted to grievous bodily harm. He lost the lower part of his right leg. The appellant also suffered serious injury to his right hand and arm, leaving them with little function. The two motorcycles were in a satisfactory mechanical condition and had no defects which could have contributed to the cause of the collision. The road was in good repair and 30 January was a fine, clear day.
- [6] The appellant was the lead rider in a line of five or six others, including the witness Jason Reddy, who was travelling behind the appellant. Mr Fleming was the last rider of a line of four, consisting of the witnesses Stephen Allen, Raymond Ireland and Michael Groth.
- [7] The appellant was travelling in a northerly direction, up hill on a winding section of the road through a number of “S” bends. Mr Fleming was travelling down hill in the opposite direction. The road was a two-laned, sealed bitumen highway with a painted double white line down the middle. The speed limit was 100 kilometres per hour. On earlier curves there were lower advisory speed signs, but none on the collision curve.
- [8] The appellant had met his friend, Jason Reddy, earlier at the Dayboro Pub with the intention of travelling to Caloundra. It was a general gathering point and other motorcyclists travelled, more or less, with them, the group comprising some five or six persons. Mr Fleming and his friends were headed to Dayboro from Gympie where they planned to have lunch and then work their way back to Gympie. His group were riding touring style motorcycles - three Harley Davidsons and a Yamaha touring bike. Those witnesses said they were travelling variously from 45 to 70 kilometres per hour as they were looking at the scenery. The two middle riders, Groth and Ireland, were not familiar with the area.

- [9] The appellant told police in a recorded interview that he was travelling at the time of impact at 100 kilometres per hour. The collision occurred immediately after the appellant's vehicle had travelled through a left hand curve.¹
- [10] The prosecution particularised its case of dangerous driving as based solely on speed. An expert in motor vehicle crash scenes and motorcycle crashes, David Tulloch, had concluded that the collision occurred on the white painted centre line, and that evidence was accepted by both sides. He also expressed the opinion that immediately prior to the collision, the appellant's motorcycle could not have been on the incorrect side of the road. No doubt, for this reason, it was not a particular of the dangerous driving that the appellant was on the incorrect side of the highway. Mr Fleming was the only witness who placed the appellant clearly on the incorrect side of the road immediately prior to the collision.
- [11] The outcome of the trial depended very much on the jury's assessment of the witnesses travelling with Mr Fleming. Any long vision in either direction was interrupted by the winding nature of the road and, in places, by the vegetation. At best, each of these witnesses coming down the hill heading south had one to two-and-a-half seconds to observe the appellant approaching on his motorcycle.
- [12] After the collision, a police officer attended the scene promptly and made a number of markings on the road with paint to indicate the location of, for example, the appellant's motorcycle, and made arrangements for a scenes of crime officer to attend and take photographs. About nine days later he attended the scene with Mr Tulloch, who was then officer-in-charge of the police forensic crash unit. Mr Tulloch identified the point of impact on the painted white centre line some metres past the apex of the left hand curve (for the appellant) in the S-bend and a right hand curve for Mr Fleming. The point of collision identification involved the marrying of two tyre friction scuff marks on the centre line with marks on the right side of the front tyre of the Kawasaki, the appellant's motor cycle. The marks revealed the direction of travel of the Kawasaki at a shallow, oblique angle across the centre line. There were no relevant marks to reveal the Harley Davidson's path of travel immediately prior to impact. Mr Tulloch accepted that there were distinct disadvantages in inspecting the scene more than a week later, especially the fading of marks on the road.
- [13] According to Mr Tulloch, a motorcycle rider in the position of the appellant as he entered the left turn would be leaning away from the centre line, while a rider in the position of Mr Fleming would be leaning towards the centre line. Mr Tulloch explained that a Kawasaki has a leaning capacity of about 45 degrees and a Harley Davidson about 28 to 30 degrees.
- [14] Mr Tulloch calculated, after examination of the motorcycles and the physical evidence on the road, that the initial contact was between the right side of the front tyre of the Kawasaki and the right foot rest of the Harley Davidson, which was bent up from impact with the Kawasaki. Applying what he was able to learn from the physical evidence and his understanding of physics and the manner in which motorcycles would behave, Mr Tulloch offered two scenarios to explain the position of the Kawasaki with its front wheel on the centre line at the collision location. Prior to doing so Mr Tulloch had given evidence about what he described as the "optimal racing line", which he explained as a theoretical schematic diagram of the likely path of travel of each motorcycle given the curvature of the road and staying

¹ As seen in photograph Exhibit 8.

within each motorcycle's lane.² That line of travel would be constant and was not speed dependent but merely an optimal line to travel on that part of the road on a motorcycle. The physical evidence did not enable Mr Tulloch to make any estimate of the speed of the motorcycles.

- [15] Scenario one involved the appellant's motorcycle being on the optimal line and travelling too fast around the left hand curve and thus going wider than the optimal line. The motorcycle would take a larger radius than the optimal radius which would take the Kawasaki towards the collision location on the centre line. In such a scenario, Mr Tulloch suggested, it would be "pure chance" that the Harley Davidson motorcycle ridden by Mr Fleming was there and "intercepted" the appellant's motorcycle.
- [16] The second scenario, which Mr Tulloch favoured, was premised on the Harley Davidson being ridden close to the centre line. As it approached the collision point, the rider would have been leaning to its right and into the curve so that the top of the rider of the Harley Davidson and the handle bars would have been over the centre line. The Kawasaki, travelling on its optimal line, would be leaning to its left. Mr Tulloch opined that with the limited line of sight because of the curving nature of the road, both riders would have thought they were on a collision course, have hesitated, and instinctively decelerated. As a result, the motorcycles would slow down and "sit up". That process would cause a motorcycle to go wide on its radius of travel. The Kawasaki would move right towards the centre line and the Harley Davidson move to the left away from the centre line. Mr Tulloch favoured the second scenario because it fitted with both riders thinking a collision was about to occur and reacting instinctively, whereas the first involved the "chance" of the Harley Davidson "being there". Both scenarios fitted the available physical evidence. The second scenario led to a direction based on s 25 of the *Criminal Code*.³
- [17] The first scenario favoured the evidence of Mr Fleming's group of riders while the second favoured the appellant. Those hypotheses needed to be considered by the jury in conjunction with the evidence of the eye witnesses.
- [18] Mr Fleming was travelling down the hill, he estimated, at about 40 to 45 kilometres per hour and about 20 metres behind Michael Groth, who he saw going into a right curve. As Mr Fleming rode into the curve, his attention was attracted by the speed of a motorcycle coming towards him. He said it was on its incorrect side of the road, about 30 to 35 metres away. Mr Fleming thought his motorcycle was at least two feet on his side of the white line because that was where he always rode. He saw that the Kawasaki was upright, that a collision was imminent and he "just hung on".⁴ Mr Fleming estimated he had the Kawasaki and its rider in his sight for one to two seconds prior to the collision.
- [19] Mr Fleming was the only witness to observe the appellant on the incorrect side of the road. Mr Tulloch's evidence was that it was impossible for the appellant to have been on the wrong side of the road as early as Mr Fleming estimated and for the collision to have occurred where it did.
- [20] Michael Groth said the group stopped shortly before the collision for a five minute break. When they set off again Mr Allen and Mr Ireland were some distance in

² As shown in diagram Exhibit 27.

³ Sudden emergency.

⁴ AR 118.

front of him. He was riding cautiously, being unfamiliar with the road and travelling, he estimated, at 50 to 60 kilometres per hour. He noticed Mr Allen and Mr Ireland going into a left hand corner in front of him and at that point noticed another motorcycle coming the other way. It was travelling very quickly, judging by the angle at which the rider was leaning. Mr Groth thought the rider's right knee was inches from the ground. The motorcycle was close to the centre line in its correct lane of travel and accelerating into the straight. As the motorcycle was just in front of him and in his peripheral vision, he saw the rider rising on his motorcycle as it passed him with inches to spare. Almost immediately Mr Groth heard a crash, looked in his right rear mirror and saw Mr Fleming's motorcycle go up a bank, hit a tree and come down, landing on the road about a metre behind him. When asked if he took any action because of the proximity of the appellant's motorcycle to him, he said that he did not have a chance to take any action because he did not see the other motorcycle "until he was right there".⁵

- [21] Raymond Ireland was riding in front of Mr Groth, travelling, he estimated, at around 70 kilometres per hour in third gear and steadily down hill. He saw Mr Allen go around a left curve and as he approached that curve, a motorcycle appeared "from nowhere, really quick".⁶ As a result Mr Ireland had to lay his motorcycle down further and scraped his foot on the foot peg. Mr Ireland said, colourfully, "it scared the living hell out of me",⁷ and "basically I could have kissed him on the side of the cheek. I was that scared it freaked me out, it was so quick".⁸ Mr Ireland estimated that he was about a foot from the centre line as he started into the curve. He described the other motorcycle as coming across the line when it came around the corner. He noted the motorcycle rider's knee right down and the front wheel just starting to come off the ground, indicating acceleration. Mr Ireland said that he had only a couple of seconds when the motorcycle went past him "but what you can see in a couple of seconds very quickly is amazing... If you've been riding for a long time there's a lot of things you observe".⁹
- [22] Stephen Allen was the lead motorcycle for Mr Fleming's group. He was travelling at 60 to 70 kilometres per hour, finishing his cigarette and in the middle of his lane. He saw a motorcycle going the other way "like a rocket ship".¹⁰ When asked how long he had to observe that motorcycle travelling very quickly he responded "Oh, like a blink of an eye really".¹¹ Mr Allen noted the motorcycle was on its correct side of the road and the rider appeared to be shifting his weight to exit the curve with his leg out and his body off the motorcycle "as if you could imagine Mick Doohan would ride a bike".¹² Mr Allen and Mr Ireland were unaware of the collision until they got to the bottom of the hill at the Woodford turn off and returned to the collision scene.
- [23] Jason Reddy was travelling with the appellant and second in line behind him as they travelled up the Kilcoy-Beerwah Road. They had been friends for many years and he had sold the appellant the motorcycle that he was riding. It was capable of reaching 280 kilometres per hour. He said that the appellant was consistently

⁵ AR 230.

⁶ AR 312.

⁷ AR 312.

⁸ AR 312.

⁹ AR 314.

¹⁰ AR 289.

¹¹ AR 292.

¹² AR 293.

approximately 100 metres in front of him and as they went up the S-bends they were travelling between 60 to 80 kilometres per hour. Mr Reddy did not see the collision as the appellant had disappeared around the left curve but when he last saw the appellant, he was in his correct lane and moving to undertake the left curve.

- [24] The appellant did not give evidence but he did participate in a recorded interview with police on 25 April 2005. Although he could recall events immediately prior to the collision, he could not recall seeing Mr Fleming's motorcycle and next thing he recalled was lying on the road. He said that he was riding slowly because he was cautious about gravel from the shoulder of the road just before the left curve which sometimes was scattered onto the road.
- [25] Ronald Smith was riding his Honda CBR 600cc on the Kilcoy-Berwah Road on 30 January 2005. He, too, was a very experienced motorcycle rider. When he was about 12 kilometres from what became the collision scene, he saw a group of motorcycles turning into his road about two kilometres behind. The motorcycles overtook him on a long straight stretch. Mr Glynn accepted that that group included the appellant. The speed limit was 100 kilometres per hour and Mr Smith was travelling at the speed limit. He estimated that as the motorcycles passed him, they were travelling at double his speed. He attempted to catch up to travel with them, reaching speeds of "probably 190, maybe 200".¹³ He did not reach them before he came upon the collision site.
- [26] Mr Glynn submitted that the evidence of Fleming, Groth, Ireland and Allen about the appellant's speed and mode of riding was so fleeting that no reasonable jury could act on that evidence to be satisfied beyond reasonable doubt that the appellant was travelling at a speed which was dangerous in the circumstances and caused the injuries to Mr Fleming. When an appellate court is asked to determine whether a verdict of guilty is unreasonable or cannot be supported having regard to the evidence, the test is not in dispute. An appellate court must ask whether, upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused person was guilty.¹⁴
- [27] There was a substantial body of evidence, which was unshaken, that the appellant was travelling at a speed which was regarded as excessive or very fast by very experienced motorcycle riders travelling in the opposite direction. It was not contested, as Mr Tulloch said, that it is difficult to estimate the speed of another vehicle travelling in the opposite direction. The actual speed did not require calculation. The uniform impression was that it was too fast for the conditions. That impression might have been fleeting but it was surely compelling. It was confirmed by the evidence of Mr Smith, not that he had been passed by a group of speeding motorcyclists at speeds well in excess of 100 kilometres per hour some 12 kilometres from the collision site, but because he himself travelled at excessive speeds of 190 to 200 kilometres per hour in an attempt to catch up.¹⁵ The jury were entitled to reject the evidence of Mr Reddy that they were travelling at a conservative speed of 60 to 80 kilometres per hour.
- [28] The jury would have been assisted by Mr Tulloch's evidence particularly about the point of impact on the painted white line. But the limitations upon his

¹³ AR 399.

¹⁴ *MFA v The Queen* (2002) 213 CLR 606 at 615.

¹⁵ See *R v Duryea* (2008) 103 SASR 70; [2008] SASC 363 where the authorities are discussed by White J, with whom Anderson and Kelly JJ agreed, at [56]-[64].

investigations occurring nine days after the collision resulting in faded or lost data were acknowledged by him. He was able to assist those of the jury who had no experience in motorcycle riding about the manner of setting a path through a curving road which he described as the “optimal racing line” and the response of a motorcycle to deceleration. He rejected scenario one, which involved the appellant travelling at an unsafe speed so that he could not take the curve inside his lane, because of the “chance” that the Harley Davidson just happened to be there. The jury were entitled to accept the evidence of the witnesses in Mr Fleming’s group which supported Mr Tulloch’s scenario one.

- [29] The jury had to be satisfied beyond reasonable doubt that the appellant was driving dangerously and that the dangerous driving caused Mr Fleming’s injury. The evidence permitted them to be satisfied on both of those matters to the requisite degree.
- [30] I would dismiss the appeal.
- [31] **DOUGLAS J:** I agree with the reasons of Justice White and the order proposed by her Honour.