CITATION: Police v Couturauo *[2010] NTMC 013*

PARTIES:	LEIGH CAHILL
	v
	ROSINIA COUTURAUO
TITLE OF COURT:	Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20908745
DELIVERED ON:	26.2.10
DELIVERED AT:	Darwin
HEARING DATE(s):	17.2.10
JUDGMENT OF:	Mr Daynor Trigg SM

CATCHWORDS:

Regulation 18 – Traffic Regulations
Drive without Due Care
Virgo v Elding [1939] SASR 294
Dayman v Gill [1941] SASR 208
Milkins v Roberts [1949] SASR 251
R v Little (1976) 14 SASR 556
Howie v SA Police BC9300402

REPRESENTATION:

Counsel:

Prosecution:	Mr Tierney
Defendant:	Mr Lawrence

Solicitors:

Prosecution:	Summary Prosecutions
Defendant:	Bill Piper

Judgment category classification: B
Judgment ID number: [2010] NTMC 013
Number of paragraphs: 78

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20908745

[2010] NTMC 013

BETWEEN:

LEIGH CAHILL
Complainant

AND:

ROSINIA COUTURAUO
Defendant

REASONS FOR DECISION

(Delivered 26 February 2010)

Mr Daynor Trigg SM:

1. The defendant was charged on complaint taken on the 1st day of April 2009 with the following two charges:

> On the 13th November 2008
>
> At Darwin in the Northern Territory of Australia
>
> 1. drove a vehicle, namely a Darwin Bus Service Scania Volgren Articulated bus NT NTGMO8122, on a road, namely McMillans Road, and whilst turning right at an intersection, namely Meuller Road, failed to give way to any oncoming vehicle that was going straight ahead at the intersection:
>
> Contrary to Rule 75(5)(b) of the Australian Road Rules.
>
> AND FURTHER
>
> On the 13th November 2008
>
> At Darwin in the Northern Territory of Australia

2. drove a vehicle, namely a Darwin Bus Service Scania Volgren Articulated bus NT NTGMO8122, on a road, namely intersection of McMillans Road and Meuller Road, without due care:

Contrary to Regulation 18 of the Traffic Regulations.

2. The matter commenced before me on 26/2/10, but before the charges were read Mr Lawrence, of counsel, submitted that the two charges were duplicitous, and accordingly the prosecution should elect which charge they wished to pursue. Mr Tierney, who appeared to prosecute the matter, did not seek to dispute this submission. Accordingly, I advised Mr Tierney that he would need to elect at the close of the prosecution case (rather than before he read the charges, as requested by Mr Lawrence) which charge he wished to pursue.

3. Accordingly, both charges were then read and the defendant entered a plea of not guilty to both charges.

4. In relation to charge 2 Mr Lawrence had sought particulars, and at the time of reading charge 2 Mr Tierney read the following particulars onto the record, namely:

Failed to see a vehicle oncoming and/or failed to judge the safe distance of oncoming vehicle prior to making a turn.

5. The only evidence of the details of the bus (as per the details in the charges) comes from ExP3 which was a photo of the damage to the bus. From this I can see that it is an articulated bus. I can not tell the make or type of bus. I can make out that the last two numbers of the number plate are “22” and that it is labelled “Darwinbus”, and it has a number “122” on the back window. Beyond that I would be unable to make any other findings.

6. Various overhead maps from a Google search made there way into evidence. It is clear from these that Mueller Road was a terminating

road, and McMillans Road was the continuing road of a T intersection. Further, in the area of the intersection McMillans Road had 3 outbound lanes (and hereafter I will refer to the lane closest to the footpath as “lane 1”, the middle lane as “lane 2” and the lane closest to the middle of the road and median strip as “lane 3”), and 2 inbound lanes plus a right hand turning lane. The outbound and inbound lanes were divided by a median strip. It was not the evidence of any of the witnesses that there was anything (either from the median strip, or by way of any bend or any elevation change) that interfered with an unobstructed view down McMillans Road (towards the Bagot Road end) for several hundred metres. The evidence was that the speed limit on McMillans Road in the area was 80 km/hr.

7. The first witness called in the prosecution case was Simon DeSouza. He was a secondary science teacher, and on 13/11/08 at about 1510 he was driving from school to a second job as a tutor. He was driving along Mueller Road (incorrectly spelt “Meuller” in the complaint), and stopped at the intersection with McMillans road where he intended to turn right.

8. Mr DeSouza stated that when he was stopped at the intersection there was a double length bus on McMillans Road that was waiting to turn right into Mueller Road. He also noticed a car coming from his right hand side. He then observed the bus to start taking off “very slowly” and he didn’t think it was going to get through. He then covered his face in case something happened to him and he then heard a bang. He went to the assistance of the car driver who was dazed and bleeding, and not making much sense. He called an ambulance. He then went to the bus to check on the occupants.

9. Mr DeSouza was unsure whether any cars had passed from his right before the bus commenced to turn, but in cross examination he said it

was his clear recollection that no car passed. He said the bus was the first thing he saw, it was in front of him, and he had to give way to it. He was unsure whether the bus was stationary or moving when he first saw it, but later said in cross examination that his preference was that the bus was stationary. He said that he noticed that the bus was "very slow" and he was thinking……a double bus….it's not going to make it, and it didn't. He said the bus started off very lethargic.

10. When he first saw the car on his right he estimated that it was 100 – 150 metres away. He said that it looked like it was doing the speed limit, and didn't look like it was doing anything excessive. It was doing at least the speed limit, and he conceded in cross examination that it was possible the car was going over the speed limit. He said that the car was in lane1.

11. Once the bus entered Mueller Road Mr DeSouza's view was obscured and he did not see the impact. However, he opined that it was between lanes 1 and 2 from where the glass was after the impact.

12. At no time did he see the car slow down or move from lane 1, but his view was obscured by the bus as it drove into Mueller Road.

13. It was suggested to Mr DeSouza that from the time the bus started to move until the collision would have been about 9 seconds, and he agreed that this was about right. He went on to say that his view was obscured by the bus for possibly about 3 seconds as the bus was getting faster.

14. I found Mr DeSouza to be an honest independent witness who did his best to tell the court what he saw on this day. He was not prone to exaggeration. He made reasonable concessions where appropriate. I generally accept his evidence.

15. I will deal with the evidence out of order, as it is convenient to do so, and there was no “no case” submission at the end of the prosecution case.

16. Timothy Cox gave evidence in the defence case. He is the operations manager of the Darwin Bus Service, who employs the defendant. He has been a heavy vehicle driver for 35 years and driven buses for 10 years. He said that the articulated bus is 18.5 metres in length and therefore if the front windshield was at the entrance of Mueller Road the whole of the bus would be across the 3 lanes of McMillans Road and there would still be several metres in the right turning lane. He timed the turning of this same bus on the same section of road with children in it doing the same run that the Defendant was doing on the day of the collision. He said that from the time the bus took off to turn right until the time the last 2 panels of the bus were in the centre of lane 1 was 8.9 seconds. Whilst this is clearly not scientifically accurate it does give some guide.

17. Mr Cox went on to say that this bus has a computer to control the speed of take-off so that passengers are not thrown about. He said it is an even take-off and the bus stays at an even speed for a distance, but he did not say what this distance might be. He said the driver would accelerate on full acceleration and the bus would take off gently.

18. I return to the prosecution case. The next witness called was Kevin Masterson who was the driver of the car that collided with the bus. He gave his age as 65 but he looked considerably older. He walked very slowly and gingerly into the witness box. He appeared quite frail. He stated that he was retired, and it transpired from cross examination that he had been a police officer with NT police for 22 years before

his retirement. He had driven for 40 years but had not driven since this incident.

19. On 13/11/08 Mr Masterson was driving from his home in Anula to the Karama shops. He had not been drinking alcohol before driving and he was alone in the car. He was not asked and therefore gave me no details of the car he was driving. He was driving along McMillans Road in the direction of Berrimah. He said that a bus turned in front of him going into Mueller Road, it seemed to slow down, and the next thing he remembered was an impact.

20. He said he was doing 80km/hr and he first saw the bus when he was a bit less than 200 metres away. In examination in chief he said the bus was half way through it's turn when he first saw it and he confirmed this during cross examination. However, later in cross examination he said that the first time he saw the bus was when it commenced to turn and not when it was half way through it's turn. These two versions are quite different, and no explanation was offered to assist me in deciding which one might be correct.

21. He went on to say that the bus seemed to going at the correct speed but as he got closer it seemed to slow down. Mr DeSouza gave no evidence to suggest that this might have been the case.

22. Mr Masterson said that he didn't apply the brakes as he didn't have time. In cross examination he confirmed that he did not slow down at all before impact, he didn't move lanes before impact and he made no effort to avoid impact with the bus. His only explanation appears to be that he says he didn't have time. I am unable to accept this explanation.

23. Mr Masterson went on to say that he had no memory of events after the collision until he woke up in hospital a couple of days later. I

accept this. It was a very forceful impact and he suffered serious injuries. From ExP1 (a statutory declaration of Dr Brent compiled from RDH notes) the following injuries and medical opinions are noted:

- Multiple bruises and lacerations to his face, knees and abdomen;
- A fractured nose;
- A fractured sternum;
- Multiple closed rib fractures with a retrosternal haematoma and small pericardial effusion;
- He subsequently developed a pneumonia and required intubation and ICU management for that; and
- He certainly would have died without medical treatment.

24. Mr Masterson suffered significant life threatening injuries from the collision, but why he appears to have taken no evasive steps remains a mystery. His injuries may well have accounted for his presentation at trial and his evidence deficiencies.

25. In the course of his evidence Mr Masterson was asked in evidence in chief to mark on a Google map the position of his car with an “A” and the position of the bus with a “B” when he first saw the bus. On the document that became ExP2 he placed the letter “A” in lane 3 and at a distance of what appears to less than 100 metres from Mueller Road. The letter “B” appears to have been placed about 10 metres into Mueller Road and on the incorrect side of the road.

26. I was not invited to see what markings Mr Masterson had placed on the document at this point. Mr Tierney returned to this document later in evidence in chief and asked Mr Masterson to confirm which lane he says he was travelling in, and he said “the right hand side” which is lane 3. He was then asked to draw a rectangle of where he says the

bus was when he originally saw it. The only rectangle on the document is next to the letter “B” which (as noted earlier) is well into Mueller Road and on the wrong side of it. Mr Tierney then asked him to put an “X” where the bus was when he first saw it. This was his third attempt at the same request. There are two “X” marked on the document. One is marked to the left of the “A” and in lane 2. The other one is marked near the border of lane 1 and lane 2, and in about the middle of where the Berrimah side of Mueller Road would extend to. There is also a line with an arrow on the document that was unexplained in evidence, but this line seems to indicate a direction of travel (presumably of the bus) travelling down lane 3 of McMillans Road on the wrong side of the road, then turning into Mueller Road on the wrong side of that road also.

27. ExP2, and Mr Masterson’s evidence in relation to it did not greatly assist the prosecution case. He again confirmed in cross examination that although he said he was watching the bus turn at no time did he brake or even slow down. It was put to him that if he had slowed down the collision would have been avoided. In response he said “if I’d seen the bus earlier and slowed down, maybe, yes”.

28. I approach Mr Masterson’s evidence with some caution. I do not think he has deliberately lied, but I consider he may be confused about some aspects of the events this day, and given his serious injuries and current apparent frail state this may be understandable. I am unable to accept that Mr Masterson was travelling in lane 3 as he says. All the other evidence in the case would suggest that he was travelling in lane 1, and I find that this is where he was.

29. On my calculations:

- A vehicle travelling at 70 km/hr is travelling at 19.44 metres/second;

- A vehicle travelling at 75 km/hr is travelling at 20.83 metres/second and would travel 187.49 metres in 9 seconds;
- a vehicle travelling at 80 km/hr is travelling at 22.22 metres/second and would travel 199.9 metres in 9 seconds;
- a vehicle travelling at 85 km/hr is travelling at 23.61 metres/second and would travel 212.49 metres in 9 seconds.

30. The next witness called in the prosecution case was Senior Constable David Finch. He attended at the collision scene and made some observations and spoke to the defendant briefly. He advised that there were 33 children on the bus that the defendant was driving, but fortunately none of them were injured. None of these potential witnesses were called to give evidence, but neither counsel sought any inference to be drawn from this.

31. S/C Finch advised that he breath tested the defendant at the scene and obtained a negative result. In cross-examination he agreed that the impact was in lane 1 (and not lane 3 where Mr Masterson claims to have been), and marked a Google map accordingly (in the middle of lane 1), and this became ExD1.

32. Further in cross examination Mr Lawrence queried with S/C Finch why he had not taken any measurements at the scene. He advised that he was not a qualified accident investigator. However, given that there was no evidence that there were any marks on the road (which is not surprising given that the evidence suggests Mr Masterson took no evasive action), apart maybe from some impact marks, I am not sure what Mr Lawrence would have wanted measured. There do not appear to be any skid marks to measure or any other marks before impact. I am therefore unable to see how any measurements may have assisted.

33. The next witness in the prosecution case was Constable Leighton Arnott. He was working with S/C Finch on 13/11/08 and attended the collision scene with him. He also made some observations of the scene and did some traffic direction. He subsequently had a conversation with the defendant on 19/2/09. That was the extent of his involvement.

34. The prosecution then closed it's case. Mr Tierney elected to proceed with charge 2 and accordingly leave was granted to withdraw charge 1. Accordingly, hereafter I will limit my considerations to charge 2 only.

35. The defence (as noted earlier) went into evidence and the defendant gave evidence in her own defence.

36. The defendant advised that she was born in Tahiti and English was her third language. She had a strong accent and it appeared at times that she struggled to find words to convey her full meaning. But I'm satisfied that she did her best. She came to Australia in 1974, and has lived in Darwin since 1975.

37. The defendant has been driving since 1975, and has been a bus driver for 14 years. She started with Buslink for 2 years and has been with the Darwin Bus Service for the last 12 years. She stated that she had driven articulated buses for 12 years, and did 3 months training before going on the road. She later stated in cross examination that she drives an articulated bus 5 or 6 times a week.

38. The defendant was driving the bus in question on 13/11/08. She stated that she had made that right hand turn at that same intersection in a bus about 100 times before this day. On this day she started work at 1400 and collected students from Darwin High and dropped them at the Casuarina bus exchange. She the proceeded to

Marrara Christian School and collected students. She then proceeded inbound on McMillans Road intending to turn right into Mueller Road to pick up more students from O'Loughlin College to drop them off at Casuarina.

39. The defendant said that she stopped at the corner (which I take to mean the intersection in question).....there were two cars already passed.....I let them passed.....one car far away and I safe to cross. She went on to say that the car was on the inside lane (lane 1) and it was about 300 metres away. She said she made a judgment that it was safe to go across.

40. In cross examination the defendant was asked if she could be mistaken about the "300 metres" and she said "no". She was then asked if the car could have been further away or closer and she again replied "no". When she was asked to mark the position of the car on one of the Google aerial photographs she did so by trying to reference it to the position of a bus stop and some traffic lights apparently near a caravan park, and stated in re-examination that the car was "near there". However, the defendant gave no evidence that she subsequently did any measurements of the area to confirm in her mind that the point she thought the car was at was in fact 300 metres away. She did say in cross examination that on the day she showed S/C Finch where the car was and she walked with him, but she gave no evidence to suggest that either of them paced any distance out. S/C Finch gave no evidence to suggest that this did or did not occur.

41. I consider the defendant's definitive statements as to the distance of the car to be less than compelling. Judging distance is never easy and in my view no proper foundation was laid to allow me to accept that the car was exactly 300 metres away (and nothing more or less) at the time she first saw it. The defendant did not even use the word

"approximately" or anything similar in her evidence. She was at all times adamant that the car was 300 metres away and nothing more or less.

42. If the car was 300 metres away, and if it took the bus approximately 9 seconds to get to the position the collision occurred then Mr Masterson's car would need to have been travelling at 120 km/hr to have moved 300 metres in that time. Taking the evidence as a whole I find that the car was doing nothing like 120 km/hr. If the car was doing about 80 km/hr, then this would mean that the defendant did not commence her turn until about 5 seconds after she had first seen the car. This is possible, but there was no evidence that this was what in fact did occur. I am unable to accept that the car was 300 metres away when the defendant first saw it.

43. From the three persons who gave evidence who observed the incident we have three different estimates of distance. These are:

- Mr DeSouza who says 100 to 150 metres;
- Mr Masterson who says a bit less than 200 metres; and
- The defendant who says 300 metres.

44. However, all of the witnesses may have first seen the vehicles at different points in time. Further, in my experience, estimates of distance and time invariably are very difficult, and there can be very large variations between witnesses' recollections.

45. In evidence in chief the defendant was asked if the bus was driving slow, and she said it fair when you take off it slow and then it build up. She said that she did not slow down and she did not accelerate (which may make sense given the evidence of Mr Cox, as referred to earlier,

about the computer on the bus controlling the speed of the bus). She said she went at the same speed she always goes.

46. The defendant went on to say that she went across.....and I see the car is speeding.....and I inside Mueller Road.....and then when it hits I can't stop straight away. The defendant did not give any evidence to suggest what speed the car may have been doing, or anything else to explain her opinion that the car was "speeding".

47. In cross examination she stated.....I was right in Mueller Road.....I can't see other car when enter into Mueller Road.....when turn half way can see. She was then asked how far into the turn she was before she noticed the car was "speeding", and she again replied "half way". If this evidence is truthful, then it must follow that when she was "half way" through her turn and before she entered into Mueller Road she realised in her own mind that the car may be "speeding". Unfortunately she was not asked to mark on any of the Google maps where she says she was when she noticed the car allegedly "speeding" towards her. But on her own evidence she then took no action based upon this new information. She did not attempt to stop the bus to allow the car to pass in front of her. She did not attempt to speed up so as to complete the turn faster. She just kept turning in front of the oncoming car driving as she normally did.

48. It may have been an impression that she gained that the car was "speeding". It may have been a belief she came to because the car was upon her sooner than she had anticipated. It may have been a reconstructed memory looking back on the event later. I don't know. But given the other evidence in the case I am unable to make much of this piece of her evidence. She says nothing to suggest what she meant by "speeding" and therefore I have no idea whether she was suggesting the car was 1 km/hr over the speed limit or 50 km/hr over.

Absent being able to quantify the alleged “speeding”, the defendant’s evidence in this regard is of limited value.

49. In cross examination it was suggested to the defendant that it takes more time for an articulated bus to turn than a rigid bus. I would have thought (as a matter of logic) that the answer had to be yes given the extra length of the articulated bus, but surprisingly (to me) the defendant responded “no”. She then went on to immediately add “just a little bit” and when saying this she held up her hand with her thumb and forefinger very close together to emphasise what she was now saying. She then added “it doesn’t take longer but you have to judge how to turn”.

50. I find it difficult to accept this evidence. Whilst it may not take longer for the front of the bus (where the driver is seated) to get to the same point during a turn, in my view, as a matter of logic it must take longer for the back of an articulated bus to clear an intersection fully as opposed to a rigid bus. The only way that this could not be the case is if an articulated bus was faster than a rigid bus, and there is no evidence one way or the other in that regard. Despite the fact that Mr Cox gave evidence after the defendant, Mr Tierney did not canvas this issue with him.

51. I find that the defendant was generally an honest witness. However, in some aspects of her evidence (as noted above) she was too definite, and in others she was not compelling.

52. I bear in mind that the defendant has no evidentiary or other onus in this case. Having gone into evidence, her evidence stands to be considered with all the other evidence in the case. The defendant was not required to give evidence, and if she had chosen not to no adverse inference could be drawn against her. In deciding this matter the prosecution bear the onus throughout of satisfying me of each or

the necessary elements of the offence beyond all reasonable doubt. In addition, if there is any reasonable doubt as to the guilt of the defendant then the defendant is entitled to (and must) be found not guilty.

53. Taking the evidence as a whole I make the following findings of fact beyond all reasonable doubt:

- At about 1510 on 13/11/08 the defendant was driving an articulated Darwin Bus Service bus with about 33 school children on board along McMillans Road heading in the direction of Bagot Road;
- The articulated bus was about 18.5 metres in length;
- The articulated bus was a vehicle (see Regulation 3(2) of the Traffic Regulations and Rule 15 and the meaning of "motor vehicle" in the dictionary of the Australian Road Rules);
- At about the same time Mr DeSouza was driving along Mueller Road in the direction of McMillans Road;
- At about the same time Mr Masterson was driving a car (described by Constable Arnott as a dark green Mitsubishi Lancer) in lane 1 of McMillans Road in the direction of Berrimah;
- The intersection between McMillams Road and Mueller Road was a "T" intersection, and Mueller Road was the terminating road;
- The defendant intended to turn right into Mueller Road, and stopped the bus at the T-intersection of McMillans Road and Mueller Road for this purpose;

- Mr DeSouza wished to turn right from Mueller Road onto McMillans Road and stopped his car at the T-intersection for this purpose;
- Mr DeSouza noticed the bus in front of him and realised that he had to give way to the bus;
- Mr DeSouza also looked to his right and observed the car driven by Mr Masterson some distance away travelling in his direction in lane 1 of McMillans Road;
- The defendant looked down McMillans Road (where she had a clear and uninterrupted view) and observed the car driven by Mr Masterson driving towards her along McMillans Road in lane 1;
- The defendant was obliged (see example 4 of Australian Road Rule 73) to give way to Mr Masterson's car;
- Mr Masterson was driving at approximately the speed limit (which was 80 km/hr) but I am unable to exclude the reasonable possibility that he may have been travelling slightly above the speed limit, but I find that if he was he was not exceeding it by much, and he was not noticeably "speeding";
- The defendant decided that it was safe to turn right and commenced a right hand turn into Mueller Road;
- In deciding that it was safe to turn right the defendant was of the opinion that it took about the same time (maybe a little bit longer) for an articulated bus to turn as a normal bus;
- There was no proper basis laid for the defendant's opinion in this regard, either in logic or fact and I reject it;

- It takes in excess of about 9 seconds for this particular bus to commence to turn right from a stationary start (on McMillans Road) until the rear of the bus would clear all outbound lanes of McMillans Road in this location;
- At the time the defendant commenced to turn Mr Masterson's car was about 200 metres away from where the defendant was seated;
- Mr DeSouza's thoughts upon seeing the bus commence to move was that he didn't think the bus would get through;
- Mr DeSouza's thoughts were correct;
- At the time the defendant commenced to turn (due to the length and slow speed of this articulated bus) it was not reasonably possible for the bus to fully clear McMillans Road without incident unless Mr Masterson took some positive action (either by slowing his car, or changing lanes to his right);
- Accordingly, at the time the defendant commenced to turn right she was not fully giving way (as she was obliged to do) to Mr Masterson's car;
- The defendant continued her turn into Mueller Road;
- The defendant further observed Mr Masterson's car when she was half way through her turn but took no action to speed up or take any other action;
- The defendant proceeded forward in the bus neither increasing nor decreasing speed to any real extent;
- Mr Masterson observed the bus turning in front of him;

- Mr Masterson did not take any steps to slow his speed of travel (but nor was there any evidence to suggest that he increased his speed either);
- Mr Masterson did not attempt to brake;
- Mr Masterson did not attempt to move his car to the right into either lane 2 or lane 3;
- There was no other traffic in the vicinity of Mr Masterson's car, and accordingly it was safe for him to move his car to the right;
- If Mr Masterson had slowed his speed of travel, or braked, or moved his car to the right (or a combination of any of these) it is highly likely that no collision would have occurred;
- Mr Masterson drove without due care and attention and took no reasonable steps to avoid a collision or ensure his own safety;
- The front of Mr Masterson's car collided with the left hand rear of the bus between the rear wheel and the end of the bus (ExP3);
- At the time of collision the rear of the bus was fully blocking lane 1 of McMillans Road;
- At the time of collision Mr Masterson's car was fully within lane 1 of McMillans Road.

54. Based on those findings, is the defendant guilty of charge 2?

55. Regulation 18 of the Traffic Regulations is a regulatory offence (see Regulation 92) and accordingly Part II of the Criminal Code does not apply (see section 22 of the Criminal Code). At the relevant date Regulation 18 stated as follows:

> (1) A person must not walk, or drive a vehicle, on a road or public place without due care or attention or without reasonable consideration for other persons using the road or public place.
>
> (2) A person must not drive a vehicle in a disorderly manner on a road or public place.

56. Accordingly, there are a number of obligations imposed by Regulation 18(1), but the prosecution has chosen not to seek to rely upon "or attention or without reasonable consideration for other persons using the road or public place". Hence, my deliberations herein are limited to the meaning of the words "without due care" only.

57. What does "without due care" mean? In this regard, the only case I was referred to was *Crispin v Rhodes* (to which I will refer in more detail later in these reasons) by the prosecutor. Accordingly, I have had to rely upon my own researches.

58. In *McCrone v Riding [1938] 1 AllER 157* it was held that (noting that "attention" is not relied upon by the prosecution herein):

> The standard implied in relation to the offence of driving a motor-vehicle without due care and attention is an objective one, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience attained by the individual driver.

59. In *Virgo v Elding [1939] SASR 294* Angas Parsons J stated at pages 295-6:

> The language of section 120 is "without due care and attention," not "and" intention, but it is not necessary to decide whether these words include two separate offences, because the conviction under appeal is for "driving without due care" only. But it is clear that the words "without reasonable consideration for other persons" constitutes a separate offence and do not govern the words "due care or attention". Driving on a road without due care is, on a proper construction of the

section, an offence, irrespective of whether other persons are using the road or not.

His Honour went on to say at pages 296-7:

> I have ventured to omit from the quotation from the judgment of Lord Hewart in this case (*McCrone v Riding [1938] 1AllER 157*) the words "he must do his best". The standard of care, as the case shews, is not what a person charged may only be capable of exercising, but what is expected of the ordinary prudent driver.
>
> The respondent drove the service car on the day in question in such a manner that it left the highway and travelled for a distance of about 31 feet, crossing on its way a watercourse about 18 inches deep, and another watercourse about 4½ feet deep. According to the photograph, this latter obstacle seems to have terminated its career. In my view, this method of driving is driving without due care, and is a case of *res ipsa loquitur*. A motor car, in the ordinary course of things, does not behave in this way if the driver is exercising due care. I should infer as a fact want of due care on the part of the driver unless there is an explanation which I regard as probably true and consistent with the exercise of due care. See per *Napier* J., *McKenzie v. Hoskins*, [1939] S.A.S.R. The only explanation for it considered by the Magistrate is that contained in the admission of the respondent to the police, "I must have fallen asleep, for until I hit the first bump I did not awake, and could not avert the accident." The learned Special Magistrate accepted this explanation as the "most probable explanation of what occurred," but in the absence of evidence that he had "some warning that it was likely that he would fall asleep," he was not prepared to convict the respondent.
>
> I find it somewhat difficult to understand what is the finding of the Magistrate on the case for the defence, or whether there was any finding at all; but I assume that the Court below was satisfied that the explanation of the respondent's manner of driving was that he fell asleep, although he had no warning that he was about to do so. This, however, is not an answer to the inference I draw from the facts proved by the prosecution. It may be possible in some cases for a drunken driver to drive with due care, but it is impossible for a driver to do this when asleep, and whether he is overcome by sleep with or without warning is immaterial. (underlining added)

60. I have underlined the passage above, as during Mr Lawrence's closing address he submitted that "res ipsa loquitur" had no place in the criminal law, but this passage may cast some doubt on that submission.

61. It is apparent from these two decisions that the test is an objective one, and is based upon what the court would expect from an ordinary prudent driver.

62. *Dayman v Gill [1941] SASR 208* was a case where the Defendant was charged with driving without due care. The facts were that he was driving north along West Terrace and turned to his right into Gilbert Street, and in so doing turned across the line of traffic proceeding southwards, at the front of which was a tramways bus. The driver of the bus was unable to stop and veered to his left into the entrance to Gilbert Street, where the bus collided with the defendant's car. During the first hearing the magistrate dismissed the complaint without calling upon the defendant for his answer to the charge. The crown appealed and Richards J (decided that there was evidence that the defendant had created a situation of danger, by crossing the course of the oncoming traffic, when there was insufficient – or barely sufficient – time to cross in safety) remitted it back to the magistrate to hear the defendant's answer to the charge. At the conclusion of the evidence the magistrate dismissed the charge again and the crown again appealed. At pages 209-210 Napier J said the following:

> I see no reason to doubt the propriety of the order of this Court upon the first appeal. <u>The fact that no collision would have occurred if the bus had been driven with due care is no answer to the charge. The driver who creates a situation of danger may be guilty of driving without due care, although no harm results, and if the evidence discloses that the collision was due to reckless or careless driving on both sides, it shews, simply, that both the drivers were equally guilty.</u>

> As it turned out there is no doubt that the defendant was cutting it close, or taking a risk, when he crossed in front of the bus, and it seems to me as it seemed to *Richards* J, that the act of turning in these circumstances, called upon the defendant for some excuse or explanation of his conduct. But I hold, as my learned brother was prepared to hold, that the outcome is not conclusive. Negligence is a question of fact, depending upon the circumstances of the particular situation, and I am not prepared to hold that the mere fact that a collision has occurred is conclusive evidence that the driver of the turning vehicle was driving without due care. One of the risks of excessive speed, and reckless driving generally, is that it leads other people into errors of judgment.
>
> Upon the second hearing there was evidence that the bus was being driven at an excessive speed – the estimate of an independent witness was 40 or 50 m.p.h. – and that it came from behind other cars that were following Hogben's cycle. Upon that evidence the Magistrate accepted the defendant's explanation that, when he commenced his turn into Gilbert Street, the approaching vehicles were at a distance, which made it appear safe to cross in front of them.
>
> I think that this was a possible view of the evidence and it is not for me to say whether I should have come to the same conclusion. It is sufficient that I am not prepared to say that the Magistrate was wrong. (underlining added)

63. Accordingly, if in the instant case I had been satisfied that Mr Masterson had been travelling at an excessive speed (which I have not found) then this would be justification for accepting that the defendant may have been led into an error of judgment and that may be sufficient to lead to a finding of not guilty. In this case I have found that Mr Masterson was doing a speed which was around the speed limit. I am unable to find on the evidence that whatever speed he was doing was such that he would have taken the defendant by surprise.

64. On the contrary, Mr DeSouza quickly realised the possibility of a potential problem when he saw the defendant start to turn the bus (because of the slow speed the bus was going). It would seem to follow from Mr DeSouza's observations that if the bus had not been

going at what he considered to be a slow speed, that the bus may have been able to complete the turn without incident.

65. In *Milkins v Roberts [1949] SASR 251* Mayo J said at page 254:

> "Without due care" relates to the manner of driving, and prima facie is satisfied by proof that due care was wanting, if the driver were upon a road, whatever the other attendant circumstances might be.

Then after quoting both *Virgo v Elding* (supra) and *Dayman v Gill* (supra) with approval His Honour went on to say at pages 254-255:

> The phrase "due care" in s. 120(1) does not connote "care due" to some other person. "Due care" means, I think, "adequate caution in all the circumstances." Certainly the absence of any person or property that could be injured or damaged can be an element in the total situation for the purpose of appraising the requisite standard or degree of care to be maintained. But the sub-section is not to be read as driving "without due care...for other persons using the road", according to the opinion expressed by *Angas Parsons* J. in *Virgo v. Elding*(8).
>
> An error of judgment in an emergency created by another person, although open to criticism, will not necessarily amount to a want of due care (*Johns v Silby*(9)). Whether or not an act or omission will constitute the want of care required by the sub-section must depend on all the circumstances. Conduct, that in a certain situation would infringe the law, will not necessarily involve a breach in other circumstances. No course of conduct can be prescribed for all situations (*Howe v. Dayman* (10)).
>
> The question in the present case does not relate directly to the responsibility for the collision. It is not an inquiry whether the appellant wrongfully caused the vehicles to come into contact. The problem may be simply stated. Was the appellant shown to have driven on the road without due care? The facts upon which an answer is to be given must be proved so as to remove reasonable doubt, that is, if the offence is to be deemed to have been established. (underlining added)

66. In *Geneff v Townsend [1970] WAR 20* it was held (noting that "attention" is not relied upon by the prosecution herein):

> The words "due care and attention" ..... mean that degree of care and attention which a reasonable and prudent driver would exercise in the circumstances.

67. In *R v Little (1976) 14 SASR 556 @ 569* Bray CJ stated (not in relation to "due care" but as a general statement of what the law expects): "The law does not require a driver to drive perfectly, a requirement with which few drivers, and perhaps none, could comply, but only to drive with reasonable care and skill."

68. In *Howie v SA Police BC9300402* an unreported decision of the Supreme Court of South Australia delivered on 13/8/93 Olsson J stated as follows at pages 2-3:

> A finding that the traffic lights may well have malfunctioned, at the relevant time, does not automatically give rise to a conclusion that the charge brought pursuant to s45 of the Act necessarily fails, although it may well be relevant in mitigation of penalty.
>
> As O'Loughlin J stressed in *Crispin v Rhodes (1986) 40 SASR 202,* s45 requires the court to assess the relevant factual situation by reference to an objective test. The statutory obligation to drive with due care is the duty to exercise the standard of care that one would expect of a reasonably prudent driver in the like, or similar, circumstances. The duty so expressed does not connote care due to some other specific person. Rather it requires adequate caution in all the circumstances.
>
> It was pointed out by O'Loughlin J that s45 requires the court to have regard to the surrounding circumstances and the existence, at the relevant time, of particular potential hazards. As he put it, the extent to which a driver must take care is to be measured according to the existence of factors calling for specific acts of watchfulness, caution and vigilance which, in this case, included the poor light conditions and the presence of other vehicles. The fact that it might well be that a collision would not have occurred but for the lack of care of another driver does not, of itself, afford an answer to a charge under s45. The real question is whether the person charged has proceeded with adequate caution in the specific, relevant fact situation.

> In the instant case the possibility of malfunction of the traffic lights was but one factor for consideration. What cannot be overlooked is that the incident occurred at what is a notoriously busy intersection at that time of evening and in conditions of poor natural light. Moreover the appellant entered the intersection at a speed of about 55kph.
>
> The appellant was simply not entitled, as he apparently did, to rely simply on the traffic light indication and not maintain any more general lookout for the actions of other drivers. It was not enough merely to assume that all other drivers would strictly and scrupulously obey the rules of the road. We all know that, as a matter of common, daily experience, they sometimes do not.
>
> It is, at all times, incumbent on a person in control of a motor vehicle to discharge his or her function in the manner of what was described by White J in *Antonow v Leane* (1989) 53 SASR 60 at 70 (albeit in the context of a civil negligence case) as a "reasonably competent, alert and defensive driver" in the sense discussed in a series of authorities stemming from *Stoeckel v Harpas* (1971) 1 SASR 172. (See, for example, my discussion of that concept in *Tenhoopen v Nilsen* (1989) 150 LSJS 16.)
>
> Had the appellant done so on the evening of 2 May 1992 the collision giving rise to the charge against him would not have occurred. His simple reliance on the malfunction of the traffic lights to exculpate him cannot be sustained. As the learned magistrate correctly assessed, the gravamen of the complaint against him was a separate failure to maintain an adequate general lookout. (underlining added)

69. I respectfully adopt and follow these cases as stating the current law.

70. The defendant and Mr De Souza were in an equally good position to assess the situation that confronted the defendant. Mr DeSouza's thoughts when he saw the defendant commence to turn was that he didn't think she would make it, and this seems to have been because of the slow speed of the bus. The defendant was an experienced bus driver, and was experienced in driving articulated buses, and had made this same right hand turn over a hundred times before. What went wrong this time? The above authorities make it clear that it is not

necessarily a good answer to the charge to say that no collision would have occurred if Mr Masterson had also not been guilty of an offence.

71. If this were a civil case and I was being asked to apportion liability between the defendant and Mr Masterson, then on the evidence I would be looking to hold Mr Masterson responsible for somewhere between 75% and 95%. He didn't have to do much to avoid a collision. He didn't really need to brake. If he had seen the defendant commencing to turn when he was about 200 metres away (as he said that he did), then he only needed to reduce the pressure of his foot on the accelerator a little (to reduce his speed to about 70 km/hr) when he was about 100 metres away and it is likely that no collision would have occurred even if he stayed in lane 1.

72. I find that the defendant made an error of judgment on this day, and did not allow sufficient time for the rear of the articulated bus to fully clear McMillans Road. She misjudged the distance away that Mr Masterson was. In doing so, she obliged Mr Masterson to take some form of evasive action, which for some unexplained reason he was unable to do.

73. Is a person driving without due care whenever they require a corresponding reaction from another road user? Clearly, given that there was no evidence to suggest that Mr Masterson increased his speed at any stage, the defendant was unable (at the speed the articulated bus was moving) to safely clear lane 1 of McMillans Road without some suitable reaction (of which there was none) from Mr Masterson. In an ideal world of perfect drivers no reaction by Mr Masterson should have been necessary. In my view, a driver is not permitted to pull out in front of another vehicle (that they are obliged to give way to) and cause that other vehicle to take some form of evasive action. A driver cannot assume that other drivers on the road

are giving their full attention, or will themselves not drive without due care. The size of the turning vehicle does not change the situation. A large vehicle does not have any right under the Traffic Rules or Regulations to force it's way (although there was no evidence in the instant case to suggest that was what the defendant was doing).

74. Having said all that, was the defendant's departure from the standard of a reasonable prudent driver on this day, such that a finding of guilt to this regulatory offence should follow? It is the answer to this question that has troubled me on the facts of this case. I remind myself of what Bray CJ said in *R v Little* (supra) that "The law does not require a driver to drive perfectly, a requirement with which few drivers, and perhaps none, could comply, but only to drive with reasonable care and skill".

75. On the evidence, the following conclusions appear to be reasonably open:

- If Mr Masterson had been in lane 3 (as he said he was) then the defendant would have been safe to turn and no action or reaction from Mr Masterson would have been required;
- Even if Mr Masterson had been in lane 2 then the defendant would have been safe to turn and no action or reaction from Mr Masterson would have been required;
- If Mr Masterson had been just a little further away (even 20 to 40 metres, so allowing for a 10% to 20% error factor) a collision may not have occurred;
- If Mr Masterson had been going a little slower or had reduced his speed a little when he saw the bus turn it is likely that no collision would have occurred;

- When the defendant commenced her turn she needed about 10 seconds (or maybe a fraction more) to clear McMillans Road fully, but as it turned out (maintaining a constant speed) Mr Masterson was about 9 seconds away.

76. Clearly the defendant did not drive perfectly on this day, and must take some responsibility for the collision that occurred. Whilst I consider that the defendant may well have not driven with reasonable care and skill on this occasion, I am still left with a lingering doubt in my mind. As such I am unable to be satisfied beyond all reasonable doubt that the defendant drove without due care on the facts of this case.

77. I am therefore obliged to find the defendant not guilty of charge 2.

78. Charge 2 will be dismissed and the defendant will be discharged. I will hear counsel on the questions of costs and any consequential matters.

Dated this 26th day of February 2010.

_____

Daynor Trigg
STIPENDIARY MAGISTRATE