cause a warrant for his arrest to be issued. After his arrest, the defendant must be brought before a magistrate in court so that he may show cause why he should not give good and sufficient bail for his appearance on the date of the hearing of the summons. If the defendant fails to show such cause, the court shall order him to give bail for his appearance and his surety or sureties shall undertake in default of such appearance to pay any sum of money which may be adjudged against him in the action or suit with costs. It is only where the defendant neither furnishes security nor offers a sufficient deposit (see section 7) that the court may commit him to custody until the decision of the action or suit or, if judgment is given against him, until the execution of the judgment, that is, if the court shall so order.

In the present case, the applicant, after his arrest, was not taken to a magistrate's court for the necessary inquiry to be made, but was taken to an officer of the court who, unwittingly, in my view, arrogated to himself the functions of a magistrate and caused the applicant to be kept in custody without lawful authority. I find that the respondent, the Acting Senior Police Magistrate, properly exercised his discretion in causing a warrant for the arrest of the applicant to issue. I find also that the plaintiff/respondent is not to blame for the unlawful detention of the applicant. The wrongful act stemmed from the bailiff, Mr. Rahim. In the case of the respondent/the Director of Prisons, it is understandable though inexcusable that he may have thought that the warrant gave him authority to detain the applicant in prison without an order from a magistrate.

In the circumstances, I dismiss the Acting Senior Police Magistrate and the plaintiff from these proceedings. I, however, find that the applicant was wrongfully held in custody by the Director of Prisons and I therefore grant the application for the writ of habeas corpus sought. I make no order as to costs.

[SUPREME COURT]

Freetown
August 19.
1963
Marke J.

ARNAUD FRANCE . . . . . *Appellant*

v.

COMMISSIONER OF POLICE . . . . . *Respondent*

[Mag.App. 29/63]

Criminal Law—Careless driving—Car entering main road from side road—Duty of driver on main road to avoid accident by exercise of care and diligence—Road Traffic Act (*Cap.* 132, *Laws of Sierra Leone*, 1960), *s.* 43.

On November 14, 1962, a policeman was driving a police van along Battery Street, Freetown, in the direction of the King Tom police barracks. The van was travelling at about 20 m.p.h. when it collided with a car driven by the appellant, which had just emerged from a side lane and had proceeded into Battery Street to a distance of about 4 ft. 6 in. At this point Battery Street is 13 ft. wide. The driver of the van did not see the car until after the collision. The van was brought to a stop 50 ft. from the place of impact.

Appellant was charged with careless driving in a magistrate's court and was convicted. The magistrate based his decision on *MacAndrew* v. *Fillard*, 1909

S.C. 78, in which it was said that a driver approaching a main road from a side road must have his vehicle under such control as to be prepared for any traffic he might encounter. Appellant appealed against her conviction to the Supreme Court.

Held, allowing the appeal, that, even though appellant was wrong to have brought her car into Battery Street when she did, there was still a duty on the driver of the police van to avoid a collision if he could do so by the exercise of ordinary care and diligence.

Cases referred to: *MacAndrew* v. *Fillard*, 1909 S.C. 78; *Davies* v. *Mann* (1842) 10 M. & W. 546; *Radley* v. *London & North Western Railway Co.* (1876) 1 App.Cas. 754.

Claudius D. Hotobah-During for the appellant.
Titus E. Fewry (Crown Counsel) for the respondent.

MARKE J. This is an appeal from a magistrate who convicted the appellant on a charge of driving without due care and attention.

Mr. Hotobah-During, before proceeding with his argument, said that the magistrate's record was incomplete in that it omitted some evidence material to his client's case. Mr. Davies, Crown Counsel, who appeared for the respondent, could not say anything as to this as he did not conduct the case before the magistrate. I asked Mr. During to swear to an affidavit setting out his objections to the record. This he did and a copy thereof was sent to the magistrate who tried this case.

The magistrate's observations to Mr. During's affidavit were as follows:

"I cannot now remember if Mr. During posed the specific question or if posed was answered in the affirmative by the witness. To the best of my recollection I wrote down all relevant facts adduced on both sides."

It is significant to note that paragraph 5 of Mr. During's affidavit—the last paragraph of his affidavit—read as follows:

> "5. And also that His Worship the Police Magistrate omitted to note down in his said records of the court that after the close of the prosecution's case on the said February 14, 1963, I submitted that there was no prima facie case made out for the defendant to answer when he overruled and said he would like to hear the defence."

The magistrate, in submitting his observations to this court, has overlooked that paragraph of Mr. During's affidavit. The appeal, however, proceeded on the record before me.

The facts of the case were briefly as follows: on November 14, 1962, a policeman was driving a police van (C.4156) along Battery Street in the direction of the King Tom police barracks when a car (C.4546), driven by the defendant, emerged from her compound as the police van was passing the junction of Battery Street with the lane leading into her compound.

According to the prosecution, it was the defendant's car which hit the police van. The damage to the defendant's car was more extensive than that to the police van, which was the heavier vehicle.

According to the defendant, as she was travelling towards Battery Street she heard the noise of an approaching motor vehicle: she stopped her car and was stationary when the police van hit her car and proceeded.

A plan of the scene showing the positions of the van and of the car was admitted in evidence.

The magistrate, however, believed the prosecution's case and convicted the defendant, imposing a sentence of £10 or two months' imprisonment.

Against that decision the defendant has appealed on the following grounds:

(1) The judgment is against the weight of evidence.

(2) The trial magistrate misdirected himself on the question of speed.

(3) In considering the evidence the learned magistrate ignored the plan put in evidence by the prosecution.

(4) The police who prepared the plan referred to in ground (3), above, were not called to give evidence.

(5) There is no corroboration of the prosecution's story.

(6) The prosecution witness perjured himself in that in examination-in-chief he said he stopped immediately after the impact, whereas on cross-examination he said he stopped some 50 feet from the point of impact.

Mr. Hotobah-During, however, argued grounds (2), (5) and (6).

As regards grounds (2) and (6) Mr. Hotobah-During argued that the driver of the police van could not have braked at the point of impact as the plan which was signed by him and the defendant contradicts that. Mr. Hotobah-During submitted that the police van was driven at such speed that it was unable to brake on the spot. Mr. During said that the magistrate ignored the plan in his judgment.

In answer to this, Mr. Davies said the van, though it halted so far from the point of impact, was travelling at 20 m.p.h. As to ground (5), Mr. During pointed out that the policeman admitted he did not see the car till after it had collided with him. As to this, Mr. Davies referred to the plan.

Mr. Davies, in replying to ground (6), said that all the policeman said was that he braked on the spot; he did not say he stopped on the spot.

Mr. Hotobah-During said that the policeman, after saying that he braked on the spot, in the next sentence said that he alighted. Looking at the plan, which was admitted in evidence and marked Exhibit 1, the following facts appear:

1. Battery Street is 13 ft. wide.
2. At the point of impact C.4156 had a clearance of 4 ft. 6in. on either side.
3. C.4156 halted at a distance of 50 ft. from the point of impact.
4. C.4546 was about 4 ft. 6 in. in Battery Street when the impact took place.
5. There is a note in the plan of position of C.4546 found after impact—slantwise facing east.

The learned trial magistrate, referring to a case, *MacAndrew* v. *Fillard*, 1909 S.C. 78—a report which is not available in our library—said that a driver approaching a main road from a side road must have his vehicle under such control as to be prepared for any traffic encountered there; and it is on this principle he based his decision. The learned trial magistrate did not seem to appreciate the principle to be deduced from the earlier case—*Davies* v. *Mann* (1842) 10 M. & W. 546. The facts in that case—often referred to as the hobbled donkey case—were as follows: The defendant in that case negligently drove his horse and wagon against and killed an ass. The ass had been left in the highway fettered in the forefeet, and was then unable to get out of the way of the defendant's wagon. It was held that the jury were properly directed that although it was an illegal act on the part of the plaintiff to put the animal on the highway, the plaintiff was entitled to recover. That case was followed

by, among others, *Radley v. London & North Western Railway Co.* (1876) 1 App.Cas. 754, where it was held that if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened the plaintiff's negligence will not excuse him. It has been held in cases similar to the present case that no one driving a motor vehicle has an absolute right of way when driving on a main road. That is imposing on the driver of a motor vehicle on a main road the same duty of care as on a driver emerging from a side road into a main road, the test being "Could the driver on the main road have by the exercise of ordinary care and diligence avoided a collision?" From the principle in *Davies* v. *Mann* it should make no difference if the other party—that is, the appellant—was doing something which in law he should not be doing. There is, nevertheless, the duty to avoid a collision by the exercise of ordinary care and diligence.

In the present case, the police van, according to Mr. Davies, was travelling at 20 m.p.h. along Battery Street. If he was using the road as he should have done, he should be on that part of the road which was nearer the lane from which the defendant issued than the other side—his driving side of that road. From the plan, the defendant had come out of her private lane to about 4 ft. 6 in. of Battery Street when the impact took place. But the driver of the police van said that he did not see the defendant's car until after the collision. At 20 m.p.h. one would have expected a careful and diligent driver to have seen the defendant's car before the collision. Again, at the point of impact the police van had a clearance of 4 ft. 6 in. on its driving side which could have enabled him to avoid a collision if in fact he was travelling at 20 m.p.h. I should like to make it perfectly clear that I am not saying that the defendant according to the plan was right in the circumstances to have brought her car 4 ft. 6in. into Battery Street. What I do say is that even where she was in the wrong there was still a duty on the driver of the police van to have avoided a collision if he could, by the exercise of ordinary care and diligence, have done so. With respect, it seems that the learned trial magistrate erred in thinking that the duty of avoiding a collision was only on the defendant, who was obviously wrong from the finding of the magistrate in issuing 4 ft. 6 in. from her lane. If I were to support the magistrate's decision then it would be excusable for a driver to run over a man who was lying in the road, drunk and incapable. Even in that case, the law imposes a duty on the driver to avoid running over the drunken man if by the exercise of ordinary care and diligence he can do so.

For the reasons stated I would allow this appeal. The order of the court is:

1. The appeal is allowed.

2. The conviction and sentence are set aside and a verdict of "acquitted and discharged" substituted.

3. The fine, if already paid or deposited as a condition of this appeal, to be refunded to the defendant/appellant.

4. The amount deposited as costs for preparing record to be refunded to defendant/appellant.

5. Magistrates' court to carry out.