## SPECK *v.* COMMISSIONER OF POLICE

SUPREME COURT (Cole, Ag. C.J.): September 7th, 1964
(Mag. App. No. 14/64)

[1] **Courts—Supreme Court—appeals from magistrates' courts—matters of fact—conviction on matter of fact set aside if palpably wrong:** Where a conviction in a magistrates' court based on a matter of fact is obviously and palpably wrong it will be set aside on appeal (page 127, lines 12–14).

[2] **Criminal Procedure — appeals — appeals against conviction — matters of fact—conviction on matter of fact set aside if palpably wrong:** See [1] above.

[3] **Evidence—burden of proof—driving without due care and attention—striking preceding car in rear—prosecution to negative inevitable accident and prove absence of due care:** The mere fact that the driver of a car collides with the rear of a car preceding him is not evidence of his driving without due care and attention, especially if he raises the defence of inevitable accident; it is for the prosecution to negative this defence and offer positive proof that he has driven without due care and attention (page 126, line 32—page 127, line 1).

[4] **Road Traffic—driving without due care and attention—striking preceding car in rear—prosecution to negative inevitable accident and prove absence of due care:** See [3] above.

[5] **Road Traffic—driving without due care and attention—test of reasonable and prudent driver in circumstances:** The test to be applied in deciding whether an accused person has been guilty of driving without due care and attention is whether he was exercising the degree of care and attention that a reasonable and prudent driver would exercise in the circumstances; this is always a question of fact (page 126, lines 23–30).

The appellant was charged in a magistrate's court with driving without due care and attention.

The appellant was driving third in a line of traffic at 8 p.m. The first car stopped suddenly and was struck in the rear by the second car. The appellant's car struck the rear of the second car, though there was a conflict in the evidence as to whether it did so before or after the second car had struck the first. The driver of the second car did not give any signal that he was slowing down. There was no evidence as to the extent of the damage caused to the second car by the appellant's vehicle.

He was convicted and appealed on the ground that the verdict

was unreasonable having regard to the evidence.

*Wyndham* for the appellant;
*Browne-Marke, Sol.-Gen.,* for the respondent.

COLE, Ag. C.J.:

The appellant was charged before the magistrate's court with the offence of careless driving under s.43(1) of the Road Traffic Act (*cap.* 132). The magistrate convicted him of the offence and imposed a sentence of £20 or three months' imprisonment. The finding of the magistrate is short. It reads:

> "I believe the evidence of the prosecution witnesses. The accused admits hitting Abu Bakarr Kamara's car while it was stopped. He said that he did so because Kamara did not give a slow down signal. I have dealt with this in my ruling. I therefore find the accused guilty of driving a car without due care and attention."

The ruling referred to by him was made at the close of the prosecution's case when learned counsel for the appellant submitted that there was no case for the defendant to answer. Again, that ruling is short and I shall set it out in full. It states:

> "In this case Abu Bakarr Kamara got into a state of emergency which made it impossible to comply with r.39. On the other hand the accused failed to keep his car at a reasonable distance from Kamara's car and ran at a speed that would prevent his stopping in any emergency without colliding with the preceding car. I rule that there is a case for the accused to answer."

Three witnesses gave evidence for the prosecution. Two were motor drivers involved in the incident and the third was a police officer who appeared at the scene after the incident, took measurements and made a plan of the scene. He also produced in evidence the statement of the appellant.

It appeared that on February 1st, 1964, Allie Kaloko was driving motor car C5244 along Kissy Road in Freetown. Immediately behind him was travelling motor car C1318 driven by Abu Bakarr Kamara. Immediately following car C1318 was motor car F7481 driven by the appellant. Kaloko had cause to stop his car suddenly. As he did so he heard a bang on one of his rear mudguards. This was followed by another bang. Kaloko said his car had been hit before he heard the second bang. Kamara, on the other hand,

said that it was the impact on his car which forced his car to collide with Kaloko's car. The magistrate did not deal with this conflict in the evidence. One thing that was clear was that Kamara's car did hit Kaloko's car and that the appellant's car did hit Kamara's car. There is no evidence of the extent of the damage to Kamara's car. None of the prosecution witnesses gave evidence as to the time of day the incident took place. Kamara, in altering his speed and ultimately bringing his car suddenly to a standstill, did not give the signal prescribed by law which he was in duty bound to have done (reg. 39(1)(*i*) of the Road Traffic Regulations, 1960 refers). He therefore gave no indication to the appellant that he was about to alter his speed. The appellant did not give evidence. His version of the incident as contained in his statement is, *inter alia*, thus: "At a certain point the driver [meaning Kamara] stopped suddenly. Immediately, I applied my brakes and tried to avoid hitting the car but I was unfortunate and then ran into the rear off-side mudguard and stopped at the same spot." He added that the accident took place at about 8 p.m. That was the state of the evidence on which the magistrate convicted the appellant.

The appellant has appealed to this court on three grounds but argued one only and abandoned the rest. The ground argued was—"that the verdict was unreasonable having regard to the evidence."

The authorities show that the question whether or not a person has driven without due care and attention was always a question of fact for the magistrate. In determining this question the following principles are to apply. Where the accused was not exercising the degree of care and attention that a reasonable and prudent driver would exercise in the circumstances he should be convicted. If the circumstances show that his conduct was consistent with that of a reasonably prudent driver he should be acquitted, always remembering that the onus of proof was on the Crown throughout.

The *ratio decidendi* of the decision of the magistrate was that the appellant—"failed to keep his car at a reasonable distance from Kamara's car and ran at a speed that would prevent his stopping in any emergency without colliding with the preceding car." With the greatest respect to the magistrate, I have searched the record of proceedings in vain to find any evidence in support of those findings. Those were necessarily part of the prosecution's case and it was their duty to have proved them. The defence of the appellant from the very outset was that the incident was one of inevitable accident. That being so, the onus of disproving the same was on

the prosecution. The evidence of the prosecution witnesses, which the magistrate said he believed, was more in support of the appellant's case. This showed that the appellant at night-time found himself in the same predicament as, if not a worse one than, the witness Kamara who, according to the magistrate, "got into a state of emergency." In those circumstances, can it be said that the appellant did not exercise that degree of care and attention that a reasonable and prudent driver should exercise in the circumstances? The answer appears clearly to be in the negative. As I have already stated, the question whether or not a person has driven without due care and attention is always a question of fact for the magistrate and his finding on the point ought not to be disturbed. Where, however, a conviction on a question of fact is obviously and palpably wrong this court will set such conviction aside. After a careful review of the whole evidence I find that the conviction here was obviously and palpably wrong. In the circumstances the appeal succeeds.

I hereby allow this appeal. The conviction is hereby quashed. The sentence is set aside. If the fine has been paid it should be refunded to the appellant.

*Appeal allowed.*

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BAYON *v.* GBOW, KAMARA and BENDU

SUPREME COURT (Marke, J.): September 16th, 1964
(Civil Case No. 409/62)

[1] **Civil Procedure—costs—successful party—successful defendant may be deprived of costs of improperly pleaded defence:** A successful defendant may be deprived of the costs of and connected with drawing, filing and delivering a defence which is pleaded imperfectly and in violation of the rules (page 130, lines 10–35; page 132, lines 29–32).

[2] **Civil Procedure—pleading—defective pleadings—costs—successful defendant deprived of costs of improperly pleaded defence:** See [1] above.

[3] **Civil Procedure — pleading — defence — implicating third person not joined is gross violation of rules:** For a defendant to plead in answer to an allegation of malicious prosecution that a third person, not joined as a party, caused the plaintiff to be prosecuted and had reasonable and probable cause is a gross violation of the rules which it is counsel's duty to bring to the notice of the court by interlocutory proceedings (page 130, lines 26–35).