

ONTARIO COURT OF JUSTICE

KENNETH ANDERS

Appellant

-and-

CITY OF MISSISSAUGA

Respondent

PROCEEDINGS

BEFORE THE HONOURABLE MR. JUSTICE MERRIDEW
ON OCTOBER 21, 2005, AT BRAMPTON, ONTARIO

25 APPEARANCES:

Ms. J. Anand

Counsel for City of Mississauga

Mr. Burd

Counsel for Mr. Anders

(i)

ONTARIO COURT OF JUSTICE

TABLE OF CONTENTS

5
10 Submissions page 1-13

Decision page 13

15

Transcript Ordered November 4, 2005

20 Transcript Completed December 15, 2005

Parties notified of completion December 16, 2005

1

Submissions

OCTOBER 21, 2005

UPON COMMENCING: 10:00:

MS. ANAND: Good morning, Your Honour, my last name is Anand, initial J. Your Honour I'm here to address a Provincial Offences' Act appeal matter that's been placed on Your Honour's list today. The reason was, was that there was a requirement for an out of town Justice to address this matter for the perception surrounding it.

THE COURT: Yes.

MS. ANAND: So, I'm just going to be seeking your direction. Mr. Burd, I understand is the Appellant. The City of Mississauga is the Respondent to the application. And we're just seeking your direction as to whether you'd entertain that now.

THE COURT: Yes, ma'am, which?

MS. ANAND: Whether you would address it now, or whether you would like to address your other matters on the list before this.

THE COURT: We have the matter before us.

MS. ANAND: Yes, we do.

THE COURT: Let's do it.

MR. BURD: Thank you, Your Honour.

THE COURT: I'm sorry, I didn't catch the name.

MS. ANAND: Certainly, my name is Anand. ANAND, initial J.

2

Submissions

THE COURT: Okay.

MS. ANAND: And I'm from the legal department of the City of Mississauga.

THE COURT: And you sir, are?

MR. BURD: For the record, Burd, BURD. initial G. appearing as agent for the appellant. This is a part one Highway Traffic Act, POA appeal, and the Appellant's name is Kenneth Anders.

Your Honour, it's a very strict question of law and interpretation that we have for your consideration today. This charge is called, "pass off roadway". It's pursuant to Section 150 (2) of the Highway Traffic Act. Your Honour probably doesn't have a Highway Traffic Act. I think I will -

MS. ANAND: I have a copy.

MR. BURD: Oh, fantastic. My copy machine wasn't working this morning.

MS. ANAND: If it assists Your Honour, I believe Mr. Burd's grounds are only one in terms of - There were three listed. So that might assist. I have a copy of the Section to provide which is 151(2), 150, I'm sorry, subsection 2. And also the definitions Mr. Burd.

MR. BURD: Fantastic.

MS. ANAND: If I could pass these to Madam Clerk.

THE COURT: As a part one matter, was there an actual trial?

3

Submissions

MR. BURD: Yes, sir.

THE COURT: Do I have a transcript?

MR. BURD: Yes, sir. It should be attached to the package.

THE COURT: Here it is.

MR. BURD: So, Your Honour, for purposes, if I could just paint a picture. This happens on the 410 in the City of Mississauga, and for purposes of clarification, if one were to be southbound on the 410, there are three through lanes, the left most lane to be considered lane one, the center lane, lane two, and the right most lane, lane three.

As one approaches Derry Road there is an on-ramp lane from Derry Road, that exits onto the 410 southbound, becomes a lane to the right of lane number one. What Mr. Anders did, and does not deny, --

THE COURT: Just a minute. Turning left off Derry Road.

MR. BURD: Well, there would be, an on-ramp.

THE COURT: Yes, I know.

MR. BURD: Southbound. And that ramp would be to the right of the three main 410 lanes, and would eventually merge into those lanes.

THE COURT: It wouldn't be lane one, it would be lane three.

MR. BURD: It would be lane four, actually.

THE COURT: Yes. Not one.

Submissions

MR. BURD: Yes. In any case, there's a little section before that lane actually merges or becomes lane number four, in which the officers call a bullnose. It's a paved finished portion of the roadway. And this evidence is all – subject to My Friend's comments – this evidence is all found in the transcript and as far as we're concerned, on consent, that, that is a bullnose.

THE COURT: The bullnose is the lane which allows you time to get into lane three.

MR. BURD: No. The bullnose would be a portion of the roadway, not marked, finished, but it's the portion between lane number three and the merge lane that it slowly merging up before it becomes lane four.

THE COURT: All right, the diamond shape along the diamond shape.

MR. BURD: Yes. The officers describe that as a bullnose. Now Mr. Anders is charged with passing off the roadway, and what Mr. Anders does, and is conceded, is, he leaves lane three, crosses into the diamond shape, as Your Honour described or the bullnose, and enters into lane four, the merge lane.

And if I'm correct, that would be the officer's allegation where the offence is committed. And perhaps that's on consent.

MS. ANAND: Yes, it is.

MR. BURD: So, I'm asking Your Honour then, My Friend has

5

Submissions

provided with you the definition of roadway, pursuant to Section 1 of the Highway Traffic Act, and roadway means:

The part of the highway that is improved, designed or ordinarily used for vehicular traffic, but does not include the shoulder. And where a highway includes two or more separate roadways, the term roadway refers to any one roadway, separately, and not to all of the roadways collectively.

In my respectful submission, either lane four --

THE COURT: Hold on, all right. Sorry, I'm picking this up now.

The factual matter is that he came off lane three to the right.

MR. BURD: Yes.

THE COURT: Heading for lane four or the collector, or whatever, and to do so he passed through the bullnose or over the bullnose.

MR. BURD: Correct. In my respectful submission, he's charged with driving off the roadway, which reads:

No driver of a motor vehicle shall over take, pass another vehicle by driving off the roadway.

It is conceded as well Mr. Anders passed vehicles when he did this manoeuver. So, that's not a question that court has to consider.

The only question is, did Mr. Anders leave the roadway when he made that manoeuver. My respectful submission is, he did not.

When you read the definition of roadway, in order for Mr. Anders to have left the roadway, lane four, or that merge lane, would have to be considered a separate roadway. In my respectful submission, it is not. It's the merge lane. It is another lane. There are other

Submissions

sections of the Highway Traffic Act that say, an unsafe lane change, or fail to drive in a marked lane, but according to the definition, the only way he could be found to have left the roadway is if that merge lane is determined to be a separate roadway, according to the definitions.

And that is basically the crux of this appeal, and I'd only ask Your Honour to consider, as far as the transcript goes, and the ruling of the learned Justice, on page 33, at line five, the Justice— This argument was put to him — and the Justice indicates;

The other issue is, what is the definition of shoulder.

Well, there is no definition in the Highway Traffic Act, and that is somewhat unfortunate, which creates a bit of a problem for us. In my respectful submission, right there, the learned Justice, in my respectful submission, indicates that now there's been created, at least for the section that Mr. Anders is charged with, there's been some doubt created. He does not know what this portion of the roadway, the triangle as the court described it, or this bullnose, but it's certainly not off the roadway, in my submission, and that's what Mr. Anders is charged with, and I would ask that Your Honour rule that crossing through that portion into lane four does not constitute leaving the roadway. It constitutes perhaps an unsafe lane change, or failing to drive for a certain period of time in an unmarked lane, which are other sections of the Highway Traffic Act, but it's certainly

Submissions

not driving off the roadway. In my respectful submission, even the learned Justice at the trial proper had some problems, since shoulder is not defined as being off the roadway, as far as he's concerned, because shoulder is not even defined in the Highway Traffic Act.

THE COURT: On page two the charge is said to be, "did commit the offence of pass off roadway".

MR. BURD: Yes.

THE COURT: Not drive off roadway.

MR. BURD: Yes, but in order to—

THE COURT: You're saying because in fact he was passing.

MR. BURD: And you'd have to be driving in order to make that passing manoeuvre off the roadway. If you pass somebody while you're on the roadway it's not an offence. You have to leave the roadway, pass motor vehicles in order to commit the offence. That is the crux of the Appellant's position, subject to any questions that Your Honour may have and comments of My Friend.

THE COURT: Just a minute. Is it the Crown's position that he was passing off the roadway, because he was in, what we call collector lane four, or because he was passing over the bullnose?

MS. ANAND: Passing over the bullnose, Your Honour. I'll tell you why that is the case. To be clear, I think that's essentially the crux, that whether the bullnose is considered off roadway pursuant to the

Submissions

Section and the definition.

Your Honour the prosecution's position is this. and first of all, you certainly have powers, Your Honour, on the appeal to affirm, or reverse or vary the position. It would be our comment, just at the beginning, that Justice of the Peace Welch, made no error in law based on what was before him, and I'll explain why. Our position generally is this, the spirit of the legislation and the spirit of the Highway Traffic Act is that, bullnoses are not traveled portions of highways, and there's many reasons for that.

Mr. Burd's suggestion is that traveling in the bullnose should be permitted because it's not off the roadway. He's suggesting Mr. Anders did not go off the roadway. But, what our suggestion is, and it goes right to the definition of what roadway means, and Your Honour has that, is:

Roadway means a part of the highway that is improved. Which I believe Mr. Burd has no difficulty with improved. I believe means, paved in a proper condition.

Designed or ordinarily used for vehicular traffic.

The spirit of this, in my submission, is that bullnose areas are triangular areas on the highway that depict where lanes merge together, are not supposed to be used for traffic to be traveling in those locations, and there's many reasons why. And I think the reason is that the safety reasons. there should be areas on the

9

Submissions

highway that are for vehicular traffic and areas that are not. And this is, in my submission, this is not to be used and is not ordinarily used for vehicular traffic. So, in terms of going to what off roadway means, I feel that this definition clarifies our position that, that is not a traveled portion of the roadway and should not be used. This appears to be an absolute liability offence, Your Honour. And I believe His Worship, Welch, did, in his judgment, consider that definition of roadway, and the finding of that was commented in the judgment. I don't believe that the definition of shoulder even needs to come into play here because we're not speaking of a shoulder. You might see that roadway has a very long definition because it also has to incorporate shoulder, but we're not even speaking of a shoulder. We're speaking of an untraveled portion in between lane three and a Derry Road entrance onto the 410. And this is not an area to be driven on, and this is in the judgment, page 34 of His Worship, about line 19. What he said:

It is not an area to be driven on.

And his finding, His Worship's finding, is that, traveling in there and passing vehicles, who I believe it's agreed, that were stopped on the 410 in a traveled portion properly in lane one, two and three is not permitted under this section. That is the crux of our position, that, that bullnose area is not a traveled portion of the highway, is not meant for vehicles to travel on and that clarified by the

10

Submissions

definition. Those would be my submissions, subject to your approval.

THE COURT: He goes on to say,

Markings in the evidence in-chief of Constable Miller is that they are two defined lines of a solid nature, not a broken nature.

Again, people who have been driving some time, have some experience know that, that indicates an area not to be gone into unless it is some sort of emergent situation. It is not an area to be driven on. It's just the same as if there were two solid lines on a curve, one does not pass, -etcetera- It's common knowledge, commonly accepted practice.

But these common knowledge and commonly accepted practices have no foundation in law; do they? I mean, we know, if we're reasonably sophisticated, that it's unsafe to pass against two double markings, but we also know that, that mere guidance, there's no law which says, you can't pass on two double markings, for example. As far as I know, unless it has changed in recent years. And I think whether or not that affects the ruling, and I think maybe it does, unless you can show me the statute which makes these markings mandatory. I think the Justice of the Peace just completely misunderstands.

MS. ANAND: That would take us to, if there's a definition of

11

Submissions

lanes— If I could just have your indulgence, Your Honour, just for a moment.

THE COURT: Yes, of course.

MS. ANAND: The Highway Traffic Act doesn't particularly have a definition of lanes, but under Section 154, of the Highway Traffic Act, Your Honour, it's described, lane markings, where a highway is divided into lanes. I'll just read the section;

A vehicle shall be driven as nearly as practical entirely within a single lane and shall be not moved from that lane until the driver has ascertained the movement be made in safety.

And subsection (b) speaks of lanes, clearly marked lanes. I can't find a definition particularly for dashed lanes as opposed to straight filled in lines on the roadway.

THE COURT: I don't think there is.

MS. ANAND: I don't believe there is. And perhaps it's evolved over time; however, Your Honour, with all due respect, and I see where you're going, I just can't see how that can fit into the definition of, regular use for vehicular traffic. I can't see how that's the case, that bullnose. So my position would still be the same. I can't see how that would be meant for vehicular traffic to travel through.

MR. BURD: If Your Honour, if I may, if Mr. Anders was charged, and that was one of my submissions on the appeal, that there were

12
Decision

other charges that might have been more appropriate with other issues that would then have to be dealt with by the court as, was the movement made in safety and so on and so forth. But, the court is quite correct that markings have no meaning in law and certainly when you read the whole of Section 150, that you have defined in there, you can see the intent that My Friend has, it's clearly when there's one lane and it's not quite wide enough, it's not safe, and you're not permitted to travel on a soft, or off the roadway, in order to pass because people end up in ditches and so on. But, in this case Mr. Anders was entering into a fourth lane and was not leaving the roadway.

THE COURT: I gather it's common except that you may have mentioned it that clearly this bullnose is not a "shoulder".

MS. ANAND: Yes.

THE COURT: But you do have *expressio eorum*; don't you?

MS. ANAND: Yes.

DECISION:

THE COURT: I'm sorry, I have to disagree with the Justice. On the technical parsing of the Section, once you get into an *expressio* situation, where you're excluding something which otherwise would be part of a roadway, that is, a paved shoulder, and is only a shoulder because somebody put a paint mark down there, a lane marking. The statute has expressly referred to that as not being

13
Decision

included. Once you get into the game of exclusion by reference, you better exclude everything that you want to be excluded. I just see nothing that even suggests that a bullnose isn't part of the roadway.

On this appeal, with respect, I find there's nothing in the statute, particularly in the definition of roadway in Section 1.1, of the Highway Traffic Act, which would exclude from the technically described roadway, part of the roadway, which has been described as a bullnose, that is a paved gore between, in this case, an ongoing lane and an entrance lane. There's no particular legal significance given in the Highway Traffic Act to lane markings. If it's intended that bullnoses not be part of a roadway, I'm afraid they've got to be so defined. And for the decision of Mr. Justice Welch, in the case of Kenneth Anders, is overturned.

MS. ANAND: I believe it would be endorsed that acquittal be entered at this stage.

THE COURT: Acquittal entered. It's not an appropriate case for a new trial.

MS. ANAND: Thank you.

MR. BURD: Thank you very much, Your Honour. And I thank Ms. Anand for her indulgences this morning.

MS. ANAND: Thank you, Your Honour for addressing the matter first thing this morning. Thank you very much, Sir, for allowing us to

14
Decision

begin the day, thank you.

THE COURT: That's fine, thank you.

MATTER CONCLUDED.

5

10

15

20

25

30

I, Deborah A. Stewart certify that this document is a true and
accurate transcription of Kenneth Anders and City of Mississauga
the recording of October 21, 2005 in the Ontario Court of Justice at Brampton,
Ontario, taken from recording number 400, courtroom 105

Deborah A. Stewart CVR