
PROVINCIAL COURT OF SASKATCHEWAN

PRINCE ALBERT

IN THE MATTER OF
Ticket #5079992

HER MAJESTY THE QUEEN

- and -

Justin Wade Dryka

DECISION - **H.W. Goliath**, P.C.J

J. Kulyk, Q.C. CROWN PROSECUTORS, Prince Albert, SK. FOR THE CROWN.

DEFENDANT PRESENT WITHOUT COUNSEL.

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1. The defendant was driving north on Highway #2 at about 0.7 kilometres south of

Northside when Mr. Greening pulled out onto the highway from a turn-off where he had stopped to check his tires. Traffic was fairly heavy and Greening had to wait for an opportunity to get back into the flow. He saw an opening, pulled onto the highway and began to accelerate to the speed of the traffic flow, but soon noticed the defendant closing quickly from behind. He considered pulling to the right to allow the defendant to pass, but before he took any evasive action, the defendant passed him on the right shoulder. Greening has considerable experience as a driver training instructor and is very conscious of traffic safety. He was of the view that the defendant's actions were dangerous. He noted the licence plate, and when the defendant pulled into the gas bar and restaurant at Northside, he followed and attempted to discuss the matter with him.

2. Greening says that he had accelerated to 93 - 95 kilometres per hour before the defendant's vehicle passed him at what he describes as a high rate of speed. The defendant says that he was driving at the speed limit of 100 kilometres per hour and that he "did slow down a bit" to about 75 kilometres per hour before he passed. He says that he was about 50 metres behind Greening's van when he pulled out. He says that he first pulled left, saw oncoming traffic, then swerved to the right and then passed, almost losing control at the edge of the highway. He also says that this all took place in the space of 1 - 3 seconds and that he could not have stopped. He says that if he hadn't gone around to the right he would have collided with the rear of the van.
3. Section 48(1)(b) of The Highway Traffic Act requires that when over taking or passing another vehicle at a place other than an intersection one should pass on the left. Since it is admitted that the defendant passed on the right contrary to the subsection, the only issue is whether the facts give rise to a defence of due diligence or necessity.

Due Diligence

4. The defence of due diligence applies in the case of regulatory offences such as most of The Highway Traffic Act offences, where the defendant is able to show, on a balance of probabilities, that he took reasonable care in the circumstances (i.e., that he took all reasonable steps to avoid the particular occurrence). In light of the view that I take of the facts in this case, the defence of due diligence has not been made out.

Necessity

5. In Perka et al. v. The Queen, (1985) 14 C.C.C (3rd) 385, 404, Dickson, J., said:
"Although necessity is spoken of as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act. The

prosecution must prove every element of the crime charged. One such element is the voluntariness of the act. Normally, voluntariness can be presumed, but if the accused places before the court, through his own witnesses or through cross-examination of Crown witnesses, evidence sufficient to raise an issue that the situation created by external forces was so emergent that failure to act could endanger life or health and upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue. There is no onus of proof on the accused.”

6. The facts of this case as I find them raise the issue of necessity. I find that either defendant was driving faster than the 100 kilometres per hour which he and his passenger estimated, or that Greening was driving slower than the 93 - 95 kilometres per hour to which he testified. It is not unlikely that the defendant may have increased his speed to pass; nor is it unlikely that Greening’s van had not yet reached 93 - 95 kilometres per hour, since he was fully loaded and was experiencing some handling difficulty. If the defendant’s estimates are correct, (i.e. that he had slowed to about 75 kilometres per hour and the van had accelerated to 50 - 75 kilometres per hour), he should have had little difficulty in avoiding a rear-end collision without swerving to pass on the right.
7. The issue is not whether Greening pulled out into traffic without yielding the right-of-way or whether the defendant was speeding or driving too fast for the traffic conditions. I am satisfied that on the evidence that by the actions of the defendant, or Mr. Greening, or both of them, an emergent situation was created, and that quick action was required. The defendant would no doubt have passed lawfully on the left had there been no oncoming traffic. By the time he ascertained that he could not safely pass on the left, he could no longer exercise the option to slow down or to stop, and opted to pass on the right.
8. The fact that the defendant may have contributed to the situation requiring the highway traffic violation does not disentitle him to the defence of necessity. One of the “preliminary conclusions as to the defence of necessity” given by Dickson, J. in Perka, (supra.) at page 406 is that: “negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity”.

Conclusion

9. I find that the defendant has the defence of necessity and I therefore dismiss the charge.

DATED this 31st day of January, A.D., 2000, at the City of Prince Albert, in the Province of

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Saskatchewan.

H.W. Goliath, Provincial Court Judge

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