

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Howarth*, 2017 ONCJ 856

DATE: 2017 11 30

COURT FILE No.: Toronto

ICON #4811-999-00-307-654OB-00

IN THE MATTER OF an appeal under subsection 135 of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN
Respondent

— AND —

JOSEPH HOWARTH
Appellant

Before Justice H. Pringle
Heard on November 23, 2017
Reasons for Judgment released on November 30, 2017

C. Cahill..... **counsel for the prosecution**
F. Alfano..... **agent for the defendant Joseph Howarth**

On appeal from conviction entered on August 12, 2016, for the offence of Careless Driving.

Pringle J.:

Overview

[1] On December 16, 2014, the appellant was charged with committing the offence of Careless Driving, contrary to s. 130 of the *Highway Traffic Act*. On April 8, 2016, his

trial was heard and, on August 12, 2016, he was convicted. He appeals against conviction only.¹

[2] Undisputedly, an accident occurred on December 16, 2014. The appellant was negotiating a left turn from Bloor Street West onto Mill Road when the rear of his car was struck by another car. That car, driven by Olga Stojanovic, was proceeding eastbound on Bloor Street, straight through the intersection, when the two cars collided.

[3] The appellant testified in his own defence, denied the requisite elements of Careless Driving and offered a positive defence. His evidence differed from that of Ms. Stojanovic on material issues. As a result, the issue of witness credibility needed to be meaningfully resolved. Respectfully, it was not. A new trial must be ordered in this case.

Competing Versions of Events

[4] Ms. Stojanovic was the sole prosecution witness. On December 16, 2014, she was driving her car eastbound on Bloor Street, towards Mill Road. It was a drizzly afternoon but road conditions were clear. Ms. Stojanovic testified her car was in the eastbound curb lane for miles before reaching the intersection of Bloor West and Mill Road. Her speed was anywhere between 30 km to 50 km per hour and thus within the speed limit. When she got to the intersection, the light was green in her favour and so she kept driving forward. She noticed that in the eastbound middle lane next to her, four or five cars were stopped and waiting to turn left.

[5] When Ms. Stojanovic entered the intersection, the green light still in her favour, she saw the appellant's car crossing in front of her to turn left on Mill Road. His car seemed to appear in front of her "in the blink of an eye". She hit the brakes, but the two cars were so close that a collision was inevitable and her car struck the other car's rear bumper.

[6] The appellant was the sole defence witness and the driver of that other car. On December 16, 2014, he was driving his car westbound along Bloor Street West. He was planning on turning left onto Mill Road. Approaching the intersection of Mill Road and Bloor Street West, the appellant made observations of oncoming traffic to ascertain whether it was safe to turn. Facing him, in the eastbound middle lane, were four cars all stopped and waiting to turn left (southbound), onto Mill Road. The eastbound curb lane was clear of any cars. The pedestrian "count-down" clock was at 11 seconds.

[7] The appellant nudged his car up, to ensure no oncoming traffic was in the "right hand lane". He could see 120 metres down Bloor Street and observed no oncoming traffic in that lane. Believing the route clear, he turned left through the intersection. He estimated his speed while making the turn to be 35 km per hour. He got all the way through the intersection when the rear of his bumper was struck by Ms. Stojanovic's car.

[8] Although Ms. Stojanovic's car was white and easy to spot, the appellant had not seen it until a moment before the accident. To his belief, she must have been driving

¹ The appellant's factum asserted an appeal against sentence, but this issue was not advanced in the "Issues and Law" or oral argument. I have treated this appeal as against conviction alone.

over the speed limit to appear so suddenly. He could not say, first hand, where her car had come from. He could only say that when he checked the eastbound curb lane for oncoming traffic, he saw no cars there and felt it safe to turn left. The appellant surmised that Ms. Stojanovic may have been driving in the eastbound middle lane and suddenly switched lanes, right before the intersection, to avoid getting stuck behind the four cars waiting to turn left.

The *W.D.* Analysis at Trial

[9] Obviously the testimony of these two witnesses differed on key points. She said she was going the speed limit or under it; he said she must have been speeding. She said she was driving in the eastbound curb lane well before entering the intersection, which should have made her car visible to the appellant before he turned; he said he could see 120 metres down that curb lane before he turned, and there were no cars at all driving in it.

[10] The conflicting evidence made credibility a key issue. Accordingly, after reviewing the evidence, the Justice of the Peace conducted this *W.D.* analysis:

[29] I do not believe the defendant.

[30] I have no doubt as a result of the defendant's testimony.

[31] If I am not left in doubt by the evidence of the accused, I then must ask myself whether I am convinced beyond a reasonable doubt of the guilt of the defendant on the basis of the balance of the evidence which I do accept.

[32] Ms. Stojanovic was clear and consistent in her testimony. She acknowledged that a substantial period of time had passed, and that she wanted to give accurate testimony. She understood that her testimony was under oath, and that she was bound to be honest and forthright in her testimony in a Court of Law.

[33] In his defence against the charge, Mr. Howarth's testimony did not provide any clarity on the details of the mishap.

[34] On the contrary, he appeared to be seeking to transfer responsibility to Ms. Stojanovic for the consequences of his actions and in doing so did not enhance his own credibility.

[11] The appellant was convicted. On appeal, he argues that the reasons for judgment were insufficient in law. In particular, he submits the reasons for judgment were deficient because they failed to explain why the appellant was disbelieved. The respondent resists this argument.

[12] I agree with the appellant. Respectfully, the *W.D.* analysis in this case consists of conclusions alone. These reasons reflect no meaningful analysis of those conclusions. The appellant has succeeded in establishing an error of law. A new trial must be ordered.

Insufficient Reasons on Credibility

[13] There is no dispute on the applicable law in the case at bar. A trier of fact must give reasons for judgment that permit meaningful appellate review. The legal process, including reasons for judgment, must aim for the goal of transparency. Perfection is not expected from busy trial courts. But courts owe a duty to the public and to the litigants to explain *how* key issues were decided, and *why* they were decided that way: *R. v. Sheppard*, [2002] 1 S.C.R. 869.

[14] This was a credibility case. It was incumbent on the Justice of the Peace to meaningfully resolve that issue, in relation to both witnesses. The appellant's testimony constituted a denial of the requisite elements and raised due diligence.

[15] Obviously, the Justice of the Peace disbelieved his denial. After reading these reasons, however, I do not understand *why* the appellant's denial was disbelieved. The Justice of the Peace's treatment of the appellant's testimony rings similar to the case of *R. v. Strong*, [2001] O.J. No. 1362 (C.A.), where Doherty J.A. stated at para. 9,

[T]he trial judge offered no reason for his rejection of the appellant's evidence. He simply said "I do not believe him". In a case like this, some explanation for that conclusory statement was required. The appellant's evidence was not inherently incredible.

[16] This applies squarely to the appellant's case. I have reviewed the appellant's testimony with care, to ascertain whether his testimony was inherently incredible or improbable. It was not. As much as credibility can be assessed through reading a transcript, the appellant's evidence seemed credible. There were no inconsistencies. He recounted all relevant events with an attention to detail. His version of events was not inherently implausible.

[17] Where credibility is at issue, reasons must both decide the issue and demonstrate the logical path underlying those decisions. In addition to the duty owed to the litigants and the public, requiring sufficient reasons ensures that impermissible onus shifts or reliance on inappropriate factors cannot remain masked. As the Court of Appeal said in *R. v. Y.M.*, [2004] O.J. No. 2001, at para. 29:

[T]he absence of adequate reasons for rejecting the appellant's evidence makes meaningful appellate review problematic. This court cannot be satisfied that the trial judge properly applied either the burden of proof or the principles underlying *W.(D.)*. Instead, his conclusory rejection of the appellant's evidence suggests that he wrongly shifted the burden of proof to the appellant and failed to consider whether the appellant's evidence, though not accepted, still raised a reasonable doubt about his guilt.

[18] That is exactly the problem in the case at bar. What little mention there was of credibility hinted towards an uneven approach to the issue. I am referring, specifically, to where the Justice of the Peace stated the appellant "did not enhance his credibility" by suggesting Ms. Stojanovic caused the accident. There are some problematic inferences that could be drawn from this statement, including a possible onus shift.

[19] Further, the Justice of the Peace relied on irrelevant factors – such as the fact that Ms. Stojanovic understood the importance of giving evidence under oath and her desire to give accurate testimony despite the passage of time – to artificially bolster her credibility and reliability. As a result, the substance of the only prosecution witness went largely uninspected. Although a trier of fact can reject a defendant’s testimony based on the acceptance of conflicting testimony from a Crown witness, this can only occur where the acceptance is “considered and reasoned”: *R. v. A.N.*, 2017 ONCA 647, at para. 16. Respectfully, I cannot describe the analysis in this case as either.

Remedy Sought

[20] The appellant seeks an acquittal on appeal, relying on the passage of time and the expense of pursuing an appeal. I must disagree. The failure to give sufficient reasons is an error in law and the correct remedy is the order of a new trial.

[21] It may be the case that the prosecution decides not to proceed with a new trial, given that this case dates back to 2014 and the accident caused no injuries. However, that decision is not mine to make, but is properly left up to the discretion of the prosecution.

[22] The appellant’s conviction for Careless Driving is set aside and a new trial is ordered, to be held in the Ontario Court of Justice and presided over by a justice other than the justice who tried the appellant in the first instance.

Released: November 30, 2017.

Signed: Justice Heather Pringle