

Case Name:

R. v. Januario

Between

**Her Majesty the Queen, respondent, and
Helder Januario, appellant**

[2002] O.J. No. 895

27 M.V.R. (4th) 71

Court File No. Toronto, P.O.A. 4812999005605264900

Ontario Court of Justice
Provincial Offences Appeal Court

Fairgrieve J.

Heard: February 25, 2002.

Judgment: March 1, 2002.

(8 paras.)

Motor vehicles -- Regulation of vehicles and traffic -- Careless driving -- What constitutes.

Appeal by Januario from his conviction on a charge of careless driving. He was stopped in a line of cars in a designated left turn lane at an intersection. He pulled his car into the lane to the right of the left turn lane, passed the vehicles waiting to turn left, and drove up to within a car length of the intersection, where he stopped, waiting to get back into the left turn lane. Before another driver let him in, a few cars coming up behind him had to move into the curb lane to pass him in order to continue through the intersection. Some of them honked their horns at him. After being let back into the left turn lane, he turned into the passing lane of the intersecting road and over a distance of less than one kilometre, changed lanes twice. He never exceeded the speed limit. The trial judge found that Januario's driving displayed a degree of arrogance and that he was driving without reasonable consideration for other users of the highway.

HELD: Appeal allowed. The conviction was set aside. Januario's driving in relation to the left turn may have demonstrated bad manners and a lack of civility, but did not amount to careless driving.

There was no evidence of a lack of regard for the safety of other users of the highway or of their reasonable expectation that driving laws would be complied with. Similarly, his lane changing while proceeding a considerable distance on the intersecting road was not carelessness. A mere finding that Januario's motivation was to pass slower-moving traffic hardly indicated carelessness.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, s. 130.

Counsel:

A. Smith, for the respondent.

E. Branco, for the appellant.

1 FAIRGRIEVE J.:-- This is an appeal against Mr. Januario's conviction on a charge of careless driving, contrary to s. 130 of the Highway Traffic Act, R.S.O. 1990, c. H.8, as amended. Mr. Branco's submission, on behalf of the appellant, is that the facts found by the justice of the peace at trial fail to make out the offence of careless driving. The appeal accordingly raises a question of law concerning the legal effect of the facts found by the trier, which requires consideration of the elements of the offence created by the statute.

2 It is important to point out that this appeal differs from cases, such as *R. v. Pamenter* (2001), 11 M.V.R. (4th) 23 (Ont. C.A.), where the Court of Appeal found that the provincial offences appeal judge had erred by essentially retrying the case, substituting his own view as to whether the evidence supported a finding of carelessness. I accept that the proper test for appellate review is whether the finding of carelessness made by the justice at trial was one open to the trier to reach on the evidence she accepted, that is, whether the findings of fact made by her, supported by the evidence, meet the statutory requirements of the offence of careless driving.

3 The facts found by the justice of the peace here were quite straightforward and were supported by the largely consistent evidence of the police officer, P.C. Martin, and the appellant. The appellant was driving his car southbound on Weston Road in Toronto, stopped in a line of cars in a designated left turn lane waiting to turn left onto Rogers Road at an intersection governed by traffic lights. The appellant was observed by the officer to pull his car into the lane to the right of the left turn lane, passing the vehicles waiting to turn left, and to drive up to within a car length or so of the intersection, where he stopped, waiting to get back into the left turn lane. Before another driver let him in, a few cars coming up behind the appellant had to move into the curb lane to pass him in order to continue driving south on Weston Road. Some of these cars evidently honked their horns. After the appellant was let back into the left turn lane, he turned left into the passing lane of

westbound Rogers Road. The officer then observed that over a distance estimated to be more than half a kilometre, but less than one kilometre, he changed lanes twice. The appellant testified that first he moved into the curb lane in preparation for turning into a coffee shop on the right side of the street, but when the lane was blocked by parked cars ahead, he passed them by going back into the passing lane and then back into the curb lane. The officer was unable to say if there were parked cars blocking the curb lane. The officer testified that the driver of a car coming behind the appellant in the passing lane "touched his brakes" when the appellant moved back into that lane. Although the officer testified that the appellant seemed to be in "quite a rush", she did not allege that the appellant ever exceeded the speed limit.

4 The learned justice of the peace reserved judgment briefly to allow her to determine whether the evidence, as she put it, "tips over into careless driving". She found that the appellant's passing the long line of cars waiting to turn left displayed "a degree of arrogance", and that his blocking a "live lane" of heavy traffic at the intersection, waiting to merge back into the left turn lane, further demonstrated that he was motivated solely by his "own agenda". The justice of the peace also rejected the appellant's evidence concerning the two lane changes on Rogers Road and found instead that he simply wanted to pass slower vehicles. She stated her conclusion in the following terms:

And the community is not prepared to tolerate individuals, in a community of a number of motor vehicles far beyond the capability of our infrastructure today, in my opinion, to not waiting for you, to jump the line to better their position, to force their way into traffic, to make others wait for them while they make an improper turn, to make changes that are entirely unnecessary because vehicles aren't going fast enough for you. The bottom line, sir, that's driving without reasonable consideration for other users of the highway.

5 The offence of "driving carelessly", created by s. 130 of the Highway Traffic Act, applies to driving on a highway "without due care and attention or without reasonable consideration for other persons using the highway". The word "consideration" obviously has different connotations in different contexts, but in the context of s. 130, it seems to me that it must bear some relation to the concept of "carelessness". The law has been clear for decades that to constitute the quasi-criminal offence under s. 130, the driving must be of such a nature that it amounts to a breach of duty to the public and is deserving of punishment: see *R. v. Beauchamp* (1953), 16 C.R. 270 at p. 278 (Ont. C.A.). A mere error of judgment is not necessarily sufficient to establish the offence: see *R. v. Wilson* (1971), 1 C.C.C. (2d) 466 (Ont. C.A.). The offence, generally speaking, requires proof of a departure from the standard of care that a reasonably prudent driver would have exercised in the circumstances, and normally involves conduct that includes other less serious statutory infractions or driving in a manner that can be regarded as unsafe in some way.

6 It would appear that in this case the learned justice of the peace viewed the phrase "without reasonable consideration" in s. 130 as the equivalent of "reasonably inconsiderate", in the sense of

discourteous or lacking in regard for the feelings of others. With respect, I do not think that that is the proper meaning to be given to those words in the context of the section. It may be that passing a line of cars in a left-turn lane, with the hope that one will be able to merge into that lane at the front of the line, demonstrates bad manners and a lack of civility, but I do not think that the conduct comes within the section. It may even indicate an attitude of arrogance or selfishness, as the justice observed, but I do not think it provides any evidence of a lack of regard for the safety of the other users of the highway or their reasonable expectation that the laws governing driving will be complied with which, in my view, is the kind of carelessness or lack of consideration to which the provision is directed. It was understandable that some impeded motorists who had to change lanes themselves to go around the appellant at the intersection expressed their annoyance at his queue-jumping by honking, but in my view, causing annoyance is not the same thing as driving carelessly. The appellant's conduct may have warranted a rebuke by being honked at; it did not, however, deserve punishment by the provincial offences court.

7 Similarly, I do not think that the evidence that the appellant changed lanes on two occasions while proceeding a considerable distance along Rogers Road provides any support for the justice's finding of carelessness. Even if she rejected his explanation that he was simply passing parked cars, without specifying why she did not find the appellant's uncontradicted evidence on the point to be believable, a mere finding that the appellant's motivation was to pass slower-moving traffic hardly indicates carelessness. In the absence of any evidence that the appellant was exceeding the speed limit or that the lane changes were not made in safety, I do not think the conduct disclosed any traffic infraction at all, much less an offence as serious as careless driving. While the justice characterized the appellant's conduct as the kind of aggressive driving that is a valid public concern, the facts she found, in my view, did not support that conclusion. In my opinion, had the justice at trial properly instructed herself as to the legal requirements of the section, she would inevitably have found that the appellant's driving, while hardly exemplary, fell well short of establishing careless driving.

8 The appeal is allowed, the conviction is set aside, and an acquittal is entered. The fine that has been paid by the appellant will be refunded to him.

FAIRGRIEVE J.

cp/e/nc/qlrme

---- End of Request ----

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