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R. v. McDorman

Between
Regina, respondent, and
Darren McDorman, appellant

[1984] B.C.J. No. 1053

27 M.V.R. 37

12 W.C.B. 48

Kamloops Registry No. CC 596

British Columbia County Court
Kamloops, British Columbia

Robinson Co. Ct. J.

Heard: January 30, 1984.
Judgment: March 2, 1984.

(11 pp.)

Highway traffic -- Truck driver transporting dangerous load in truck with faulty brakes, and after 30 hours without sleep, guilty of careless driving -- Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 149(b) -- Motor Vehicle Regulations, s. 5.08.

This was an appeal from convictions for careless driving under s. 149(b) of the Motor Vehicle Act, and driving with faulty brakes contrary to the Regulations, s. 5.08. The accused was a professional truck driver who was transporting a load of cyanide. The evidence showed that he had been driving without sleep for 30 hours, had continued to drive after discovering an air-leak, had not checked the slack-adjusters before the trip, and had failed to see truck route signs indicating a city by-pass. While driving through a city, the truck's brakes failed, and a serious accident ensued. The accused claimed there was insufficient evidence to support all the trial judge's findings, that he had exercised due diligence and had had no reason to suspect that the brake system was defective. See 84 DRS P17-688 for a summary of the decision under appeal.

HELD: The appeal was dismissed. The Court held that the trial judge's findings of fact on the evidence were sound. Considering all the factors of the accused's conduct prior to the accident, it was reasonable to conclude that the accused had been driving without reasonable consideration for other persons using the highway. The accident itself was not a determining factor. There was an onus on every driver to adhere to reasonable standards of safety, which may vary with the circumstances. A finding that such standards had not been met was an implicit finding of negligence. In view of all the facts, the trial judge's decision was reasonable. In regard to the breach of regulation regarding the brakes, it was held

that the accused did not do all that he should have in ensuring their fitness, and therefore could not be excused from a strict liability offence.

Counsel:

H. Pontious, for the respondent.

T. Weiss, for the appellant.

1 ROBINSON CO. CT. J.:-- This is an appeal from the conviction from Shupe, P.C.J., involving two counts, one under s. 149(b) of the Motor Vehicle Act and the other under s. 5.08 of the Regulations to the Motor Vehicle Act.

2 The Motor Vehicle subsection under consideration is that part of the section which is infrequently given judicial attention, compared to s. 149(a). The facts as found by the Provincial Court Judge, and which are not much in dispute are set forth in these words:

"The plaintiff is a professional driver with some three and one half years experience as the holder of an Alberta Class 1 Air Brake Operator's licence and who was at all material times employed by the Alert Transport Company of Edmonton, Alberta to drive its semi-trailer unit shown in photographs 21 to 23 of Exhibit No. 1 from Edmonton, Alberta to Vancouver, British Columbia empty and back with a load of cyanide. The defendant had never driven this route professionally and acknowledges that he missed the two truck route signs shown in photographs 2 and 4 leading to the by-pass around Kamloops via Peterson Creek. At approximately 9:15 p.m. on February 18, 1982, a time when the defendant had been driving for approximately 30 hours, the defendant's truck descended the rather steep grade of the Columbia Street hill in downtown Kamloops at a speed this court is satisfied was within the posted speed limit. As the defendant proceeded easterly and approached the lighted intersection of First Avenue and Columbia Street, the defendant applied the brakes of the truck and experienced a total brake failure. Ahead of him he saw two stationary vehicles, in the centre lane the Ford pick-up truck driven by Eric Mayrhofer, and in the curb lane the vehicle driven by the late son of the witness, Sybil Spragge and in which she was riding as a passenger; those vehicles awaiting the change of the red light at Third Avenue and Columbia Street. In an unsuccessful attempt to alert these drivers of the impending collision, the defendant applied his horn and decided against trying to stop the truck by running into the retaining wall on his right, because he feared a loss of control and consequent plunging over a bank and into the houses on the left side of the road. Instead he elected to try and drive between the said stationary vehicles, which produced calamitous results depicted in the photographs 9 through 25 of Exhibit No. 1."

3 In addition, certain technical opinion evidence relating to the bad brake linings, brake drums and slack adjusters are referred to in the Reasons for Judgment and these, I find, must be included in the Reasons for Judgment and in support of the finding of guilty, at trial. The opinion evidence is as follows:

"In his report, Exhibit No. 2, the expert mechanical witness, Harry Caunt, service manager of Boose Truck & Diesel Service Ltd. expresses the opinion that the brake linings on the tractor were worn to within 1/64 of the rivet heads, being beyond

acceptable limits; that the brake drums should have been changed due to ridges and heat cracks in same; and that the truck's brakes were not set up evenly causing more braking on one wheel than the other. In addition, while the brake linings on the trailer were within acceptable limits the trailer brakes were unsafe because they were not set up properly. In his opinion the slack-adjusters had not been attended to for some substantial time as there was too much travel on the slack-adjusters for them to have proper braking effect. His conclusion in that regard was supported by the heavy build-up of oil and grease he observed on the adjusting nuts and which was demonstrative of inattention. On cross-examination Mr. Caunt said that with the condition of the brakes as he saw them after the accident, even if the cursory checking technique of locking all the brakes and trying to drive forward had been applied when the trailer was empty and cold, the brakes would not have held the truck back. That would seem to suggest that if the defendant had applied the test en route, perhaps even in Vancouver before setting out with his load, rather than just in Edmonton at the outset, he should have detected failing brakes."

4 The trial judge then, referring to the accumulation of four factors found that the operator of the vehicle had not driven under those circumstances with reasonable consideration for other persons using the highway. The factors referred to are as follows:

- "(1) driving a vehicle laden with a hazardous load without having had sleep for 30 hours;
- (2) continuing to drive after detecting the air leak at the emergency service line to the trailer, rather than having a mechanic attend to same;
- (3) failure to personally crawl under the truck and check the slack-adjusters as part of a pre-trip inspection;
- (4) failure to see the two truck route signs leading to the Kamloops by-pass avoiding downtown Kamloops."

5 Put briefly, without doing injustice to the appellant's most capable argument, the appellant submits that there is an entire absence of evidence with respect to the first and fourth factors dealt with by the trial judge, namely, the lack of sleep for 30 hours and driving a vehicle with a hazardous load, and the failure to see the two truck route signs, insofar as those factors might be said to have contributed to the accident.

6 It is apparent that the trial judge drew an inference that the appellant's motor responses and reflexes were slowed below normal as a result of fatigue and that the failure to observe the truck route signs was quite possibly a result of that fatigue also. It must be emphasized that these were inferences drawn, on the basis of findings of fact and one of the issues in this appeal is whether such inferences were capable of being drawn.

7 The appellant contends that the temporary repair by him of the air leak hose and an earlier test of the braking capacity of his tractor and trailer producing satisfactory results, satisfies the test of due diligence, and, although the brake failure undoubtedly contributed to, or perhaps was the major cause of the accident, the appellant driver had no reason, immediately prior to the accident to suspect that the brakes or slack-adjusters or brake linings were defective or improperly adjusted.

8 There seems to be a paucity of precedent referring specifically to the offence of "driving without reasonable consideration for other persons using the highway", in contrast to the numerous cases dealing with "driving without due care and attention". Here, the trial judge referred himself to Regina v.

Marceau (1978), 2 M.V.R. 202 (Quebec Supreme Court). The facts of that case involved a police chase for a distance of four miles with the accused travelling at 85 miles an hour in a 55-mile-an-hour zone and during this chase, the accused twice passed vehicles across double lines. The pursued vehicle then travelled through a village or small town at 55 miles an hour where the speed limit was 25 miles an hour, again passed two other vehicles across a double line, and finally, travelled through an intersection at 30 miles an hour without obeying a stop signal. Dugas, J. found it rational to conclude that the accused had conducted his vehicle in an imprudent manner and without the care required by the highway code. The series of prohibited driving manoeuvres in Marceau did not culminate in an accident. Similarly, the Crown in the appeal before me does not in any way rely upon the accident as proof of the offence or contributing to such proof, but the factual circumstances before Shupe, P.C.J. were such that he was entitled to draw the inferences that he found, and that given these facts and inferences, the same result would obtain even if no accident had occurred. The Crown relies upon *Regina v. Henderson* 3 M.V.R. 314, and *Regina v. Fotti* 45 C.C.C. (2d) 353. *Regina v. Henderson* is a case of dangerous driving where the defence was that only an error of judgment had occurred. At p. 328, Davies, C.C.J. (as he then was) said:

"It is clear from that statement that he considered the evidence and that in his mind the accused's evidence amounted to dangerous driving taking into account all of the circumstances. It is also clear that he considered the explanation offered by the accused and was not prepared to accept it as an excuse. There is no indication that the learned trial Judge misdirected himself with respect to the facts and from his line of reasoning he appears to have applied the correct test. Therefore, I do not propose to substitute my judgment for his when I find that the conclusion which he has reached is not unreasonable or unjust on consideration of the evidence."

9 *Regina v. Fotti* was again a charge of dangerous driving, where there was an acquittal at the trial level, on the basis that the conduct of the accused was a "momentary lapse". There was a finding of fact that the accused had gone through a red light. The Manitoba Court of Appeal reversed the acquittal. At p. 357 from the judgment of Hall, J. the following appears:

"To determine whether Mr. Fotti was guilty of dangerous driving it is essential that all the circumstances must be looked at in totality. Each of them may be considered separately for the purpose of elucidation but in the end, all the circumstances must be considered in relation to each other. The accident occurred because of a sequence of events culminating in the collision at the intersection. Each of those events, happening within seconds, were related to each other in causing the accident."

10 In *Regina v. Henderson*, supra, the conviction was for dangerous driving and briefly, involved an attempted pass by one vehicle, unsuccessfully, resulting in sideswiping of the car in front and glancing or careening off that car into the path of an oncoming car with disastrous consequences. The substantial defence was an error in judgment in passing at the wrong time. In dismissing the appeal, reference was made to a number of cases, some of which have been recited many times, in particular *Binus v. Regina*, [1967] S.C.R. 594, 2 C.R.N.S. 118, [1968] 1 C.C.C. 227 and *Regina v. Beaudoin*, [1973] 3 O.R. 1, 12 C.C.C. (2d) 81. A portion of the judgment of Laskin, J.A. (as he then was) of the Ontario Court of Appeal is quoted:

"In the case at bar, the trial judge ought to have given the jury clearer direction than he did on what constitutes dangerous driving, especially in view of its relation to the greater offence of criminally negligent driving and to the lesser provincial offence of careless driving. He ought to have told them that on a charge of dangerous driving it was not necessary for the Crown to establish that the accused intended to jeopardize

the lives or safety of others by the way he drove nor was it necessary for the Crown to establish that the accused was reckless as to such consequences; but it was incumbent on the Crown to prove beyond a reasonable doubt that (1) the accused did not drive with the care that a prudent person would exercise in the circumstances confronting him having regard to the factors mentioned in s. 221(4), and (2) the accused in failing to exercise such care, in fact, endangered the lives or safety of others whether or not harm resulted."

... and from *Regina v. Binus* [1966] 2 O.R. 324, 48 C.R. 279:

"I am persuaded that an objective test best comports with the object and the language of the prohibition and with its setting in the scheme of offences of which it is a part. I do not, however, regard the offence as one of absolute prohibition, admitting of no defences (except possibly one based on the contention that the accused was not driving). It is not, in my opinion, enough to establish that an accused in fact drove in a manner dangerous to the public if at the same time he has not departed from the standard of conduct expected of a careful driver in the circumstances. For example, a driver may injure pedestrians or other motorists in trying to bring to a stop a car whose brakes have suddenly failed, although he had just had them inspected and they had been found to be in good working order. Again, he may be misled by a turned traffic sign in driving the wrong way along a one-way street and thus endanger others thereon. Or, a person's driving may endanger others by reason of an error of judgment in turning one way rather than another when confronted by an emergency arising from the sudden action of others. As was said in *Regina v. Marbus* [1963], 39 C.R. 201, in this Court, in respect of the immediately preceding illustration, there cannot be a conviction of dangerous driving in those circumstances. The Crown's case on a charge of dangerous driving would be based on proof of the accused's conduct as allegedly falling below the standard above indicated; that is, the conduct to be expected from a careful driver, prudent in the care and operation of his vehicle and attentive to the conditions of traffic confronting him. As in other types of cases, the unanswered evidence of the prosecution may be sufficient to support an adverse finding beyond a reasonable doubt; but defence evidence of prudence may remove any basis for such a finding."

11 I observe then, perhaps tritely, that the offence of driving without due consideration for others on the highway can be considered in the overall framework of driving offences, where negligence is involved and specifically the offences of criminal negligence in the operation of a motor vehicle and dangerous driving. An example of the judicial approach, where no accident is involved and where only two specific elements of the manner of driving were put forward by the Crown may be found in *Regina v. McPhee* [1977] 38 C.C.C. (2d) 49. The Appeal Division of the Nova Scotia Supreme Court found that speeding in a village area at four o'clock in the morning and occasionally driving on the wrong side of the centre line was sufficient to establish that the accused was in fact driving in a manner dangerous to the public.

12 In my view, notwithstanding the attack upon the inferences drawn by the learned trial judge in the case before me, I think it not open to me to say that those inferences should not or could not have been drawn, or that there was an absence of evidence justifying such inferences. *Regina v. Janzen* (1978), 9 B.C.L.R. 208. Further, put on a simplistic factual basis, the evidence shows that in this case, the appellant was driving a large transport unit, carrying a potentially lethal cargo, had driven for 30 hours without rest, and was operating a vehicle in imperfect mechanical condition, particularly with regard to its brakes and slack-adjusters. Without drawing any inferences, from any specific item or allegation, and

without drawing any inference from the fact of the accident itself, do these factors constitute, from an objective standard, driving without reasonable consideration for others on the highway. I think they do.

13 Considered, in the context of the words, "without reasonable consideration", there must be an onus on every vehicle owner to adhere to a reasonable standard for his own safety, the safety of his own vehicle and the safety of others using the highway. That standard varies according to the circumstances at hand. Implicit in finding a failure to achieve the requisite standard, is a finding of negligence in accord with the principles set forth in *Regina v. Jacobsen* [1964] W.W.R. 272. I repeat my view of the overall consideration given by the learned trial judge in this instance, that the facts before him, cannot be said to result in an unreasonable verdict or incapable of support from the evidence before him.

14 With respect to the second count of a breach of s. 5.08 of the Motor Vehicle Act Regulations, the essential defence is that of due diligence, in face of a strict liability offence, I find myself also in accord with the trial judge's reasoning. In applying the reasoning of *Regina v. The City of Sault Ste. Marie* [1978] 40 C.C.C. (2d) 353, it is my view that the appellant did not do all that he should have done in the circumstances, with respect to the brake linings of his vehicle.

15 The appeal, then, must be dismissed.

ROBINSON CO. CT. J.

qp/s/kfw