

Regina v. McIver

[1965] 2 O.R. 475-481

ONTARIO

[COURT OF APPEAL]

PORTER, C.J.O., ROACH, GIBSON, MacKAY and KELLY, JJ.A.

17th MARCH 1965.

Motor vehicles -- Careless driving -- Fact of accident as sole circumstantial evidence -- Where forbidden act proved onus is on accused to show no negligence or fault on his part -- Highway Traffic Act. s. 60.

The fact of an accident itself, without any direct evidence of the manner of driving, may constitute sufficient circumstantial evidence, within the rule in Hodge's case, to justify a conviction for careless driving contrary to s. 60 of the Highway Traffic Act, R.S.O. 1960, c. 172, and the Crown is not required to negative suggestions or hypotheses of innocence which are not founded on proven facts. Moreover, with respect to the offence of careless driving, the Crown need only prove that the accused committed the prohibited act and unless he can show that such act was done without negligence or fault on his part he will be convicted.

[R. v. Roseblade, 80 C.C.C. 128, [1943] 3 D.L.R. 733; [1943] O.W.N. 355; R. v. Patterson, [1964] 1 O.R. 628, [1964] 2 C.C.C. 176; R. v. Bain, Oct. 9, 1963 (Ont. C.A., unreported), overd; Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136; Gauthier v. The King, 56 C.C.C. 113, [1931] 4 D.L.R. 582, [1931] S.C.R. 416; O'Grady v. Sparling, 128 C.C.C. 1, 33 C.R. 318, 25 D.L.R. (2d) 145, [1960] S.C.R. 804, 33 W.W.R. 360; Sherras v. De Rutzen, [1895] 1 Q.B. 918; John v. Humphreys, [1955] 1 All. E.R. 793, refd to]

APPEAL from a decision of McRuer, C.J.H.C., [1965] 1 C.C.C. 210, [1965] 1 O.R. 306, affirming a conviction by H.G. Hays, Q.C., Magistrate, for careless driving contrary to s. 60, Highway Traffic Act.

J.G.J. O'Driscoll, for accused, appellant.

C.M. Powell, for the Crown, respondent.

PORTER, C.J.O.:-- This is an appeal by leave of this Court from the judgment of McRuer, C.J.H.C., dated June 25, 1964 [[1965] 1 C.C.C. 210, [1965] 1 O.R. 306], on a stated case by the accused from his conviction by H.J. Jays, Q.C., Magistrate on a charge that on January 8, 1964, the accused at the Town of Seaforth, in the County of Huron, did drive a vehicle on a highway, carelessly, contrary to s. 60 of the Highway Traffic Act, R.S.O. 1960, c. 172. The section reads as follows:

60. Every person is guilty of the offence of driving carelessly who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway and is liable to a fine of not less than \$10 and not more than \$500 or to imprisonment for a term of not more than three months, and in addition his licence or permit may be suspended for a period of not more than two years.

Upon application made on behalf of the accused for a stated case, pursuant to s. 734 [am. 1960-61, c. 43, s. 44 (1); 1960-61, c. 43, s. 44 (2)] of the Criminal Code, the learned Magistrate stated the following case for the opinion of the Court:

At the request of the said Louis Patrick McIver, I state the following case for the opinion of this Honourable Court.

It was shown before me that:

(1) At about 7.00 p.m. on the 8th day of January, 1964, the said Louis Patrick McIver, while driving his automobile, a 1956 Dodge, south on Main Street South, in the said Town of Seaforth, brought the right front portion of his automobile into collision with the left rear portion of an automobile owned by the Crown witness, Charles Reeves, parked off the pavement on the west shoulder of the said street facing south, parallel to and against a snowbank.

(2) The pavement at this point is 22 feet wide, but this surface as well as shoulder on both sides had been cleared of excess snow so that there was about 30 feet of snow covered travelling surface to the left or east of the parked car as the defendant McIver approached it from the rear, or north.

(3) The weather was clear, the road surface was snow covered but in good condition, straight and level. The Reeves car, a 1959 Studebaker, was light green in colour, parked directly under Mercury Vapour 250 watt street light, and there did not appear to have been any cars other than the Reeves car parked on either side in the area at the time. The particulars of the damages indicated that the right front fender and head light of the McIver automobile and the rear left fender and tail light of the Reeves automobile overlapped some 5 inches to 6 inches in the impact, and amounted to \$150.00 and \$73.00 respectively.

(4) The defendant McIver had consumed intoxicating liquor in some amount and within such time before the accident that there was "quite" a smell of alcohol from his breath.

He was not "impaired" in the view of the investigating officer and no symptoms other than the smell and whatever inference could be taken from the driving in question were proven before me.

The defendant, appellant gave no evidence nor called any witnesses. On the above facts, I was of the belief that the defendant had driven off the paved portion of the road from

some point north of the parked car which he should have seen ahead of him for a considerable time and had ample opportunity and space to either turn out to the left and pass the Reeves car or stop behind it.

In my opinion, the Crown proved beyond a reasonable doubt that the defendant McIver failed to use the care and pay the attention which an ordinary prudent driver would have used and that such conduct was of such a nature that it constituted a breach of duty to the public, was deserving of punishment, and went beyond mere negligence for the purpose of civil action.

I could find no facts in the evidence, inferences therefrom, or theories subjective thereto, by way of explanation or excuse for the defendant driving his automobile into the parked automobile. It was contended by counsel for the defendant that the prosecution had to prove negligence more specifically, or I took it, disprove negatively unnamed hypothetical defences.

Having some reservation that there existed direct evidence to determine whether the driving in question amounts to careless driving, I applied the rule in Hodge's case (1838) 168 E.R. 1136, and following the reasoning of Kennedy, Co.Ct.J. in Regina v. Ayotte (1962) 37 Criminal Reports, page 28, and considering the evidence on that issue to be circumstantial and held that not only were the circumstances consistent with the defendant driving at the time without due care and attention and therefore carelessly under the section in question but that the facts were such as to be inconsistent with any other rational conclusion and thereupon convicted him on the charge as aforesaid, and fined him \$10.00 and costs.

The defendant, Louis Patrick McIver, desires to question such conviction on the grounds that it is erroneous in point of law and on his application I submit the following questions for the judgment of this Honourable Court.

(1) Did I err in law in convicting the defendant, Louis

Patrick McIver, of the charge under Section 60 of the Highway Traffic Act?

(2) Did I err in law in holding that there was evidence before me on which to base the said conviction?

(3) Did I err in law in holding that there was a prima facie case adduced by the Crown's evidence?

The Chief Justice ordered that Qq. 1, 2, and 3, propounded by the Magistrate be answered in the negative, and made no order as to costs. This appeal comes to this Court by authority of the following subsection of s. 743 of the Cr. Code which confines the appeal to questions of law alone:

743 (1) An appeal to the court of appeal, as defined in section 581 may, with leave of that court, be taken on any ground that involves a question of law alone, against

(b) a decision of a superior court in respect of a stated case under section 740, except where the superior court to which the case was stated is the court of appeal.

(2) Sections 581 to 595 apply mutatis mutandis to an appeal under this section. [rep. & sub. 1960-61, c. 43, s. 45]

(3) (Notwithstanding subsection (2), the court of appeal may make any order with respect to costs that it considers proper in relation to an appeal under this section.

(4) The decision of the court of appeal may be enforced in the same manner as if it had been made by the summary conviction court before which the proceedings were originally heard and determined.

As to the three questions submitted by the Magistrate, I agree with the contention of Mr. Powell, counsel for the Crown, that as a matter of law these raise a single question: Was there any evidence upon which the Magistrate could base his

finding of guilt? If there is some evidence upon which this finding could be based, then the issue as to whether the proper inference has been drawn from that evidence is not a question of law but a question of fact. In *Gauthier v. The King*, 56 C.C.C. 113 at p. 114, [1931] 4 D.L.R. 582, [1931] S.C.R. 416, Anglin, C.J.C., said:

Assuming that the question, whether there was any evidence to support a conviction, should be deemed a question of law, the question whether the proper inference has been drawn by the trial Judge from facts established in evidence, is really not a question of law, but purely a question of fact for his consideration.

Counsel for the accused argued, first, that the evidence of the Crown consisted of nothing more than that there had been an accident. There was no direct evidence as to the manner in which the accused had been driving his vehicle prior to the accident. This, he contended, was insufficient to satisfy the rule in *Hodge's Case* (1838), 2 Lewin 227 at p. 228, 168 E.R. 1136. Secondly, he contended that the judgment in *R. v. Bain* (an unreported decision of the Court of Appeal, dated October 9, 1963) applied. The facts in that case were substantially similar to those in the case at bar, and the Court, without giving reasons, allowed the appeal and acquitted the accused.

Upon reading the case stated by the Magistrate, I would conclude that there was evidence from which an inference could be drawn to the effect that the accused was driving carelessly. The juxtaposition of the two vehicles by itself would point to lack of due care and attention on the part of the accused. In addition to this there was evidence described by the Magistrate in the stated case of a number of conditions and surrounding circumstances from which it would appear that unless there were carelessness the collision would not likely have occurred. There was nothing in the evidence from which a contrary conclusion could be drawn. There was no explanation of the cause of the accident.

The rule in *Hodge's Case* as stated by Alderson, B., [p. 228]

after telling the jury that the case was made up of circumstances entirely, was that before they could find the prisoner guilty, they must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person" [*italics added*]. In his judgment the Chief Justice said [pp. 214-5]:

The rule makes it clear that the case is to be decided on the facts, that is, the facts proved in evidence, and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts. No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one.

.....

In the case before me the Magistrate considered all proven facts and the circumstances and drew the inference that the accused drove his automobile carelessly. There was evidence on which he could draw that inference and there was no evidence to support any other finding. On an application of this sort I cannot disturb the learned Magistrate's finding of fact. He applied to the proven facts a process of reasoning not of conjecture, as it was his duty to do. I agree with and would adopt these statements of the Chief Justice. In view of the judgment of the Supreme Court of Canada in *O'Grady v. Sparling*, 128 C.C.C. 1, 33 C.R. 318, [1960] S.C.R. 804, and that recently of this Court in *R. v. Mann*, [1965] 2 C.C.C. 338, 45 C.R. 296, [1965] 1 O.R. 483, regulatory provincial offences are generally regarded as being offences of strict liability. Cf. *Russell on Crime*, 12th ed., by J.W. Cecil Turner, p. 62. The English section similar to our careless driving section has been so considered: *McCrone v. Riding*, [1938] 1 All E.R. 157; *Pearks, Gunston & Tee Ltd. v. Ward*, [1902] 2 K.B. 1, per Channell, J., at p. 11, where he said that quasi-criminal offences were of this category. In *Sherras v. De Rutzen*,

[1895] 1 Q.B. 918 at pp. 921-2, Wright, J., said: There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered. ... The principal classes of exceptions may perhaps be reduced to three. One is a class of acts which ... are not criminal in any real sense, but are acts which ... are prohibited under a penalty. ... Another class comprehends some, and perhaps all, public nuisances. ... Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right. ... But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of someone whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence. And see the chapter [VI] on "Strict Responsibility" in Morris and Howard, *Studies in Criminal Law* (1964). In these cases it is necessary for the Crown to prove only the actus reus, and not the mens rea. Having reached these conclusions and reconsidered the judgment in *R. v. Bain*, supra, I do not think that that case was rightly decided, and it therefore should not be followed. I would overrule also, *R. v. Roseblade*, [1943] 80 C.C.C. 128, [1943] O.W.N. 355, [1943] 3 D.L.R. 733, and *R. v. Patterson*, [1964] 2 C.C.C. 176, [1964] 1 O.R. 628. I would dismiss the appeal. There should be no order as to costs. ROACH and GIBSON, JJ.A., concur with MACKAY, J.A. MACKAY, J.A.:-- I am in agreement with the reasons and conclusions of my Lord the Chief Justice. I desire, however, to express my views in regard to the application of the rule of strict liability as it applies to this case. Section 60 of the Highway Traffic Act, R.S.O. 1960, c. 172, prohibits a defined type of conduct; it is silent as to intent or mens rea. In such case, the Crown need only prove that the accused committed the prohibited act and the accused will be convicted unless he can show that the forbidden act was done without negligence or fault on his part. If there were an explanation of this accident having occurred without fault on the part of the accused, it was

wholly within his knowledge and the principle applied by the Court of Criminal Appeal in *John v. Humphreys*, [1955] 1 All E.R. 793, applies. In that case the accused was charged with not having a driver's licence. At p. 794 Lord Goddard, C.J., said: ... when an act of Parliament provides that a person shall not do a certain thing unless he has a licence, the onus is always on the defendant to prove that he has a licence because it is a fact peculiarly within his own knowledge ... As to the onus of explanation resting on the accused in the case of statutory offences that do not by their terms require proof of intent, the following cases are in point: *Proudman v. Dayman* (1941), 67 C.L.R. 536; *Maher v. Musson* (1934), 52 C.L.R. 100 at pp. 105 and 108; *Sherras v. De Rutzen*, [1895] 1 Q.B. 918 at p. 921; *R. v. Patterson*, [1962] 1 All E.R. 340. The first three of these cases and others are discussed in an article by Colin Howard on "Strict Responsibility in the High Court of Australia", 76 L.Q.R. 547. The Australian cases to which I have referred, are in respect of the defence of reasonable mistake of fact on the part of the accused. On a charge laid under s. 60 of the Highway Traffic Act, it is open to the accused as a defence, to show an absence of negligence on his part. For example, that his conduct was caused by the negligence of some other person, or by showing that the cause was a mechanical failure, or other circumstance, that he could not reasonably have foreseen. In the case of any such defence, the same principles are applicable as in the case of a defence of reasonable mistake of fact and I adopt as a correct statement of the law, the submission of Mr. Howard at pp. 565 and 566 as to the respective positions of the Crown and the accused in regard to onus and standard proof. The submission is as follows: It is submitted that the general defence of reasonable mistake of fact which emerges from the foregoing cases is a true defence, the burden of proving which rests upon D. This is the second point of distinction from the so-called defence of mistake of fact in offences requiring a full mens rea, where the mistake alleged is merely a method of denying P.'s case and has no effect on the burden of proof. It is in accord with principle to assume that the standard of proof to be attained by D is on the balance of probability only. Nevertheless, even if D fails in this

endeavour, there cannot be a conviction unless P has proved his case beyond reasonable doubt. Needless to say, if D establishes reasonable mistake on the balance of probability, he must be acquitted, for P has not proved his case at all. Where a statutory prohibition is cast in terms which at first sight appear to impose strict responsibility, they should be understood merely as imposing responsibility for negligence but emphasising that the burden of rebutting negligence by affirmative proof of reasonable mistake rests upon D. In the present case it was open to the accused to show, if he could, that the collision of his car with the car parked on the shoulder of the road, occurred without fault or negligence on his part. He having failed to do so was properly convicted. KELLY, J.A., concurs with MACKAY, J.A. Appeal dismissed.

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