

ONTARIO COURT OF JUSTICE

B E T W E E N :

Her Majesty the Queen

— AND —

Gurvir Sandhu

2009 ONCJ 77 (CanLII)

Before Justice of the Peace Kenneth W. Dechert
Heard on May 23, 2008 and October 24, 2008
Reasons for Judgment delivered orally on February 25, 2009

D. Howarth **for the prosecution**
L. Carter **for the defendant Gurvir Sandhu**

K.W. DECHERT, J.P.

INTRODUCTION

[1] Under certificate of offence no. 1260-85960894, Gurvir Sandhu stands charged that he, on the 15th day of December, 2006 at Plains Road at Waterdown, in the City of Burlington did commit the offence of red light-fail to stop, contrary to section 144(18) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended.

[2] On May 23, 2008, the defendant entered a plea of not guilty to the said charge in the Burlington Provincial Offences Court (2051 Plains Road East, Burlington, Ontario). The trial of the matter then proceeded before me. As the trial could not be completed at that time, the matter was adjourned to October 24, 2008, in the Milton Provincial Offences Court (100 Nipissing Road, Unit #2, Milton, Ontario) at which time it was completed. The proceeding was then adjourned to February 25, 2009 in the Milton Provincial Offences Court, for my judgment.

[3] During the proceeding, the prosecution (City of Burlington) was represented by Ms. D. Howarth and the defendant was represented by his legal representative, Ms. L. Carter.

THE ISSUES

[4] The ultimate issue in this proceeding is whether the prosecution has proven the subject charge as against the defendant, beyond a reasonable doubt.

[5] The offence of “red light-fail to stop”, under subsection 144(18) of the *Highway Traffic Act*, is an absolute liability offence. Accordingly, if the prosecution is able to prove that the defendant committed the *actus reus* of the said offence, to the standard of proof beyond a reasonable doubt, then the mental element of negligence is automatically imported into the offence and it is not open to the defendant to exculpate himself by showing that he was free of fault.

[6] In this case, the issue of identity is not in dispute. The issue of the proof of the *actus reus* of the subject offence, is, however, a live issue in this proceeding. An assessment of the credibility of witnesses in this proceeding is an important factor in the determination of the ultimate issue herein.

THE LAW

[7] The defendant is charged with the offence of “red light–fail to stop”, contrary to subsection 144(18) of the *Highway Traffic Act*. That subsection reads as follows:

Every driver approaching a traffic control signal showing a circular red indication and facing the indication shall stop his or her vehicle and shall not proceed until a green indication is shown.

[8] As stated above, the offence of red light fail to stop is one of absolute liability. This categorization for the subject offence was established by the Ontario Court of Appeal in its decision in *Regina v. Kurtzman*, (1991) 66 C.C.C. (3d) 161 (Ont. C.A.).

[9] The subject offence is alleged to have taken place at the intersection of two highways in the City of Burlington. Accordingly, subsection 144(5) of the *Highway Traffic Act* is also relevant to this proceeding. That subsection reads as follows:

A driver who is directed by a traffic control signal erected at an intersection to stop his or her vehicle shall stop,

- (a) at the sign or roadway marking indicating where the stop is to be made;
- (b) if there is no sign or marking, immediately before entering the nearest crosswalk; or
- (c) if there is no sign, marking or crosswalk, immediately before entering the intersection.

[10] In his decision in the case of *Regina v. Fanelli*, [2003] O.J. No. 5641 (Ont. C.J.), Smith J. concluded that “the duty to stop for a red light under s. 144(18) is to be read along with the other provisions of the legislative scheme and in particular along with or conjunctively with s.144(5) which tells the motorist where to stop in that situation”.

THE EVIDENCE

[11] During the trial of this proceeding, the Court received *viva voce* evidence from Police Constable Mark Urie, tendered on behalf of the prosecution and from the defendant, Gurvir Sandhu.

(i) The Testimony of Police Constable Mark Urie

[12] At the time of his testimony in this matter on May 23, 2008, Constable Urie testified that he was a member of the Halton Regional Police Service and had been a member of that service since August 2003.

[13] Constable Urie testified that on December 15th, 2006, he was conducting patrol duties as a police officer in the City of Burlington. He advised that at approximately 7:00 p.m. on that date, he was operating his police vehicle southbound on Waterdown Road approaching its intersection with Plains Road, in the City of Burlington. The officer stated that at that time he stopped his vehicle in the southbound, left turn lane of Waterdown Road, in accordance with a red traffic control signal facing him at the said intersection. He testified that he was stopped behind two vehicles located in the said left turn lane.

[14] In describing the area of the intersection, Constable Urie testified that Waterdown Road is a two lane highway running in a north/south direction, with one lane in each direction. He advised that a designated left turn lane for southbound traffic was located at the intersection of Waterdown Road and Plains Road.

[15] Constable Urie testified that Plains Road, at its intersection with Waterdown Road, is a four lane highway with two lanes running eastbound and two lanes running westbound. He advised that the speed limit on Plains Road, at the subject location was that of 60 kilometres per hour.

[16] Constable Urie testified that there were, at the material time, road markings on each of the four sides of the subject intersection, being crosswalk markings and stop lines relative to the entrance to the intersection from each direction. In particular, the officer advised of the existence of a stop line and a crosswalk on the west side of the subject intersection, governing the flow of eastbound traffic on Plains Road. He stated that if one was travelling eastbound on Plains Road, approaching its intersection with Waterdown Road at the relevant time, one would encounter a “solid stop line” followed by a crosswalk.

[17] Constable Urie testified that while he was situate in the southbound left turn lane on Waterdown Road, he was located in a slightly elevated position such that he had a “clear, unobstructed view” of Plains Road to the west of his location.

[18] Constable Urie described the area of the intersection of Plains Road and Waterdown Road as a residential area. He advised that at the relevant time, traffic in the area of the intersection was heavy, that the weather was clear and cold and that the roads were dry. He further advised that while it was dark out at the relevant time, the area of the said intersection was illuminated by artificial lighting.

[19] Constable Urie testified that at the material time, he was stopped for several seconds, in the southbound left turn lane, as the traffic control signal facing eastbound and westbound traffic on

Plains Road was green. He advised that as the traffic control signal for east/west traffic turned from green to yellow (he later described the yellow light as “amber”), his attention was drawn to his right; to the west of the subject intersection. He stated that at that time he heard the sound of an engine “revving very high”. Upon looking to his right he observed a “lone eastbound vehicle” travelling on Plains Road, approaching the Waterdown Road intersection.

[20] Constable Urie testified that he first observed this vehicle when it was approximately 200 metres west of the subject intersection. He noted that this vehicle was accelerating towards the intersection, estimating that it was travelling at a speed of “no less than 120 kilometres per hour”.

[21] Constable Urie testified that at that moment he began to count so as to determine the duration of the amber light governing eastbound traffic at the subject intersection. He determined that the duration of the amber light was approximately five seconds. He advised that he observed that when the said amber light turned red, all four directions were facing a red light for a further two-second period, before the red light governing north/south traffic on Waterdown Road changed to green.

[22] Constable Urie testified that when the traffic control signals governing east/west traffic changed from amber to red, the said lone eastbound motor vehicle had not yet entered the intersection. He stated that he observed the accelerating motor vehicle enter the intersection, at an estimated rate of speed of 120 kilometres per hour, approximately one second after the traffic control signal governing north and southbound traffic on Waterdown Road had changed from red to green.

[23] Constable Urie testified that he was not able to advise as to the distance of the subject motor vehicle from the stop line at the west side of the subject intersection at the time that the traffic light indication changed from amber to red, because at that moment he was watching the traffic light governing eastbound traffic to determine when it was going to change to red. He testified, however, that the “traffic signal light for east and westbound traffic was a solid red” when the subject vehicle crossed the said stop line. He stated that the subject eastbound vehicle proceeded through the intersection after the traffic control signal for north/south traffic had been green for a period of approximately one second.

[24] During his testimony-in-chief, Constable Urie stated that the sequence of traffic control signals at the subject intersection was “normal”. He testified that the amber light had a duration of five seconds, followed by a two second “solid red” signal for all directions before changing to green. He advised that he was satisfied as to the “operation” of the traffic signal controls at the subject intersection at the relevant time.

[25] Constable Urie testified that upon observing the subject eastbound vehicle enter and pass through the subject intersection against a red traffic control signal, he took steps to stop the vehicle. He stated that he never lost sight of the said vehicle as he “caught up to it as it continued on eastbound Plains Road”. He stated that he was able to catch up with the said vehicle because other eastbound vehicles on Plains Road caused it to slow down.

[26] Constable Urie testified that he initiated a traffic stop of the subject vehicle in the

eastbound lanes of Plains Road at a location approximately two kilometres east of the intersection of Plains Road and Waterdown Road. He stated that at that time he observed the motor vehicle to be a black two door Honda sports car “with a modified muffler”. He described the subject vehicle as being a “distinctive vehicle”.

[27] Constable Urie testified that the driver of the vehicle identified himself, with a valid Ontario photographic driver’s licence as the defendant, Gurvir Sandhu. He stated that he then issued Mr. Sandhu with a provincial offence notice for the offence of red light-fail to stop.

[28] During cross-examination, Constable Urie acknowledged that at the time of the alleged offence the east/west traffic flow on Plains Road was “heavy”. He indicated, however, that at the material time, the defendant’s motor vehicle was the only eastbound vehicle west of the subject intersection, noting the existence of other eastbound vehicles on Plains Road, east of the subject intersection.

[29] In describing his vantage point at the relevant time, Constable Urie acknowledged that from his position in the southbound left turn lane of Waterdown Road, two car lengths north of Plains Road, his view to the east of his position was partially obstructed. In this regard, he noted the existence of a two storey building situate on the northeast corner of the subject intersection, such that it was “tight to the sidewalk”, thereby blocking his view.

[30] During cross-examination, Constable Urie testified that approximately eight seconds had elapsed from the time that he first observed the subject eastbound vehicle, on Plains Road west of Waterdown Road, until it had crossed over the stop line at the western entrance to the subject intersection. He further testified that the duration of time from when he first noticed the said vehicle until it had exited the intersection , would have been slightly greater than eight seconds.

[31] Constable Urie testified that even though it was, at the relevant time, dark out and the subject area was illuminated with artificial light, he was able to recognize the vehicle which passed through the intersection against the red light, as he noted that it was a “very distinctive”, “modified” vehicle. The officer noted that a “modified muffler” was affixed to the vehicle such that the vehicle made a “distinctive sound”.

[32] During re-examination, Constable Urie testified that even though his view of Plains Road to the east of Waterdown Road was partially obstructed, his view of the “traffic signal lights” on the east side of the subject intersection, governing the flow of eastbound traffic, was “clear and unobstructed”. He acknowledged that these lights were located to the left of his position on Waterdown Road.

(ii) The Testimony of the Defendant

[33] During his testimony-in-chief, the defendant acknowledged that on December 15th, 2006, he was “pulled over” by a police officer, while operating his motor vehicle eastbound on Plains Road.

[34] He testified that at about 7:00 p.m. on the said date, he was driving his car in an easterly direction on Plains Road, near its intersection with Waterdown Road. He stated that when he approached the said intersection, the traffic lights facing him were “yellow”, so he decided to cross through the intersection. He stated that he did not see the “red lights” when he travelled through the intersection.

[35] The defendant testified that after he had passed through the intersection, he was “pulled over” by a police officer approximately one and one-half kilometres east of the said intersection. The defendant stated that at that time, the officer told him that he “had crossed a red light”.

[36] In describing the road conditions at the time, the defendant stated that at the subject time, the traffic was normal, but that the roads were slippery. He stated, however, that he knew that the yellow lights were “turned on” and that he could go through the subject intersection.

[37] During cross-examination, the defendant testified that on the day in question, he was driving a black-coloured Honda Prelude motor vehicle. The defendant stated that he agreed with the police officer’s description of his car.

[38] In answer to a question as to whether he had made any modifications to the vehicle, the defendant stated that at that time a new muffler had been put on the vehicle, which he indicated was “within the limits of what you can keep on your car”.

[39] During cross-examination, the defendant re-iterated his testimony that at the time in question, the roads were slippery and wet as it had been raining earlier in the day. He testified that at the subject time, he was travelling in an easterly direction in the left hand lane of Plains Road at a rate of speed of between 50 and 60 kilometres per hour.

[40] The defendant testified that at the time that he was approaching the intersection of Plains Road and Waterdown Road, there were two or three cars in front of him as well as a pick-up truck travelling in the lane to his right, approximately one-half of car length ahead of him. When the defendant was asked how far he was away from the stop line on the west side of the intersection when the traffic light turned yellow, the defendant initially stated “maybe one car length” and then attempted to clarify the distance by stating that the distance might be equivalent to the distance between the witness stand in the court to the first bench in the body of the courtroom (a distance of approximately 15 feet).

[41] The defendant was then asked whether the distance might actually be equivalent to the distance between the witness stand and the back wall of the courtroom. The defendant responded to this question as follows:

If you think either from that wall to the first row or from the desk where I’m standing to the wall at the end of the room. It could be any one of that between those two.

After some discussion, both legal representatives in this proceeding estimated the distance between the witness stand and the back wall of the courtroom to be between forty and fifty feet.

[42] The defendant testified that as he was approaching the subject intersection, he was travelling at a rate of speed of 50 kilometres per hour. He stated that the traffic control lights governing eastbound traffic turned from green to yellow as he was located an estimated distance of between forty and fifty feet west of the stop line at the west side of the intersection. He testified that at that time he did not think that he could stop prior to the stop line, and that if he tried to stop he would likely “get stuck” in the middle of the intersection.

[43] The defendant testified that in light of the situation he found himself in, and the fact that there were other vehicles behind him, he decided to slightly increase his speed in an effort to pass through the intersection on the yellow light. In that regard, he increased his speed to approximately 65 kilometres per hour, consistent with the speed of the pick-up truck travelling parallel to him in the curb lane. He advised that once he had passed through the subject intersection, he returned “back to the normal speed”.

[44] Upon being asked by the prosecutor as to the colour of the light when he exited the subject intersection, the defendant replied as follows:

When I crossed the intersection it was yellow. But when I crossed it, I don’t know I can not see in my back what was the signal light. I was going right because I’m going straight I was facing yellow light so I was doing the right thing to cross that yellow.

[45] During cross-examination, the defendant advised that at the time that he was in the middle of the intersection, he noticed that there were some vehicles in the southbound lanes of Waterdown Road, north of Plains Road, which he believed were stopped in accordance with a red traffic control signal facing them. When asked how he knew that the southbound traffic on Waterdown Road were facing a red light at that time, the defendant stated that since he was facing a yellow light while travelling eastbound, “obviously” the southbound traffic would “have the red light”.

[46] In response to a question as to where his vehicle was located when the light turned red, the defendant stated as follows:

I didn’t see the red light. That’s what I’m saying repeatedly that I did not see the red light. When I crossed the intersection it was only yellow light. ...

ANALYSIS

[47] Based on the undisputed evidence before me, the following facts have been established beyond a reasonable doubt:

- (i) that on the 15th day of December 2006, at approximately 7:00 p.m., the defendant, Gurvir Sandhu was driving a motor vehicle in an easterly direction on Plains Road approaching its intersection with Waterdown Road, in the City of Burlington;
- (ii) that at the material time, the flow of eastbound traffic on Plains Road at its intersection with Waterdown Road was governed by a traffic control signal;
- (iii) that at the material time, a solid stop line was painted on the pavement across the eastbound lanes of Plains Road on the west side of its intersection with Waterdown Road.

[48] As stated above the issue of identification is not in dispute. There is, however, conflicting evidence before me as to whether the defendant failed to stop his vehicle in accordance with a circular red indication facing him as he approached the intersection of Plains Road and Waterdown Road, from the west. According to Constable Urie, the defendant entered the subject intersection when he was facing a “solid red” indication. The defendant denies this allegation and asserts that in entering and crossing through the intersection, he did so in accordance with a yellow indication.

[49] This is a case where the issue of credibility is important. Accordingly, I must undertake an assessment of the credibility of the witnesses in this proceeding.

[50] When I embark on such an assessment, I must remind myself that the concept of reasonable doubt applies to the assessment. Furthermore, I must instruct myself that the determination of the defendant’s guilt must not be based on a simple credibility contest between the prosecution and defence witnesses. This proposition of law was established by the Supreme Court of Canada in the case of *Regina v. W.(D.)* [1991] 1 S.C.R. 742 (S.C.C.). In said decision, commencing at paragraph 27 therein, Cory J. explained how credibility is to be assessed as follows:

In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused’s evidence but still have a reasonable doubt as to his guilt after considering his evidence in the context of the evidence as a whole. ...

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First: if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[51] In its decision in the case of *Regina v. Hull*, [2006] O.J. No. 3177 (Ont. C.A.), the Ontario Court of Appeal, made the following comments pertaining to the application of the principles enunciated in *R. v. W.(D.) supra.*, as follows:

W.(D.) and other authorities prohibit triers of fact from treating the standard of proof as a credibility contest. Put another way, they prohibit a trier of fact from concluding that the standard of proof has been met simply because the trier prefers the evidence of the Crown witness to that of defence witnesses. However, such authorities do not prohibit a trier of fact from assessing an accused’s testimony in light of the whole evidence including the

testimony of the complainant and in doing so comparing the evidence of the witnesses. On the contrary, triers of fact have a positive duty to carry out such an assessment recognizing that one possible outcome is that the trier of fact may be left with a reasonable doubt concerning the guilt of the accused.

[52] There is, in my view, no question that the testimony of Constable Urie establishes all of the elements of the *actus reus* of the subject offence, on a *prima facie* basis. In order to determine whether the charge has been proven against the defendant beyond a reasonable doubt, I must apply the *W.(D.)* principles and assess the defendant's exculpatory evidence in the context of the totality of the evidence. In doing so, I must avoid reaching a determination that the requisite standard of proof has been met on the basis of a preference of the prosecution evidence over that of the defendant.

[53] In my view, during his testimony, the defendant presented his version of the events pertaining to the subject offence in a clear and unequivocal manner. His testimony was both detailed and internally consistent. Furthermore, the strength of his account of the relevant circumstances was not significantly diminished as a result of the prosecutor's extensive cross-examination. His explanation that he increased his speed so as to enter the subject intersection while facing a yellow light is, in my view, plausible. Throughout the course of his testimony he steadfastly maintained that he not only entered, but also exited the intersection on a yellow light.

[54] On the other hand, Constable Urie was equally steadfast in his position that the subject traffic light showed a solid red indication at the time that the defendant's vehicle crossed over the stop line on the west side of the subject intersection. He stated, however, that he was unable to advise as to the distance of the defendant's vehicle west of the said stop line at the moment when the subject traffic light changed from amber to red. In fact, he explained that at that time, he was "focusing" on when the said light was "going to turn red". Furthermore, he acknowledged that the subject traffic control lights were located to the left of his position on Waterdown Road, on the east side of the subject intersection.

[55] In considering Constable Urie's testimony, I am unable to understand how he was able to state with certainty, that the defendant's vehicle crossed the stop line bordering the west side of the subject intersection, against a red traffic control signal. It would appear that the officer's observations with respect to the vehicle's position relative to the said stop line were made in a matter of one or two seconds, at a time when his attention was drawn to the traffic lights located to his left, rather than on the location of the defendant's vehicle approaching the subject intersection from his right and at a time when the intersection was illuminated by means of artificial lighting.

[56] Accordingly, when I consider the defendant's exculpatory evidence that he entered the subject intersection while facing a yellow light, in the context of Constable Urie's testimony, I find that I am left in a state of reasonable doubt as to whether the subject traffic light showed a red indication at the moment when the defendant entered the intersection by crossing the westerly stop line. Applying the second prong of the *W.(D.)* principles, I find that I am left in a state of reasonable doubt as to the defendant's guilt in respect of the subject offence.

THE DECISION

[57] The prosecution has failed to meet its burden of proving all of the elements of the *actus reus* of the offence of red light-fail to stop, contrary to subsection 144(18) of the *Highway Traffic Act*, beyond a reasonable doubt.

[58] The defendant is therefore found not guilty and the said charge is dismissed.

Released: February 25, 2009

Signed: “Justice of the Peace Kenneth W. Dechert”