

Regina v. Skorput

72 C.C.C. (3d) 294

**Ontario Court (Provincial Division)
MacDonnell Prov. Div. J.**

April 10, 1992

Trial — Procedure (General) — Ex parte trial — Defendant tried ex parte on charge of careless driving — After testimony of civilian witness, judge telling Crown that he had made out prima facie case provided he could establish identity of driver — Police officer called and testifying as to driver's identity — No further evidence adduced as to investigation conducted by police officer — Judge entering conviction — Constitutes error — Prima facie case not constituting proof beyond reasonable doubt — Crown required to call all relevant evidence including evidence which assists defence — Judge required to take all such evidence into account at end of case in determining whether Crown had met onus of establishing elements of careless driving beyond reasonable doubt — Appeal by accused allowed and new trial ordered — Highway Traffic Act, R.S.O. 1980, c. 198, s. 111.

R. v. Morabito (1949), 93 C.C.C. 251, [1949] 1 D.L.R. 609, [1949] S.C.R. 172, 7 C.R. 88; R. v. Proudlock (1978), 43 C.C.C. (2d) 321, 91 D.L.R. (3d) 449, [1979] 1 S.C.R. 525, 5 C.R. (3d) 21, [1978] 6 W.W.R. 357, 24 N.R. 199; R. v. Lock (1974), 18 C.C.C. (2d) 477, 4 O.R. (2d) 178; R. v. McIver, [1965] 4 C.C.C. 182, 45 C.R. 401, [1965] 2 O.R. 475, 8 C.L.Q. 224 [affd [1966] S.C.R. 254, 48 C.R. 4, [1966] 2 C.C.C. 289n] *consd*;

Cases referred to:

R. v. Mezzo (1986), 27 C.C.C. (3d) 97, 30 D.L.R. (4th) 161, [1986] 1 S.C.R. 802, 52 C.R. (3d) 113, [1986] 4 W.W.R. 577, 43 Man. R. (2d) 161, 68 N.R. 1, 17 W.C.B. 25; U.S.A. v. Sheppard (1976), 30 C.C.C. (2d) 424, 70 D.L.R. (3d) 136, [1977] 2 S.C.R. 1067, 34 C.R.N.S. 207, 9 N.R. 215; R. v. Jacobson and Levy, [1931] App. D. 466; R. v. Sault Ste. Marie (City) (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 21 N.R. 295, 2 W.C.B. 321; R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161, 38 C.P.R. (3d) 451, [1991] 3 S.C.R. 154, 8 C.R. (4th) 145, 7 C.R.R. (2d) 36, 49 O.A.C. 161, 130 N.R. 1, 4 O.R. (3d) 799n, 30 A.C.W.S. (3d) 660, 14 W.C.B. (2d) 208; R. v. Beauchamp (1953), 106 C.C.C. 6, [1953] 4 D.L.R. 340, 16 C.R. 270, [1953] O.R. 422, [1953] O.W.N. 375

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Statutes referred to:

Criminal Code, ss. 348(2) [am. R.S.C. 1985, c. 27 (1st Supp.), s. 47], 548(1) [am. *idem*, s. 101 (1)] Highway Traffic Act, R.S.O. 1980, c. 198, s. 111 [am. 1983, c. 63, s. 22; 1989, c. 72, s. 94] -- now R.S.O. 1990, c. H.8, s. 130

Appeal by the accused from his conviction for careless driving contrary to s. 111 of the Highway Traffic Act (Ont.).

C. Matthews, for accused, appellant.

M. Leshner, for the Crown, respondent.

MacDonnell Prov. Div. J.:

A. Introduction

This is an appeal by the appellant from his conviction on October 26, 1990, on a charge of careless driving contrary to s. 111 of the Highway Traffic Act, R.S.O. 1980, c. 198. The appellant, although properly notified of the time and place of trial, failed to attend to answer to the charge, and the matter proceeded ex parte.

The sole issue of substance raised on this appeal is whether the presiding justice of the peace erred in concluding that the Crown was merely required to establish a prima facie case in order to obtain the defendant's conviction.

B. The proceedings at trial

Two witnesses were called by the Crown. The first witness, Pepino Liotti, testified that at about 7:10 p.m. on September 15, 1989, he was sitting in the driver's seat of his automobile which was parked facing westbound at the north side curb of Richgrove Drive. This location was 69 metres west of Martin Grove Road. Mr. Liotti looked in his rear-view mirror and observed a car turn from Martin Grove Road onto Richgrove and proceed westbound toward the rear of his car at 40 or 50 km/h. At the last second, the car swerved to the centre of the roadway, too late to avoid the rear left side of the Liotti vehicle. A collision resulted which pushed the Liotti car forward about 10 ft. Mr. Liotti testified that the driver of the other car was a male, but he never learned his name. He testified that the investigating officer spoke to the other driver.

The second Crown witness was the investigating officer. Before the officer gave any material evidence, the presiding justice stated as follows:

Yes, for the purpose of this trial, the officer may use his notes. Also, I would like to point out that this is an ex parte trial, and I think the Crown so far has established a prima facie case, and with the accused not being here, I think it is just a question of whether or not you can identify that person to make your case complete.

[page296] The prosecutor began to ask the officer questions with respect to what he had observed upon arrival at the scene of the accident. The following exchange occurred:

[The Prosecutor] Q. And, officer, simply tell me what vehicles you found and what damage you found to them.

A. I observed

The Court: I don't think we need the damage. All I need is --

The Prosecutor]: Q. Yes, just tell me what vehicles you found there, officer.

A. Yes, I observed a black Oldsmobile Delta "88".

The Court: Driven by?

A. Sorry?

The Court: Driven by?

A. Driven by the party that identified himself as the driver.

[The Prosecutor]: Q: And how did he do that?

A. With a valid Ontario driver's license.

Q. In what name?

A. Zlatko Skorput, a surname of Skorput, of 6 Gracey Boulevard, Etobicoke, Ontario.

[The Prosecutor]: Thank you, officer. That will be the case then for the Crown, Your Worship.

The Court: His was the car that was in the rear of the previous witness's?

A. He was in front of -- sorry, you're right. In the rear, that's right.

The justice of the peace thereupon stated: "There will be a conviction."

It is plain that from the perspective of the presiding justice, the establishing of a prima facie case by the prosecution on an ex parte trial was dispositive of the issue of guilt or innocence. The issue to be determined is whether that position is correct in law.

C. The law

(i) The concept of a prima facie case

The concept of a prima facie case is understood by courts in two senses. Quite different implications attach to its use depending on which sense is intended. At a minimum, a prima facie case is one which contains evidence with respect to all elements which the party asserting an allegation must demonstrate. In this sense, it corresponds to the requirements for a committal for trial pursuant to s. 548(1) of the Criminal Code, or for the dismissal of a motion for nonsuit at the end of the prosecution's case. An example of this usage is provided in *R. v. Morabito* (1949), 93 C.C.C. 251, [1949] 1 D.L.R. 609, [1949] S.C.R. 172 (S.C.C.). In that case, there was an issue concerning what the Crown must establish in order for an [page297] accused to be called upon for a defence. Speaking for the majority of the Supreme Court of Canada, Kellock J. stated at, p. 254:

No authorities were cited to indicate just what cogency of proof is required to establish a prima facie case at that stage, and I have not run across any case in which the point was settled. I presume, therefore, that, in order to put the accused on his defence, a Judge or Magistrate sitting alone need find only such evidence as would entitle the Crown, in a jury case, to have the facts left to the decision of the jury. In other words, the criterion would be whether the evidence is such as a jury might, in the absence of contradiction or explanation, reasonably and properly convict upon.

In *R. v. Mezzo* (1986), 27 C.C.C. (3d) 97, 30 D.L.R. (4th) 161, [1986] 1 S.C.R. 802, the Supreme Court of Canada again considered the nature of the test to be applied on an application for a directed verdict. On behalf of a majority of the court, McIntyre J. affirmed the well-known test articulated by Ritchie J. in *U.S.A. v. Sheppard* (1976), 30 C.C.C. (2d) 424, 70 D.L.R. (3d) 136, [1977] 2 S.C.R. 1067, at p. 427. He stated, at p. 102, that Ritchie J. had "adopted as the measure of sufficiency the concept of a prima facie case, that is, a case containing evidence on all essential points of a charge which, if believed by the trier of fact and unanswered, would warrant a conviction".

This first sense in which "a prima facie case" is understood might be termed the permissive sense: it will permit, but does not require, the trier of fact to draw the inference sought by the party alleging the prima facie case. However, the concept of a prima facie case is sometimes understood to describe evidence which has greater cogency than merely permitting an inference. Black's Law Dictionary, 5th ed. (1979), at p. 1071, states that

courts used "prima facie" to mean not only, that plaintiff 's evidence would reasonably allow conclusion plaintiff seeks, but also that plaintiff 's evidence compels such a conclusion if the defendant produces no evidence to rebut it.

Professor Cross (*Cross on Evidence*, 6th ed., at pp. 60-1) notes that while evidence of this degree of cogency is referred to as prima facie, it might conveniently be described as "presumptive". He refers to *R. v. Jacobson and Levy*, [1931] App. D. 466 at p. 478, for the dictum that "[i]n the absence of further evidence from the other side, the prima facie proof becomes conclusive proof...".

An illustration of a presumptive prima facie case is provided in *R. v. Proudlock* (1978), 43 C.C.C. (2d) 321, 91 D.L.R. (3d) 449, 5 C.R. (3d) 21 (S.C.C.). In that case, the central issue was whether evidence which was disbelieved by the trier of fact was "evidence to the contrary" within the meaning of the presumption created by what is now s. 348(2) of the Criminal Code. In deciding that issue, the court was required to assess the significance of an *[page298]* amendment to the wording of that provision. The subsection had provided that evidence that a person broke and entered a place "is prima facie evidence" that he did so with intent to commit an indictable offence. It was amended to provide that evidence of break and entry "is, in the absence of any evidence to the contrary, proof" of the relevant intent.

Writing for the majority of the Supreme Court, Pigeon J. concluded that the amendment did not change the effect of the subsection. That is, he regarded "prima facie evidence" as evidence which was, in the absence of evidence to the contrary, conclusive. At p. 27 he wrote:

If the prima facie case is made up by the proof of facts from which guilt may be inferred by presumption of fact, the law is clear on the authorities that, because the case in the end must be proved beyond a reasonable doubt, it is not necessary for the accused to establish his innocence, but only to raise a reasonable doubt. This he

may do by giving evidence of an explanation that may reasonably be true, and it will be sufficient unless he is disbelieved by the trier of fact, in which case his testimony is no evidence. In any case, the evidence given by himself or otherwise, has to be such as will at least raise a reasonable doubt as to his guilt, if it does not meet this test the prima facie case remains and conviction will ensue.

(Emphasis added.

In Proudlock, the elements of a prima facie case were defined in part by a statutory presumption which relieved the Crown of the obligation of leading any other evidence of the requisite intent. In some situations, upon establishing a prima facie case, the Crown will be relieved of the obligation to call further evidence in relation to the mental aspect of an offence, even in the absence of a statutory presumption. In *R. v. Lock* (1974), 18 C.C.C. (2d) 477, 4 O.R. (2d) 178 (Ont. C.A.), the accused was charged under the Criminal Code with driving while disqualified. It is an element of that offence that the accused know at the time of the driving that he is disqualified. The Crown led evidence to prove that Lock drove and that he was at the time disqualified. No evidence was adduced that he had been notified of the disqualification.

At p. 483, Martin J.A. stated that "[e]ven in offences involving full mens rea the evidential burden of introducing evidence of lack of knowledge of a material element of the offence may pass to the accused in some cases on proof of the doing of the prohibited act". He further stated, at pp. 484-5:

It does not follow, however, that anything more than the proof of the commission of the prohibited act is required to constitute a prima facie case. Where the prosecution establishes a prima facie case, the accused runs the risk of being convicted unless he discharges the evidential burden of introducing evidence of lack of knowledge of a material element of the [page299] offence. If, however, at the end of the whole case the Court entertains a reasonable doubt with respect to the accused's knowledge of a material element of the offence, he is entitled to be acquitted.

The language employed by Martin J.A. might be thought to suggest that a conviction would not necessarily follow a failure by the accused to discharge the evidential burden. However, his reasons as a whole make clear that that would only be so if there was some basis in the evidence for reasonably doubting the existence of knowledge. There is nothing inconsistent between this approach and that of Proudlock.

Perhaps the most common applications of the concept of a prima facie case in the presumptive sense arise in prosecutions for regulatory offences. On such prosecutions, the Crown is ordinarily not required to prove any culpable mental state or negligence on the part of the defendant. The Crown establishes all that it must in order to secure a conviction -- that is, it establishes a prima facie case -- by proving that the defendant committed the actus reus of the offence: *R. v. Sault Ste. Marie (City)* (1978), 40 C.C.C. (3d) 353 at pp. 373-4, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299 (S.C.C.); *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at p. 259, 84 D.L.R. (4th) 161, 8 C.R. (3d) 145 (S.C.C.), per Cory J. Once the Crown establishes a prima facie case in this sense, fault is presumed, and the onus shifts to the defendant to show on a balance of probabilities that all reasonable care was taken.

The distinction between the two senses in which the expression "prima facie case" is used is more than a matter of academic interest. A prima facie case understood in the first or permissive sense, as demonstrated in *Morabito* and *Mezzo*, does not require the Crown to meet any onus beyond adducing

"some" evidence, and no burden -- evidential or persuasive -- is shifted to the accused. Establishing a prima facie case in this sense simply allows the party with the burden of persuasion to proceed. On the other hand, a prima facie case understood in the second or presumptive sense shifts at least an evidential burden, and in the case of a regulatory offence a persuasive burden, to the accused, who must discharge it in order to avoid conviction. It is very important to recognize that while the prosecution must establish the elements of the prima facie case beyond a reasonable doubt in order to shift the burden to the accused, the allocation of the burdens between the parties does not occur until all the evidence in the trial has been heard, and the trier of fact is embarked upon an assessment of guilt or innocence. That is, the concept of a presumptive prima facie case does not affect trial procedure. An [page300] accused's decision as to whether to adduce evidence to meet an evidential or persuasive burden must inevitably be based on an assessment of what it is open to the trier of fact to find. The defence will not have the benefit of a preliminary ruling as to the trier of fact's view of the evidence before electing whether to call evidence.

(ii) What is a prima facie case of careless driving?

Careless driving is a regulatory offence as that term is understood in light of *Sault Ste. Marie and Wholesale Travel*. As was stated above, in the prosecution of a regulatory offence the Crown ordinarily establishes a prima facie case upon proving that the defendant committed the actus reus of the offence. At that point, the burden of showing that reasonable care was taken shifts to the defendant. However, careless driving is somewhat of an anomaly in that the failure to take reasonable care is part of the actus reus of the offence. In *R. v. Beauchamp* (1953), 106 C.C.C. 6 at p. 13, [1953] 4 D.L.R. 340, 16 C.R. 270, the Ontario Court of Appeal stated that the test of careless driving is:

...not whether, if the accused had used greater care or skill, the accident would not have happened. It is whether it is proved beyond reasonable doubt that the accused, in the light of existing circumstances of which he was aware or of which a driver exercising ordinary care should have been aware, failed to use the care and attention or to give to other persons using the highway the consideration that a driver of ordinary care would have used or given in the circumstances.

To establish a prima facie case of careless driving, sufficient to convict a defendant who elects to present no evidence, the prosecution must establish beyond a reasonable doubt a departure from a standard of care. The onus of establishing an absence of negligence only arises once the Crown establishes a prima facie case.

The facts of *R. v. McIver*, [1965] 4 C.C.C. 182, 45 C.R. 401, [1965] 2 O.R. 475 (Ont. C.A.), bear some similarity to those of the case at bar. In that case, the defendant, who had been drinking but was not impaired, drove on the shoulder of the roadway for a considerable period of time before colliding with a parked car which he had ample opportunity to observe and avoid. The defendant did not testify at trial, nor did he call any evidence. The trial judge was satisfied beyond a reasonable doubt that, inter alia, the defendant had failed to use the care and attention which an ordinary and prudent driver would have used, and that his conduct went beyond mere civil negligence. On appeal, it was argued that there was no evidence to support the trial judge's finding of guilt, and it was submitted that innocent explanations [page301] for the accident were possible. The Court of Appeal unanimously dismissed the appeal.

Mr. Justice MacKay, delivering the majority judgment, stated at pp. 188-9:

Section 60 [now s. 111] of the Highway Traffic Act, R.S.O. 1960, c. 72, 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...

Those remarks affirm that the "prohibited act" which the Crown must prove in order to establish a prima facie case of careless driving is not the mere fact of an accident but rather the conduct defined in what is now s. 111 of the Highway Traffic Act. In substance, the Crown must prove a departure from a standard of care. It is only when that is proved that an onus shifts to the defendant to show that he was not negligent. In *McIver*, McKay J.A. accepted as correct the proposition that the defendant bears the burden of establishing his "defence" of lack of negligence or fault on a balance of probabilities. However, he also adopted the submission that even if the defendant fails to establish lack of negligence there could not be a conviction unless the prosecution proved its case beyond reasonable doubt. In many cases of careless driving, the effect of this will be to make the onus on the accused to establish due diligence academic. If the prosecution's case is that the defendant's driving demonstrated an absence of due care and attention, and the defence is that the defendant was being reasonably careful -- i.e., that he was not negligent -- any defence evidence which raises a reasonable doubt as to that issue will produce an acquittal. In that event, it would be a moot question whether the defence of due diligence was proved on a balance of probabilities.

D. Application to the case at bar

In the instant case, the presiding justice of the peace formed the view, after hearing the evidence of Mr. Liotti, that the Crown had established a prima facie case. He was plainly of the view that since the trial was being conducted ex parte, a prima facie case would suffice to convict the defendant. There is nothing in the record which indicates whether he was employing the concept of a prima facie case in the permissive or the presumptive sense. In my opinion, whether he meant to use it in the *Morabito* and *Mezzo* sense or the *Proudlock* sense, he erred.

[page302] If the presiding justice was using "prima facie" in the permissive sense, then the burden which he ultimately placed on the prosecution was less than proof beyond a reasonable doubt. To establish a prima facie case of this type, the Crown need only adduce some evidence from which careless driving could be found and neither an evidential nor a persuasive onus is shifted to the defendant. The fact that the trial was being conducted ex parte does not alter that situation. Therefore, if the justice of the peace was using prima facie in the first sense, he misapplied the burden of proof.

If he was using the concept of a prima facie case in the presumptive sense, then the justice also erred. This concept of a prima facie case is one which only has application at the end of the case, after all the relevant evidence has been heard. It is a mechanism for allocating the evidential and persuasive burdens for the assistance of the trier of fact. It would be premature for the trier of fact to be considering in the midst of the evidence whether a presumptive prima facie case had been proved. In the case at bar, at the point when the justice determined that a prima facie case had been established, the Crown had not called all the evidence it intended to call. The evidence called by the Crown is not the private property of the prosecution. In a properly conducted trial, the Crown will call all relevant evidence, including evidence which assists the defence. The justice would be required to take all such evidence into account at the end of the day in determining whether the Crown had met its onus of establishing the elements of careless driving beyond a reasonable doubt.

The evidence of Mr. Liotti is certainly capable of constituting a prima facie case in the second sense. That is, it is capable of establishing beyond a reasonable doubt that the defendant failed to exercise due care and attention and to drive with reasonable consideration for other users of the road. It is capable of shifting a persuasive burden onto the defendant. However, it can only do that, at the end of the day, if in light of all the evidence called at trial the Crown has established beyond a reasonable doubt that the defendant failed to meet the standard of care required by s. 111 of the Highway Traffic Act.

In this case, the record does not disclose what evidence the investigating officer might have given concerning the matter. Mr. Liotti testified that the officer spoke to the defendant, and the Crown called the officer to testify. The presiding justice, because of his view that a prima facie case had been established, made it clear that he wanted to hear no evidence from the officer other than evidence identifying the defendant as the driver.

[page303] While the Crown had adduced compelling evidence of careless driving, in my opinion it is impossible to know if the evidence of the police officer with respect to his investigation of the accident would have raised a reasonable doubt concerning the actus reus of careless driving. Consequently, the conviction cannot stand, and a new trial is directed, to be held before a different justice of the peace. Appeal allowed.