

ONTARIO COURT OF JUSTICE

B E T W E E N :

The Queen

— AND —

Colin P. Sztronga

Before Justice of the Peace Conacher
Heard: March 31st, 2010
Judgement & Reasons: April 27, 2010

J. Hurst for the prosecution
H. Marschler for the defendant

Cases Cited:

R. v. Boffo, [1997] O.J. No. 5156; 37 W.C.B. (2d) 68
R. v. Gittens, [1994] O.J. No. 2140 (Ont.C.A.)
R. v. W. (D.) (1991), 63 C.C.C. (3d) 397 (S.C.C.)
R. v. Raham, 2010 ONCA 206,

JUDGEMENT AND REASONS FOR JUDGEMENT

Judgement

[1] Mr. Sztronga faces a charge of having committed the offence of stunt driving contrary to s. 172 of the *Highway Traffic Act* by operating a vehicle in a manner that fell within the definition of stunt driving as set out in Ontario Regulation 455/07:

Definition, “stunt”

3. *For the purposes of section 172 of the Act, “stunt” includes any activity where one or more persons engage in any of the following driving behaviours:*

- 1. Driving a motor vehicle in a manner that indicates an intention to lift some or all of its tires from the surface of the highway, including driving a motorcycle with only one wheel in contact with the ground, but not including the use of lift axles on commercial motor vehicles.*

[2] It is the judgement of this Court that the Prosecution has made out this driving conduct beyond a reasonable doubt and that Mr. Sztronga is guilty of the offence.

Reasons for Judgement

[3] The circumstances of the offence are straightforward and there is substantial consistency between the prosecution and defence with respect to those circumstances. Both parties are in accord that on May 5th, 2008 at approximately 7:15 p.m. Mr. Sztronga was operating his motorcycle, a Ducati model, westbound in the express lanes of Highway 401 between Morningside Ave. and Markham Road within the City of Toronto. At this point the westbound express lanes of that 400-series roadway consists of three lanes. Mr. Sztronga was riding in the company of another motorcyclist. That second motorcyclist was operating a Honda model of motorcycle. It was approaching dusk. The vehicles were travelling at a rate of speed above the 100 km/hr speed limit; a rate of approximately 120 to 130 km/hr.

[4] At this point the allegations and evidence of the prosecution differ sharply from the evidence of the defence.

[5] P.C. K. Proulx of the Toronto Police Service's Traffic Services Highway Patrol unit testified that at that time he was on duty and on patrol westbound in lane three, the right-most lane, of the express lanes on Highway 401 near Markham Road when he observed the two motorcyclists also westbound but in lane two, the centre lane of the three lanes. P.C. Proulx testified he observed what he had described as the 'very distinctive red Ducati' "pop a wheelie", that is, as he testified, the front wheel of the motorcycle left the roadway, the motorcycle inclined upwards at a 45 degree angle and the vehicle proceeded in this manner, by the officer's estimation, for approximately 50 metres. It was his observation that the Ducati had been behind the other motorcycle and that in performing the "wheelie" it then passed that second motorcycle. P.C. Proulx testified that he was, by his estimate, approximately 100 metres behind the two motorcycles. On cross-examination he testified that that distance could have been closer. He also testified that he was immediately beside the tractor unit of a tractor-trailer that was travelling in lane two of the express lanes. According to P.C. Proulx each of these vehicles were travelling at approximately the same rate of speed. P.C. Proulx recalled that the second motorcycle did stop at the time he pulled Mr. Sztronga over but he did not speak to the operator of that motorcycle. That person did not remain at the scene. The officer did obtain a partial licence plate number, #855W2.

[6] Mr. Sztronga's description of what occurred in those moments differs from Officer Proulx's on several key points. Mr. Sztronga related in his testimony that the two motorcycles were travelling in lane 1, the left-most lane and that the operator of the other motorcycle, the Honda, performed the 'wheelie'. Mr. Sztronga stated that he caught sight in his rear-view mirror of the officer's emergency lighting turning on, that he looked back and saw the officer's vehicle 500 metres back and saw the tractor-trailer 100 metres back; that he signalled to the other motorcyclist that the officer was behind; that both motorcycles then moved into lane two, with the second motorcyclist moving into a

position behind Mr. Sztronga. When P.C. Proulx pulled Mr. Sztronga over the second motorcyclist, someone not known to Mr. Sztronga, did not stop or remain at the scene.

Credibility

[7] The Court reminds itself of the law with respect to determinations of credibility. In its decision in *R. v. Boffo*, [1997] O.J. No. 5156; 37 W.C.B. (2d) 68, the Ontario Court of Appeal stated:

The trial judge then referred to the Supreme Court of Canada's judgment in R. v. W.(D.) (1991), 63 C.C.C. (3d) 397, and observed that, "the doctrine of reasonable doubt applies to the issue of credibility." He said further:

Obviously, if Mr. Boffo's evidence is believed or if it leaves the court in a state of reasonable doubt, he will be acquitted, but it is also important to say that even if his evidence is completely rejected, it is still a question of whether the Crown's evidence which is accepted, if it is, proves all of the requisite elements of the offence beyond a reasonable doubt.

[8] It is this Court's understanding that the Supreme Court's decision in *W.(D.)*, a copy of which decision was also tendered by the defence in this matter, stands for the proposition that where the case turns entirely, or almost entirely, on the credibility of the informant and the accused, the issue is not "which version of the matter is true" or, whether to believe the informant or the accused. The issue is whether the Crown's case has been proved beyond a reasonable doubt and that:

1. If the accused is believed, the judge must acquit.
2. If the accused is not believed, there may still be a reasonable doubt as the result of the accused's testimony.
3. Even if the accused's testimony does not raise a reasonable doubt, there may be a reasonable doubt on the basis of the evidence that is accepted. *R. v. W. (D.) (1991), 63 C.C.C. (3d) 397 (S.C.C.)*.

[9] While the Court, therefore, is obliged to attempt to make a determination of the credibility of the version of events as set forth by the informant, P.C. Proulx and the defendant, Mr. Sztronga, this is not simply an exercise in determining whose testimony is found to be credible. The Prosecution must still prove its case beyond a reasonable doubt and it is not incumbent on the defendant to prove his innocence.

P.C. Proulx

[10] As might be expected from an experienced traffic services officer such as P.C. Proulx, his demeanour in court was straightforward, calm and unhurried. He testified with the benefit of reference to the notes that he made at the time of this incident. He painted a clear and detailed picture of what he observed in proximity to the incident, that the front wheel of the Ducati motorcycle left the roadway causing the motorcycle to incline upwards at an approximately 45 degree angle for a distance of approximately 50 metres. Under close cross-examination the officer never wavered from expressing

confidently that he saw what he stated he saw, the Ducati performing a ‘wheelie’. He described the basis for his experience and knowledge in identifying the Ducati and being capable under the conditions of the moment of distinguishing one from a Honda of the type described by the Defendant. Even when presented with the difficulties in his observations and the possible inconsistencies, the officer calmly and confidently disagreed and asserted the accuracy of his observations. The officer noted that the incident “stood out in his mind”.

[11] At this point, the Court notes the caution from the Ontario Court of Appeal in *R. v. Gittens*, [1994] O.J. No. 2140 (Ont.C.A.) that it is tempting to believe a witness with a credible demeanour. However, it is wrong to equate credible demeanour with reliability and accuracy and to find the witness credible on that basis alone, especially in the face of significant evidence contradicting that witness.

[12] In that respect, the defence sought to challenge the accuracy of P.C. Proulx’s perceptions and hence his testimony. He was challenged on whether he was actually alongside the tractor-trailer’s tractor unit and 100 metres behind the motorcycles as he testified or whether he may not have been, in actuality, 500 metres behind when the “wheelie” occurred. He was challenged on whether he could have been able to see clearly what he says he saw, given that the vehicles were travelling towards the setting sun and that he was not wearing sunglasses. The suggestion was made that at a distance of 500 metres and with the setting sun directly in his eyes he may not have been able to make a distinction between the Ducati and the Honda, that the shapes were not distinguishable, especially to the untrained eye. Evidence was led that the colours of the motorcycles were not as the officer described them. It was underscored by the defence that the officer’s testimony about the positioning of the motorcycles, that the Ducati was initially behind the Honda at the moment of the ‘wheelie’ and that it was the trailing motorcycle that performed the ‘wheelie’, was different from his entry in his notes that it was “the lead” motorcycle that performed the “wheelie”.

Colin Sztronga

[13] Mr. Sztronga chose to testify on his own behalf. In closing argument, Mr. Sztronga’s representative submitted that this was a manifestation of Mr. Sztronga’s determination to clear his name, that Mr. Sztronga had an opportunity to otherwise resolve this matter without trial but chose to take the matter to trial. This argument was directed to underscoring Mr. Sztronga’s testimony that he did not perform the ‘wheelie’ and to bolster the weight to be attached to Mr. Sztronga’s credibility.

[14] Mr. Sztronga manifested, at points in his testimony, extreme nervousness which is understandable in someone not experienced in the court process and facing the most punitive sanction which might be imposed under the *Highway Traffic Act*. At the same time, he asserted with confidence certain details that, if accepted, would bring into doubt P.C. Proulx’s perceptions of what occurred. He, too, testified with the aid of certain notes that were made contemporaneously with the incident and over the subsequent days.

[15] Mr. Sztronga asserted strongly that the setting sun was in his eyes and even with a tinted visor on his helmet he still could not see very well. If accepted, that would bring into question whether P.C. Proulx wasn't also having some difficulty observing what he was seeing ahead of him.

[16] Mr. Sztronga asserted strongly that the colour of the second motorcycle was "black, red and silver" and he was confident of those colours because the make and model of the vehicle was a 2002 Honda 954 and those, according to Mr. Sztronga, were the only colours the vehicle came in that year. This is in some contrast to the P.C. Proulx testimony that the second motorcycle was "black with a lot of chrome" and was of the "more traditional up-right seating position." Nevertheless, Mr. Sztronga acknowledged that the predominant colour of his motorcycle is red.

[17] It was Mr. Sztronga's strong assertion that he and the Honda motorcycle were in lane 1 "the whole time" up to the point that he became aware of P.C. Proulx's emergency lights. This stands in sharp contrast to P.C. Proulx's testimony and to P.C. Proulx's notes that the motorcycles were in lane 2.

[18] Finally, and most significantly to the Court, Mr. Sztronga asserted strongly that the officer was "at least" 500 metres back at the moment when Mr. Sztronga became aware of the officer's emergency lights coming on and he looked back to see the officer and saw the tractor-trailer unit to which the officer made reference 100 metres back.

[19] Mr. Sztronga also offered testimony on points not mentioned by P.C. Proulx. Mr. Sztronga testified that he was initially riding with a third party, a Levar Piper (sp?), who was riding a pure black 2009 Suzuki GSXR 750 with silver exhaust; that they entered the 401 westbound at Ajax, that upon entering the highway they observed the Honda motorcycle 100 metres ahead, that between that point and the point at which Mr. Sztronga was pulled over by P.C. Proulx the operator of the Honda performed four or five 'wheelies', that Mr. Sztronga "chased up to" the Honda "to get a better look" because he thought the 'wheelies' were really cool to see; that he gave the operator of the Honda a "thumbs up" because the 'wheelie' was "fun to watch"; that at some point Mr. Sztronga's companion, Mr. Piper, took the collector lanes but Mr. Sztronga followed the Honda on the express lanes because he wanted to watch the 'wheelies'; that as he became aware of the police presence he signalled to the Honda operator of that fact and that that motorcyclist seemed to panic; that both motorcyclists moved from lane 1 into lane 2 in front of the tractor-trailer and the Honda fell back from being in the lead to lagging behind Mr. Sztronga; that 10 to 15 seconds elapsed between the moment that Mr. Sztronga observed P.C. Proulx's emergency lights and the moment P.C. Proulx's cruiser "came around the tractor-trailer from the left" and past the Honda and pulled him over.

[20] Notwithstanding that Mr. Sztronga was riding on that day with a friend of 5 years acquaintance, someone with whom Mr. Sztronga had frequently ridden, and notwithstanding that Mr. Sztronga had obtained several adjournments on earlier trial dates in order to permit him to continue his efforts to have that friend present to testify, the only evidence the Court had before it was the testimony of P.C. Proulx and of Mr.

Sztronga. The credibility determination is based exclusively on the testimony of the originating informant and the defendant.

Assessment of Credibility

[21] Mr. Sztronga acknowledges that ‘wheelies’ were being performed; just not by him. P.C. Proulx was correct in the observation that a ‘wheelie’ was performed and Mr. Sztronga’s testimony actually corroborates the officer’s observation that a ‘wheelie’ was, in fact, performed. Mr. Sztronga acknowledges that the second motorcycle travelling with him was a Honda. He corroborates P.C. Proulx’s observation in that respect as well.

[22] In addition to asserting that he did not perform the manoeuvre described by P.C. Proulx, Mr. Sztronga’s testimony was otherwise directed to establishing reasons why P.C. Proulx’s perceptions in other respects were, in fact, misperceptions.

[23] Mr. Sztronga asserts that at the moment he perceived in his mirror the officer’s emergency lights coming on he turned and observed the officer’s vehicle to be “at least” 500 metres back. However, he did not establish how he was able to make such a confident assessment of distance looking backwards while operating a motorcycle on a 400-series roadway travelling at 120 or so km/hr while at the same time taking mental note of a tractor-trailer 100 metres back.

[24] Nor did he establish how long after the “wheelie” in question occurred that he saw the emergency lights come on. He acknowledged that at the moment the ‘wheelie’ was performed he was not aware of the proximity of the police. He only became aware of the police presence when he saw the emergency lights.

[25] The question for the Court is what evidence has been presented as to the distance of P.C. Proulx from that event at the moment it occurred and is that evidence credible? The only evidence in that respect is that of P.C. Proulx and his evidence is that he was approximately 100 metres away and “possibly less”. Is that estimate correct or reasonably accurate? P.C. Proulx is an experienced traffic services officer. That aspect of his testimony was not challenged. It is reasonable to infer that his duties would regularly require him to make such estimates while moving in traffic. He stated and did so with precision that he was immediately to the right of a tractor unit of a tractor-trailer and was not shaken on that in cross-examination notwithstanding that that detail was not contained in his notes. He emphasized that this incident stuck out in his memory as the reason he was able to recall such details.

[26] I find P.C. Proulx’s testimony on the issue of the officer’s distance from the incident to be credible. I also find Mr. Sztronga’s testimony on the point to lack credibility and reliability, particularly in that he did not know where the officer’s vehicle was at the moment the ‘wheelie’ was performed.

[27] The officer was challenged on his evidence in chief when he had stated that the red Ducati was trailing the Honda when the Ducati ‘popped a wheelie’ and moved ahead of the Honda. In cross-examination his notes, page 29, were read into the record in

which he had written ‘red motorcycle with rider in black with silver blue helmet in lead pops wheelie’. The officer’s response, that that notation is not inconsistent with his evidence in chief, is found to be credible. The officer stated that the notation was not made chronologically. At the moment the note was made, shortly after the incident, the order of the motorcycles would not have stood out as an issue. The principal issue was which motorcycle ‘popped the wheelie’. And, according to the officer’s testimony, the distinctive red Ducati was, in fact, in the lead after the manoeuvre was performed.

[28] The defendant asserted that the westbound vehicles were travelling directly into the setting sun and that he was having difficulty seeing even with a tinted helmet visor. The inference is that P.C. Proulx, too, would have difficulty seeing, especially as he was not wearing sunglasses and may have confused the motorcycles, especially with respect to configuration and colour and position on the roadway.

[29] The Court is unable to assess the degree of difficulty Mr. Sztronga was having with vision. However, other users of the roadway were not so affected by vision difficulties from the setting sun that they adjusted their driving to compensate. These vehicles particularly were travelling at a speed significantly in excess of the 100 km/hr. maximum on that roadway. ‘Wheelies’ were being performed. Mr. Sztronga took his eyes off the road ahead long enough to observe the officer 500 metres back and the tractor-trailer 100 metres back, an imprudent action of inattention if the sun is causing problems for other users of the road. In any event, Mr. Sztronga is not able to testify as to what the officer could see and his testimony regarding the difficulties presented by the setting sun does not undermine P.C. Proulx’s own testimony insisting on the accuracy of his perceptions.

[30] Mr. Sztronga offered evidence about his own motorcycle, its capabilities when it comes to doing ‘wheelies’ and his own experience in attempting them. His testimony in these respects is assertion without corroboration. His testimony was not helpful to the Court in assessing the credibility of his testimony in other key respects. He asserted that his Ducati was a ‘show’ bike and was not for performing stunts. This does not establish that it could not be ridden in that fashion. He also asserted that he had attempted a ‘wheelie’ only once about 20 years ago, was not successful, that it had really scared him and for that reason had not attempted them again. Nevertheless, he clearly was somewhat enthralled by ‘wheelies’, by his own testimony, and parted from his riding partner that day in order to follow the unknown motorcyclist to watch that person perform ‘wheelies’. The Court cannot conclude, notwithstanding his assertion to the contrary, that he would not be inclined to attempt to perform such a manoeuvre.

[31] In a similar vein, Mr. Sztronga asserted his experience as a motorcyclist, the value of his motorcycle and testified with some degree of bravado as to his knowledge about the uniqueness of the colours of the Honda 954 made in 2002. He was, however, in the Court’s estimation strangely reticent and somewhat unforthcoming about the speed capability of his Ducati. While rate of speed is not an element of the offence for which he was charged, his explanation as to why he could not give an estimate of the top speed of the machine did not have the ring of “the whole truth”. He explained that the

motorcycle has a digital speedometer, the face of which does not reflect a top speed. However, when invited by the Prosecutor to comment on the specifications of the machine when he was acquiring it, Mr. Sztronga again made reference to the digital speedometer. His response left the Court with the impression that he understood the question, had knowledge of the speed rating and acceleration capability for his motorcycle but was reluctant to share that knowledge and chose to evade the question.

[32] Mr. Sztronga asserted that the Ducati and the Honda could not be distinguished one from the other “to the untrained eye”. This is opinion and not reliable. In any event, P.C. Proulx offered a credible basis for his ability to make the distinction, given his experience as a highway patrol officer and his interaction with the Toronto Police motorcycle show or performance unit. The Court finds it to be reasonable and credible that a police officer with traffic services highway patrol unit would develop knowledge that would permit him or her to make distinctions amongst vehicles, makes and models.

[33] In this respect, P.C. Proulx was unambiguous in his evidence, both in his testimony in chief, under cross-examination, and in his notes that the distinctive red Ducati ‘popped a wheelie’.

[34] The officer’s testimony that the motorcycles, when he observed them and when the ‘wheelie’ was performed were in lane 2, the centre lane, was contradicted by Mr. Sztronga’s testimony that the motorcycles were in lane 1, the left-most lane, “the whole time” until after the police vehicle’s emergency lights were spotted and Mr. Sztronga alerted the other motorcyclist and they moved into the centre lane. Given the Court’s difficulty with Mr. Sztronga’s testimony on other issues, it would be hesitant to make a finding of fact that the motorcycles were in lane 1 the whole time. However, even if it were so found, the question then would be, would such a finding call into question P.C. Proulx’s observations on the more essential elements pointing to an offence, that is, the ‘popping of a wheelie’ and the machine that performed that manoeuvre? The question of which lane the motorcycles were in is not in itself an essential element of the alleged offence. Could P.C. Proulx have been in error? Possibly. But it would not have been particularly significant. And again, P.C. Proulx’s testimony in this respect was particularly clearly, confidently and consistently presented; that he was immediately to the right of the tractor unit in lane 3 and the motorcycles were approximately 100 metres in front in lane 2, to his left. The Court finds that any possible error on P.C. Proulx’s part on this detail does not detract from his testimony on the other key aspects of the incident.

[35] For the reasons outlined above, I do not believe that P.C. Proulx could not nor did not observe what he clearly and confidently stated he did observe, that is, the front wheel of the Ducati, which he followed and determined was being operated by Mr. Sztronga, lifting off the road surface as described. I conclude that he did in fact observe that event. By the same token, I conclude that Mr. Sztronga’s assertion that this did not occur is false.

The Offence

[36] The Court has concluded that it does not believe Mr. Sztronga's evidence regarding who performed the 'wheelie', neither was the Court left in any doubt, reasonable or otherwise, as a result of the defendant's testimony. Nevertheless, it remains the obligation of the Prosecution to prove the offence beyond a reasonable doubt. This proof must include establishing that the conduct that the Court has found to have occurred, that is the lifting of the wheel of Mr. Sztronga's motorcycle from the surface of the road, constitutes an offence.

[37] For the purposes of this trial, the prohibition of concern is that of stunt driving as defined by para.3.1 of Ont. Reg. 455/07:

Driving a motor vehicle in a manner that indicates an intention to lift some or all of its tires from the surface of the highway, including driving a motorcycle with only one wheel in contact with the ground, but not including the use of lift axles on commercial motor vehicles.

[38] No argument was offered by either party as to the proper classification of this offence, whether absolute or strict liability or mens rea. The Court considers the implication of the Court of Appeal decision in *R. v. Raham*, 2010 ONCA 206, to be that the stunt driving offences are to be considered strict liability. As the Court of Appeal noted with respect to s. 172 of the Highway Traffic Act:

The Highway Traffic Act is public welfare legislation designed to protect those who use the roads of the province. The Act, and in particular Part X, "Rules of the Road", creates a wide variety of offences, including the offence in s. 172. Those offences, taken together, are designed to regulate and control conduct on the roads. The offences are properly regarded as public welfare offences: see R. v. Kanda (2008), 88 O.R. (3d) 732 (C.A.); R. v. Kurtzman (1991), 4 O.R. (3d) 417 (C.A.). On the authority of Sault Ste. Marie, these offences, including s. 172, are prima facie strict liability offences.

[39] The words of concern in the pertinent definition are "... a manner that indicates an intention..." The question is, must the Prosecution prove intentionality? This Court considers that the classification of the offence as one of strict liability does not require that the Prosecution prove intentionality but rather that it establish the most probable, reasonable inference to be drawn from the manner in which the proven conduct was performed was that it was intentional. It would be available to the defence to establish a due diligence defence or that one of the enumerated exceptions applied.

[40] In this case, there was neither a due diligence defence nor an exceptions argument put forth. It was the defence's straightforward contention that the alleged conduct was not performed by the accused. The Court has found otherwise.

[41] Having found as fact that the conduct did occur and that it was committed by the accused, it remains for the Court then to determine whether the most probable, reasonable inference to be drawn from the manner in which the proven conduct was

performed was that it was intentional.

[42] This is an experienced motorcyclist operating a Ducati motorcycle that he values at \$30,000 on a 400-series roadway at a speed in the range of 120 kilometres an hour. Mr. Sztronga acknowledged that ‘wheelies’ were on his mind. He understood what they were and found them to be “cool”. There were no road or traffic conditions requiring him to suddenly and rapidly accelerate or to decelerate followed by rapid acceleration. That such driving conduct might have been inadvertent is, in the circumstances of the time of day, the conditions of the road and the volume of traffic, and given Mr. Sztronga’s self-described motorcycle riding experience, highly improbable. Accordingly, the inference that this Court considers the most reasonable inference to be drawn from the proven conduct is that it was done intentionally.

[43] In conclusion and in summation, the Court finds for the reasons stated that the motorcycle being operated by Mr. Sztronga at approximately 7:15 p.m. on May 5th, 2008 on the westbound lanes of Highway 401 in the City of Toronto was driven with only one wheel in contact with the ground and the manner of the driving indicated an intention to lift the front tire from the surface of the highway.

[44] For that reason Mr. Sztronga is guilty of the offence of stunt driving contrary to s. 172 of the Highway Traffic Act.

[45] At this point, the Court will consider submissions with respect to penalty.

Delivered: April 27th, 2010

Signed: Justice Of the Peace M. H. Conacher