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R. v. Vandale (B.C. Co. Ct.)

Between
Her Majesty the Queen, Respondent, and
Bruce Hayward Vandale, Appellant

[1989] B.C.J. No. 2352

22 M.V.R. (2d) 288

9 W.C.B. (2d) 25

Chilliwack Registry No. 20738

British Columbia County Court
Chilliwack, British Columbia

Selbie Co. Ct. J.

Heard: November 6, 1989
Judgment: November 29, 1989

Criminal law -- Driving without due care and attention -- Driving without reasonable consideration for other persons using the highway -- Distinction.

Appeal from conviction. The appellant was charged with and convicted of driving without due care and attention. The trial judge based his decision on the physical state of the vehicle with no reference to the actual manner of the appellant's driving. The appellant appealed, alleging that the evidence and reasoning stated did not support the charge for which he was convicted.

HELD: Appeal allowed. Acquittal entered. A conviction for "driving without due care and attention" as distinct from "driving without reasonable consideration for other persons using the highway" could not stand in the circumstances of this case.

STATUTES, REGULATIONS AND RULES CITED:

Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 149(1).

Counsel for the Crown/Respondent: J. Gibson.
Counsel for the Appellant: F. Jensen.

SELBIE CO. CT. J. :-- The appellant was convicted under s. 149(1)(a) of the Motor Vehicle Act -

driving "without due care and attention."

The first ground of appeal is that:

"His Honour erred in his interpretation of the law and in particular failed to distinguish between Section 149(a) 149(b) and 149(c) of the Motor Vehicle Act."

This issue should be addressed first. Does Section 149 create one offence which might be committed in different ways as argued by the Crown or does it create three separate offences as argued by the appellant? The section, as amended in 1987, reads as follows:

"149. (1) A person shall not drive a motor vehicle on a highway

(a) without due care and attention;

(b) without reasonable consideration for other persons using the highways;

(c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions."

In the case of *Archer v. The Queen* (1955), 20 C.R. 181, Chief Justice Kerwin of the Supreme Court of Canada, on an appeal from the Ontario Court of Appeal involving the same question, said at p. 183:

"Opinions have differed in the Courts below, but upon consideration I am of the opinion that two offences are created by s. 29(1) of the Highway Traffic Act, as was decided by the Court of Criminal Appeal, upon a similar enactment, in *Rex v. Surrey Justices*, [1932] 1 K.B. 450, one of which is driving without due care and attention and the second of which is driving without reasonable consideration for other persons using the highway."

Mr. Justice Kellock at p. 184 cited with approval a passage in the case of the *Surrey Justices* (supra) where Avery J. said:

"On consideration of this section, however, I have come to the conclusion that it contemplates two separate offences: (1) driving without due care and attention, and (2) driving without reasonable consideration for other persons using the road. It is not necessary to give illustrations of how a man may be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons, but, if a person may do one without the other, it follows as a matter of law that an information which charges him in the alternative is bad."

Mr. Justice Locke at p. 191 said:

"To drive 'without due care and attention' is an offence under the section subjecting a person guilty of such conduct to the prescribed penalty: to drive 'without reasonable consideration for other persons using the highway' is a distinct offence punishable in like manner. If a person were to be convicted for the first of these offences and be later prosecuted for the second, in respect of the same act would a plea of autrefois convict be a defence. The answer to that question is, in my opinion, in the negative."

This case was not argued by counsel before myself and does not appear to have been cited to the

learned Provincial Court Judge. That perhaps accounts for the fact that the point was argued at all. The law is clear. The section consists of two offences (now, in B.C., three).

It follows then, that if they are different offences, they must be distinguishable.

Anticipating success on this argument the appellant then went on to argue that the accused has been charged under the wrong subsection - that if he is guilty of anything it would be of an offence under subsection (b) not (a) - that he was charged under the wrong subsection. To determine that, and thus to distinguish the two sub-sections, it is necessary to consider the case itself.

The learned Provincial Court Judge said at p. 2 of his reasons:

"I am asked to decide whether or not the Defendant was negligent within the meaning of R. v. Jacobsen (1965) 44 C.R. 24. In my view this would include considering not only the manner of actual driving but also the care of and attention to the vehicle prior to the accident I do not agree with the position of the defence that the negligence to be considered under Section 149(b) of the Motor Vehicle Act is a different consideration than negligence under Section 149(a) of the Motor Vehicle Act. It was his submission that Subsection (a) refers only to the actual driving - the manner in which the vehicle was being driven."

With the greatest respect it is my opinion that, taking into account that there are two separate offences, this is indeed one of the distinctions, although not necessarily the only one, between driving "without due care and attention" and driving "without reasonable consideration for other persons using the highway" - the wording of the first connotes the actual manner of driving (which may also include a consideration of the known mechanical condition of the vehicle) while the second does not necessarily do so. It connotes a duty to take care of and pay attention to the condition of the vehicle prior to, and perhaps during, the driving. In my opinion a conviction under subsection (b) can stand on a failure to comply with that duty quite aside from the manner of driving.

Inadvertent negligence in the driving of a motor vehicle is sufficient to found a conviction for driving without due care and attention (Regina v. Jacobsen (1965), 44 C.R. 24). Even intentionally bad driving has been held to be inadvertent negligence within the meaning of Jacobsen (R. v. Weedon, [1987] B.C.J. No. 2611, [1988] BCD Crim. Conv. 5768-01, a judgment of Hutchison, C.C.J.). Those cases cited to me where the offence of driving without due care and attention was at issue all involve actions relating to the manner of driving.

On the other hand, the case of R. v. McDorman (1983), 23 M.V.R. 165, a decision of Shupe, Prov. Ct. J., was a charge of driving "without reasonable consideration for other persons using the highway", Section 149(b). It was decided on the basis of the condition of the vehicle. The Crown conceded that the charge was not based on bad driving conduct, but rather on the cumulative effect of several factors - lack of sleep, failing to attend to an air leak, failure to adjust slack-adjusters and missing truck route signs. The Court said, at p. 171:

"... it is the defendant's conduct as a whole which must be examined and when that is done that conduct displays that degree of carelessness which is the gravamen of this offence and the defendant is, accordingly, found guilty of the offence of careless driving contrary to s. 149(b) of the Motor Vehicle Act."

On appeal (Reging v. McDorman (1984) 27 M.V.R. 37) Robinson, C.C.J., in dismissing the appeal said at p. 45:

"Considered, in the context of the words, 'without reasonable consideration', there must be an onus on every vehicle owner to adhere to a reasonable standard for his own safety, the safety of his own vehicle and the safety of others using the highway."

These cases, in my view, illustrate what I have considered to be the main difference, without saying there are no others, between subsection (a) and (b). Subsection (a), driving without due care and attention, requires inadvertent negligence in the driving itself. Subsection (b), driving without reasonable consideration for other persons using the highway, does not necessarily require any fault in the actual driving and any negligence would lie in the degree of unroadworthiness of the car when taken on to the road. Taking the point to its ultimate end it is conceivable that a person found driving a car in a dangerous state of disrepair may be, if he was aware of its unsafe condition or should have been so aware, convicted under subsection (b) of section 149 without any evidence of bad driving. But he could not, in my view, be convicted under subsection (a).

The question then in the instant case is whether the learned Provincial Court Judge found the appellant had been driving without due care and attention in whole or in part on the basis of his actual driving or solely on the basis of the condition of the vehicle. The court referred to water in the brake system, an audible air leak in the system, problems with the windshield wiper, maladjusted brakes, a loose tie rod, a flat inner tire, a leaky exhaust and other mechanical problems some, if not most, of which were not the cause of the accident. It was the Court's view that the vehicle should not have been on the road. At page 6 of his reasons the Court said:

"None of these faults was caused by the accident. All of them collectively, in my view, made the vehicle mechanically unsafe to be operated on a public highway."

and at page 7:

"Because of the brake deficiency, the flat tire and the absence of a current inspection certificate, Mr. Holtby (a Motor Vehicle Inspector) would have ruled this truck out of service on the spot. I take it that he would have required the other faults to be remedied without delay."

The Court then convicted the appellant of driving "without due care and attention". Nowhere does the Court criticize, or base its decision on, the actual manner of driving of the appellant. It is obvious that it was the condition of the vehicle and not the driving that lead to the conviction. I have come to the conclusion that a conviction for driving "without due care and attention", as distinct from driving 'without reasonable consideration for other persons using the highway' cannot stand in those circumstances. The appeal is allowed and an acquittal entered.

SELBIE CO. CT. J.