

REGINA v. VERMA

Alberta Court of Queen's Bench,
Purvis J.

Judgment—December 19, 1980.

Dangerous driving — Fail to remain — Public mischief — Whether conduct in falling asleep at wheel, failing to remain but leaving vehicle and lying to police about cause of accident supports convictions — Criminal Code, ss. 128, 233(2), (4).

The appellant had been convicted of dangerous driving, failing to remain and making a false statement to a police officer with intent to divert suspicion from himself.

The appellant was driving a van in the slow traffic lane behind a semi-trailer truck. He commenced to weave from shoulder to roadway, ultimately landing in the shoulder where his vehicle slammed into a vehicle and persons who were refuelling their vehicle which had run out of gas. It is clear that the appellant had fallen asleep. He spoke to the owner of the damaged vehicle without giving his name or address. He looked confused. The appellant left his vehicle at the scene but went away. He eventually returned to the scene. After the police had more or less completed their investigation, the appellant was interviewed and gave a false explanation of the accident.

Held—The appeals were allowed in part.

It is clear the accident was caused by the appellant falling asleep without advance warning. To sustain a conviction, it is necessary to find some indication of actual or constructive warning of the fatigue experienced by the driver. There is no such evidence, and the conviction for dangerous driving must be quashed.

Insofar as the charge of failing to remain is concerned, the appellant did not give his name and address nor was his explanation that he was going for help accepted by the trial Judge. Although it is difficult to appreciate how one could avoid civil or criminal liability when the appellant struck up a conversation with the owner of the damaged vehicle and left his vehicle at the scene, the appellate court was not prepared to substitute its opinion for the trier of facts.

To sustain a conviction under s. 128, it is necessary for the Crown to prove that the statement caused the police officer to enter upon an investigation. Here, the investigation had already been carried out. Accordingly, a conviction for attempt was substituted.

Cases considered

- Goodfellow v. R.* (1964), 44 C.R. 113 (Que. C.A.) — followed.
Kerr v. Cummings, [1953] 1 S.C.R. 147, [1953] 2 D.L.R. 1 — considered.
Konowalchuk v. Korpasho (1954), 14 W.W.R. 385, reversed 15 W.W.R. 635 (Man. C.A.) — considered.
R. v. Beaudry (1951), 13 C.R. 420, 4 W.W.R. 283, 102 C.C.C. 70 (Sask. C.A.) — followed.
R. v. Northam, 64 W.W.R. 357, 4 C.R.N.S. 26, [1968] 4 C.C.C. 321 — followed.
R. v. Steere, 19 C.R.N.S. 115, [1972] 4 W.W.R. 129, 6 C.C.C. (2d) 403 (B.C. C.A.) — referred to.

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Statutes considered

Criminal Code, R.S.C. 1970, c. C-34, ss. 24, 128, 233(2), (4), 587.

Canadian Abridgment (2nd) Classification
Criminal Law, VI, 10, b, i; VI, 10, c.

APPEAL against convictions for dangerous driving, failing to remain and public mischief.

A. Robert Anderson, for appellant.

E. Orest Yereniuk, for the Crown.

(No. 8012-00020A)

December 19, 1980. PURVIS J.:—The accused appeared before his Honour J. Campbell, Provincial Judge, at Leduc, Alberta on the 3rd day of March 1980 on an information containing three counts, namely that Devinder Kumar Verma did:

"(1) on or about the 31st day of July, A.D. 1979 at or near Nisku in the Province of Alberta, being the driver of a motor vehicle to wit: a Yellow Cab van that was involved in an accident with a motor vehicle in charge of David Hanson near Nisku, Alberta with intent to escape civil or criminal liability did fail to stop his motor vehicle and give his name and address and offer assistance to Harold Saunders, an injured party contrary to Section 233(2) of the Criminal Code;

(2) on or about the 1st day of August, A.D. 1979 at or near Nisku in the Province of Alberta, by making a false statement to the said Cst. Tucker with intent to divert suspicion from himself contrary to Section 128 of the Criminal Code;

(3) on or about the 31st day of July, A.D. 1979 at or near Nisku in the Province of Alberta, did unlawfully drive a motor vehicle on a highway in a manner dangerous to the public contrary to Section 233(4) of the Criminal Code."

The charges arose out of an automobile accident which occurred on Highway No. 2, on the southbound portion, south of the city of Edmonton, near the westerly turn-off to the International Airport. The accused, a Yellow Cab driver, was driving a Yellow Cab van south from the city of Edmonton bound for the International Airport for the purpose of picking up an air crew and transporting it to accommodation in Edmonton. He was driving his van in the most westerly lane, which is usually reserved for

avoiding civil or criminal liability. However, I am not prepared to substitute my opinion for that of the learned trial Judge on this issue. In the case of *R. v. Steere*, 19 C.R.N.S. 115, [1972] 4 W.W.R. 129, 6 C.C.C. (2d) 403, the British Columbia Court of Appeal agreed with the finding of guilt, where the accused stopped his automobile, left it standing where it had stopped, and disappeared from the site of the accident. There is considerable similarity between the facts in that case and the case at Bar.

In view of the foregoing, I dismiss the appeal insofar as it relates to the finding of guilt on count number one.

Count Number Two

"On or about the 1st day of August, A.D. 1979 at or near Nisku in the Province of Alberta, by making a false statement to the said Cst. Tucker with intent to divert suspicion from himself contrary to Section 128 of the Criminal Code;"

The statement of the accused, which was properly admitted into evidence after a voir dire, discloses that the accused did in fact make a false statement concerning the manner in which the accident took place. He told the policeman that two automobiles were racing on the shoulder and struck his van. This statement is patently false.

In order to sustain a conviction under s. 128, it is also necessary for the Crown to prove that the statement caused the peace officer to enter upon an investigation. In this particular case, the investigation had already been carried out by the peace officer, and consequently he could not have been influenced to commence the investigation by the false statement.

However, his statement to the peace officer was clearly an attempt to divert suspicion from himself and it was evidently his intention to achieve this by directing the policeman's investigation in a way that would benefit him.

I allow the appeal insofar as the accused was found guilty under count number two, but considering the provisions of s. 24 and s. 587 of the Criminal Code, I find the accused guilty of an attempt to commit the offence alleged in count number two, and impose a fine of \$50 and in default a period of five days in custody.

Count Number Three

"On or about the 31st day of July, A.D. 1979 at or near Nisku in the Province of Alberta, did unlawfully drive a motor

vehicle on a highway in a manner dangerous to the public contrary to Section 233(4) of the Criminal Code."

The evidence called against the accused in connection with this charge all related to erratic driving of the accused for a short period of time prior to the accident.

The witness, David Allan Hanson, states that he observed the van being driven by the accused swerve onto the shoulder a couple of times "and come straight at us". He states that the van pulled from behind the truck and started driving down the shoulder.

The witness Lynn Kriger who was driving the car following the van driven by the accused, also gives evidence along the same vein. She states that after she got behind the accused, she noticed the van swerve over to the shoulder several times, and move erratically. She says it finally stayed in the left lane and hit the two cars.

There is no evidence by either of these witnesses or any other as to the length of the distance covered by the van after it commenced to drive erratically.

The evidence of the accused is to the effect that he works from 5:30 in the morning until midnight, and that he usually rests from 12:00 to 3:00 p.m. but on the day in question, he was unable to rest because he had to wash his van. However, he stated that he did go home during the day, but did not indicate for how long.

He also stated that he is accustomed to working these long hours and his evidence indicates that he did not know he was tired.

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"Q: But you didn't report in to them on that trip out to the airport that you didn't want to go, did you?

A: Because I didn't know that I was so much tired."

It is clear that the accident was caused by the accused falling asleep at the wheel while it was in motion on the highway. While there can be little doubt that he is responsible civilly for the damage caused, the question in this case is whether or not the degree of negligence exhibited by his actions is sufficiently great to establish the offence of dangerous driving under the Criminal Code of Canada.

It is said that for guilt to exist there must be, for want of a better description, some degree of criminal misconduct such as may be regarded as a crime against the state and meriting punishment (*R. v. Beaudry* (1951), 13 C.R. 420 at 424, 4 W.W.R. 283, 102 C.C.C. 70 (Sask. C.A.)). It has also been stated that the element which raises

civil liability to criminal is the deliberate incurring of risks that render almost inevitable the consequences contemplated by the Code (*Goodfellow v. R.* (1964), 44 C.R. 113 at 113 and 114 (Que. C.A.)).

In *R. v. Northam*, 64 W.W.R. 357, 4 C.R.N.S. 26 at 36, [1968] 4 C.C.C. 321 (Alta. C.A.), it is stated that the negligence must be more than mere inadvertence or mere thoughtlessness — they imply a knowledge or wilful disregard of the probable consequences or deliberate failure to take reasonable precautions.

In the case *Konowalchuk v. Korpasho* (1954), 14 W.W.R. 385 [reversed 15 W.W.R. 635 (Man. C.A.)], the driver of a vehicle twice stopped his car prior to the accident on becoming sleepy, in order to refresh himself, and he then drove on. It was on the third occasion that drowsiness overcame him suddenly and the accident occurred. It was held that although he may have been negligent in doing what he did, he was not reckless in the sense that he lacked caution and did not care about the consequences: he was not guilty of gross negligence; although gross negligence case need not be proved conclusively as if it were a prosecution for criminal negligence.

In the case *Kerr v. Cummings*, [1953] 1 S.C.R. 147, [1953] 2 D.L.R. 1, the Supreme Court of Canada dealt with the same question. In that case, the defendant had no sleep the night before the accident. He started from Nanaimo, British Columbia at 7:00 a.m. on a November day and fell asleep at the wheel. Tire marks on the left shoulder of the road showed that the automobile proceeded 66 feet on the left shoulder of the road before running into a concrete abutment.

It was held that it is not necessary that such gross negligence be proven conclusively, as if there were a prosecution for a criminal offence. The circumstances described in that case were held not to be gross negligence and the civil action was dismissed.

It is my view that, in order to sustain a conviction for dangerous driving in the circumstances described in the evidence of the case before me, it is necessary to find in that evidence some indication of actual or constructive warning of the fatigue experienced by the driver. I do not find the evidence which establishes this constructive or actual warning, nor any evidence from which the warning may be properly inferred.

On the contrary, the evidence of the accused himself was that he did not know that he was tired.

The actions of the accused after the accident were foolish in the extreme and he has been properly punished for his lack of good

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slower traffic, behind a semi-trailer truck and vehicle driven by one of the witnesses to the

The driving conditions were good and sometime between 9:30 p.m. and 10:30 p.m. 1979. The evidence indicates that the light "dusk", about 75 per cent of the visibility of the day. There is no evidence of speed weather or highway conditions.

Near the turn-off to the International Airport, parked on the shoulder of the road behind which had run out of gas. Two men were involved in the gas tank of the truck.

The evidence indicates that the accused Cab van commenced to drive in an erratic fashion onto the highway and back again onto the shoulder and continued his flight until he collided with both the white car and the truck on the shoulder of the highway.

One of the persons engaged in supplying gas to the truck was injured and lay unconscious in the cab.

The accused parked his van about 20 feet from the highway, which was still on the shoulder, and came back to the owner of the truck, Mr. David Allan Hanson. His name and address, an seemed somewhat confused.

A short time later, Hanson noticed that the van was still on the scene, although his damaged van was still where it was.

In due course the injured man was removed to Hospital in an ambulance, the police attended the accident and prepared their reports, and the van was towed away.

The accused testified that he hitch-hiked to the Airport for the purpose of reporting the accident to the Yellow Cab supervisor and was referred to the Riviera Hotel back in Edmonton. It appears that he went back to the Riviera Hotel and after that, attended the accident and eventually at the Royal Canadian Mounted Police Detachment in Leduc, where he purported to make a statement about the accident.

The evidence indicates that the accused was appointed as counsel on March 3rd, 1980 for the purpose of representing him. The learned trial Judge noted that