

Cite as: R. v. Osborne, 1992 NSCO 49

CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF ANTIGONISH

C. AT. No. 2843

IN THE COUNTY COURT FOR DISTRICT NUMBER SIX

BETWEEN:

PAUL VINCENT OSBORNE

Appellant

--and--

HER MAJESTY THE QUEEN

Respondent

Paul Vincent Osborne, represented himself.
Ronald J. MacDonald, Esq., Solicitor for the Respondent

1992: October 15, MacLellan, J.C.C.:

This is an Appeal by Paul Vincent Osborne from a conviction entered against him on the 13th day of December, 1991, in Provincial Court in Antigonish by Judge John Embree.

The Appellant was charged that he did:-

"On or about the 10th day of January, 1991, at or near Pomquet, in the County of Antigonish, Province of Nova Scotia, did unlawfully commit

the offence of operating a vehicle at excessive speed for existing conditions contrary to Section 101 of the Motor Vehicle Act."

By Notice of Appeal, dated the 6th day of January, 1992, the Appellant asked that the conviction be overturned and an acquittal entered on the grounds that the Trial Judge erred in a point of law.

This matter was heard on the 22nd day of September, 1992, following the filing of briefs by both the Appellant and the Respondent and decision was reserved.

The evidence presented at trial disclosed that the Appellant was driving a five ton truck proceeding east from Dartmouth to Sydney and was involved in an accident at Taylor's Road, outside of Antigonish, on highway 104. The other vehicle was driven by Carl Michael Hardigan and his vehicle was struck from behind by the truck driven by the Appellant. His car received extensive damage and was forced off the highway and his son, a passenger in the vehicle, was injured.

Mr. Hardigan testified that he was travelling east from Antigonish to Port Hawkesbury on highway 104 and that the accident occurred somewhere around 7:15 a.m. He described the driving conditions as dark and snowing. He said he was going about 60 to 70 kilometers per hour and that he could not see the markings on the pavement because of the snow. He said that he saw the Appellant's truck coming up behind him and realized that he was going to be struck from behind. He said he didn't shift lanes prior to the collision and was driving in a cautious manner.

Two police officers testified that they came on the accident scene around 8 p.m. after travelling from Antigonish. Constable Seewald indicated that there was several inches of snow on the road and he had difficulty driving. He said that he found the Appellant's truck on the side of the road and Mr. Hardigan's car in the ditch on the right-hand side of the highway heading east. He took a statement from the Appellant in which he indicated that he had been the driver of the truck. He did not advise the Appellant at that time he would be charged. Mr. Hardigan and his wife and son were not on the scene when the police arrived because they had left by ambulance. Constable Seewald later talked to Mr. Hardigan about the accident.

Constable Briggs, the other officer on the scene, arrived with Constable Seewald and took photographs of the vehicles at the scene. He described the conditions as being very bad and that the roads were slushy. He said it was raining when they left Antigonish.

The Appellant testified that he was a longtime truck driver with a good record. He said he left Dartmouth early that morning and that he first ran into snow in the New Glasgow area. He said he was proceeding east outside of Antigonish at Lower South River when he came up behind the car driven by Mr. Hardigan. He said that vehicle was going very slow. He estimated the speed to be 20 kilometers per hour. He said that there were three lanes of traffic in that area and that Mr. Hardigan was in the right-hand lane. Going east at that point there also was a passing lane and one lane of traffic proceeding

west.

The Appellant said that he could see the markings on the highway and that he was going about 70 kilometers per hour when he came up behind the Hardigan vehicle. He said at that point he moved into the passing lane and just as he came up to the vehicle, the Hardigan vehicle started to move to the left also. He said that when this happened he had first considered moving further left to continue the passing maneuver but saw an oncoming vehicle and therefore he slowed down and moved back to the right. He said that at that point the Hardigan vehicle also moved to the right and started to brake. He said he reacted by hitting his brakes hard, but could not stop and struck the Hardigan vehicle on the rear end pushing it off the highway. He was able to stop his vehicle and offered assistance to the occupants of the Hardigan vehicle. An ambulance arrived on the scene and took the Hardigan family to the hospital. The Appellant waited for the police to arrive and he explained what happened to Constable Seewald.

The Appellant's position was that the accident was caused by the actions of Mr. Hardigan in moving to the left out of the slow lane and then moving back to the right and applying his brakes. He felt he was in complete control of his truck and was driving within the speed limit.

Evidence from the police officers indicated that the speed limit in the area of the accident was either 90 or 100 kilometers per hour.

The Trial Judge found that he did not believe the

version of events as described by the Appellant. He found that he believed Mr. Hardigan about his speed and rejected the Appellant's evidence that the Hardigan vehicle was only travelling at 20 kilometers per hour. He also found that based on the pictures of the Hardigan vehicle, that the Appellant must have been going faster than he said because of the amount of damage to the car.

The Trial Judge found that conditions were bad and that this called for a great deal of care by anyone using the highway at that time. He therefore found that the Appellant was driving at an excessive rate of speed for the existing conditions and found him guilty.

On the Appeal, the Appellant complained about a number of rulings made by the Trial Judge during the trial. He alleged that he had not been given his rights prior to giving a statement to Constable Seewald and that Constable Seewald had discussed his evidence with Constable Briggs after being told by the Judge not to do so.

During the trial, a voir dire was held to determine the admissibility of the statement given by the Appellant. The Trial Judge ruled that the statement was given voluntarily and that there was no Charter violation. I find that the Trial Judge's ruling on that issue was proper.

On the issue of the conversation between the police officers, the Trial Judge was asked to declare a mistrial but refused because he found that while there was some conversation between the officers it was not about the evidence to be presented at the trial and therefore had no effect on the evidence of Constable Briggs. I find

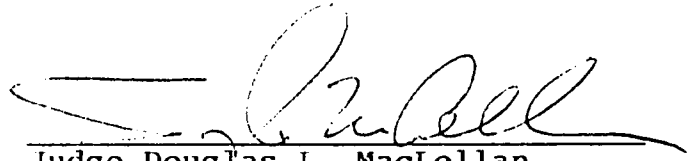
that this ruling was also proper in the circumstances. It should be noted that the evidence of the police officers did to some extent differ on what they saw when they arrived at the accident and therefore it would appear that they were not attempting to make sure that their evidence on all points was identical. The main issue in the trial was how the accident actually happened and the police evidence went only to the road conditions when they arrived on the scene.

The Crown take the position that the Trial Judge's decision was reasonable based on the evidence before him and that it was proper for him to decide which witness he believed. The standard for an Appeal Court has been set out in the Supreme Court of Canada in *R v. Yebes*, (1987) 36 C.C.C. (3d) 417, wherein the Court held that an Appeal Court must determine whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. To apply that test the Court should re-examine, and to some extent, re-weigh and consider the effect of the evidence.

Applying that test to this case, I find that the evidence presented at trial supported the finding made by the Trial Judge and that it was reasonable for him to find that he favoured the evidence of Mr. Hardigan over that of the Appellant. I am not prepared to overturn that finding of credibility. I also find that by accepting the evidence of Mr. Hardigan it was reasonable to conclude, as he did, that the accident was caused by the excessive speed of the Appellant's vehicle. This along with the evidence of the bad road conditions could reasonably lead

to a conclusion that the Appellant was travelling at an excessive rate of speed based on the conditions existing at the time.

I would therefore dismiss the appeal and confirm the conviction and sentence imposed by the Trial Judge.

A handwritten signature in cursive script, appearing to read "D. MacLellan", written over a horizontal line.

Judge Douglas L. MacLellan
County Court Judge
District Number Six