PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Burke*, 2014 NSPC 16

Date: 2014-04-10
Docket: 2562244
Registry: Amherst

Between:

Her Majesty the Queen

v.

Cale P. Burke

DECISION

Judge: The Honourable Judge Paul B. Scovil

Heard: February 20, 2014, in Amherst, Nova Scotia

Decision: April 10, 2014

Charge: That he, on or about the 15th day of December, 2012 at or near Shinimicas (6 Hwy), Cumberland County, Nova Scotia, did unlawfully commit the offence of failing to drive or operate a motor vehicle in a careful and prudent manner contrary to Section 100(2) of the Motor Vehicle Act.

Counsel: Bruce Baxter, for the Crown
Jim O'Neil, for the Defence

By the Court:

[1] It is a favourite pastime of almost all Canadian drivers to complain about the driving exhibited by all other Canadian drivers. While we may opine that such drivers, other than ourselves, operate their vehicles in a manner that is less than careful or prudent, the question in this matter centres on what is considered in law to be careful and prudent in relation to a charge under Section 100(2) of the **Motor Vehicle Act of Nova Scotia**.

FACTS

[2] On December 15, 2012, Amherst RCMP had received a complaint of a vehicle involved in a hit-and-run collision somewhere in Cumberland County, Nova Scotia. A description had been provided of the vehicle and officers in the area were on the look-out to determine if they could locate and stop the vehicle that was the subject of the complaint. I should note at the outset that the vehicle which was being searched for was not the vehicle of the Accused.

[3] Constable Mandy Edwards of the RCMP received information shortly after 2:00 p.m. on December 15, 2012 that the vehicle believed to have been involved in the hit-and-run had been located. She was advised by Constable Terence Brown, also of the RCMP, that he had the vehicle stopped in the Shinimicas area of Colchester County, Nova Scotia. When she arrived on scene, she testified that Constable Brown had the vehicle stopped off the road and on the shoulder area. She described the road as being one lane going in both directions and on a straight stretch of highway. The vehicle in question had it's front end damaged and parked behind it was Constable Brown's police cruiser which had it's emergency equipment activated at the time. These vehicles were parked facing westbound. Constable Edwards parked her vehicle behind the police vehicle of Constable Brown. Constable Edward's vehicle was a Tahoe SUV. At the front was a tow truck which had been called by the police. It as well had it's emergency lights activated. Any eastbound vehicle would therefore come across the tow truck followed by the damaged vehicle, Constable Brown's police cruiser and finally Constable Edwards' SUV. All with the exception of the damaged vehicle had their emergency lights flashing and were parked off the road on the shoulder of the Highway.

[4] Constable Edwards testified the speed limit on that stretch of road was 90 kilometres per hour. She further testified that there were speed signs in the area setting out the speed limit. She stated that she was speaking to occupants of the damaged vehicle when she heard another vehicle coming towards her at what she felt was a high rate of speed and in the eastbound direction. She looked up and noticed a yellow Jeep coming towards them. She stepped out to motion for that vehicle to slow down and noted that at that point the yellow Jeep was approximately 50 yards away. The driver of the Jeep began to slow down and in doing so caused his vehicle to slide and skid somewhat. She said that the Accused pulled off to the side of the road and was fishtailing as he did so. She noted that this was a straight stretch of road for over a kilometre and had great visibility at that time.

[5] Constable Edwards walked up to the yellow Jeep and noted that it was the Accused, Mr. Burke, who was driving. She indicated that while this was occurring that there were people on the road. On cross-examination, she testified that any vehicle approaching from Mr. Burke's direction would've encountered the tow truck first and then the vehicle that had been pulled over followed by the two police vehicles. She reiterated on cross-examination that the speed limit in the area was 90 kilometres per hour and denied jumping out in front of Mr. Burke's vehicle. She indicated that when she did step out, Mr. Burke responded right away.

[6] Constable Terence Brown testified and indicated that that at the time of the incident the sun was shining but the roads were still damp. He said that he had let Constable Edwards know that he had the subject vehicle stopped and that he had already called Danny's Towing. He confirmed that the tow truck had it’s emergency lights activated as did his own vehicle. He testified that the area was a two lane Highway with a shoulder of two to three feet in width. The vehicles were not completely off the road, but as he described them “minimally on the road”. Constable Brown testified that the speed limit in the area was 80 kilometres per hour.

[7] Constable Brown testified that he could hear the Accused’s vehicle coming and that the occupants of other vehicles were out on the side of the road. Constable Edwards was just off the side of the road. Constable Brown testified that the tires of the Jeep were very loud and he could see the Jeep coming at what he felt to be a high rate of speed. The Jeep slightly fishtailed and then continued through the scene. The vehicle partially lost control and he heard Constable Edwards yelling at

the vehicle. The Accused pulled over and he saw Constable Edwards speaking to him.

[8] In cross-examination, Constable Brown indicated that possibly the speed zone in the area was 90 kilometres per hour. He testified that on that day he was sitting in his police cruiser in the driver's seat when he saw the Jeep coming. He agreed that the tires on the Jeep were noisey.

[9] The Accused took the stand and testified that his tires were 30 to 33.5 inches in diameter. Mr. Burke introduced a picture of the Jeep in question. It is obvious from the pictures that the tires were quite large and heavily treaded. Mr. Burke indicated that he would have been traveling at approximately 80 kilometres per hour when he came upon the scene and that at most, he was travelling at 90 kilometres per hour. He indicated he saw the tow truck with the lights activated on the right side of the vehicle. He only saw the police vehicles when he got closer. He saw that Constable Edwards stepped out and waved him down which surprised him. As a result, he put his brakes on and he indicated that the car had some movement as it slowed down. He indicated that he had slowed down a little bit, but that he was able to do so without difficulty and pulled his vehicle over. In cross-examination, he indicated that when he saw the emergency lights of the tow truck, he started to slow down immediately and that anybody would. He indicated he slowed down to approximately 70 kilometres per hour at which point he saw Constable Edwards waving at him. He put the brakes on as he was startled. When this occurred, he might have skidded slightly.

LAW

[10] The Accused was charged under Section 100(1) of the **Motor Vehicle Act of Nova Scotia**. That Section states as follows:

> **Duty to drive carefully**
>
> 100 (1) Every person driving or operating a motor vehicle on a highway or any place ordinarily accessible to the public shall drive or operate the same in a careful and prudent manner having regard to all the circumstances.

[11] A review of the law in this area was considered by the Honourable Judge Batiot in **R. v. Creaser** [1994] N. S. J. No. 669 at paragraphs 21 to 26. There he states as follows:

21 The Supreme Court of Canada, in addressing the question as to whether the careless driving offence created by the Highway Traffic Act of Ontario, R.S.O. 1960, c. 172 was an encroachment of the dangerous driving provisions in the Criminal Code, held, in Mann v. The Queen (1966), 2 C.C.C. 273 (S.C.C.) that the Criminal Code deals with advertent negligence and more serious faults in anyone's conduct, whereas the Provincial Legislation deals with inadvertent negligence. It approved the reasoning in Loiselle v. The Queen, 109 C.C.C. 31, where it was held that upon an accident having occurred the questions ought to be; was there any negligence? If so, was the driver negligent to a degree over and above that which would be required to engage his civil responsibility. In all cases - and each must be treated on its own merits - "it must first be found that there was negligence of sufficient gravity to lift the case out of the civil field into that of the Criminal Code".

22 The Ontario Court of Appeal in R. v. Wilson (1970) 1 C.C.C. (2d) 466 said

> "Each case must, of necessity, turn on its own facts. Mere inadvertent negligence, whether of the slightest type or not, will not necessarily sustain a conviction for careless driving. In each instance the Crown must prove beyond a reasonable doubt that the accused either drove his vehicle on the highway without due care and attention, or that he operated it without reasonable consideration for other persons using the highway. One of these two ingredients must be proven to support a conviction under this section."

23 Further in R. v. Beauchamp (1953), 106 C.C.C. 6, at p. 9, it stated, where a defendant had backed his bus into a car parked moments after he exited the garage at 7 a.m. in a small town and backed in the same spot very slowly that he was not careless for the following reasons:

> The offence of careless driving is of a quasi-criminal nature. It is something which goes beyond mere error in judgement. It indicates a measure of indifference, a want of care for the matter in hand and an indifferent regard for the rights of others."

> "The standard of care and skill to be applied has been long established and is not that of perfection." (p. 12)

And

"It must also be born in mind that the test, where an accident has occurred, 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 a 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. The use of the care "due care", which means care owing in the circumstances, makes it quite clear that, while the legal standard of care remains the same in the sense that it is what the average careful man would have done in like circumstances, the factual standard is a constantly shifting one, depending on road, visibility, weather conditions, traffic conditions that exist or may reasonably be expected, and any other conditions that ordinarily prudent drivers would take into consideration. It is a question of fact, depending on the circumstances in each case."(p. 13)

(See also Richard Connolly, Dangerous Operation of a Motor Vehicle: More than Careless, But Less than Criminally Negligent?, 5.3 J.M.V.L. 253)

24 In considering s 100(2), Hall, J.C.C. (as he then was), in R. v. Yorkston (1991)106 N.S.R. (2d) 103, held that

1) The standard of care and prudence that the motorist is obliged to exercise is the same whether the proceeding is of civil or quasi-criminal nature.

2) There is a significant difference in the standard of proof to fix liability. In the former it is on the balance of probabilities or preponderance of evidence and in the latter beyond a reasonable doubt.

3) The failure to take care must be assessed in light of all the circumstances and the fact that there has been an accident does not necessarily establish such lack of care.

4) The conduct of the motorist must be deserving of punishment in assessing that factor, and a crucial aspect is whether there was any intentional risk taking.

25 He said, at p. 108:

"I do not believe that Canadians generally would approve of punishment by way of criminal type sanctions where there has been no moral fault or wrong doing, except in the most exceptional circumstances.

> In this case the appellant was acting in the course of his duties as a police officer. Part of his duty as such was to enforce the provisions of the Motor Vehicle Act. He observed what he believed to be a violation of the Act. In the course of attempting to pursue the violator he made an error of perception. After making a number of checks and satisfying himself that the highway was clear, he failed to see the other vehicle on the highway. In my opinion no fair minded person will say that this was conduct deserving of punishment in the nature of criminal type sanction."
>
> **26** Our Act does not contain the phrase "due care"; it does, however, ask the trier of facts to consider "all the circumstances". The cases I have considered describe facts or expectations a driver ought to keep in mind. I am not aware of a case where an imminent danger to the driver would be one of the "circumstances".
>
> See also R. v. MacKinnon [1998] N. S. J. No. 404 (NS Prov. Ct.), R. v. Schlawitz [2009] NSSC 230

[12] From the above review of the law, we can derive the following in relation to what must be considered before a Court makes a finding that an Accused operated a motor vehicle in a manner that was not careful or prudent under Section 100(1) of the **Motor Vehicle Act**:

1. That the driving must be such as to bring it into inadvertent negligence.
2. That the vehicle was operated without due care and attention, or
3. That the vehicle was operated without reasonable consideration for other persons using the highway.
4. It must go beyond the mere error in judgment indicating a measure of indifference by the Accused or a want of care.
5. That the factual standards shifts depending on the road, visibility, weather conditions, traffic conditions existing or reasonably expected, together with any other conditions an ordinarily prudent driver would take into account.
6. That the requisite elements of the offence must be proven by the Crown and beyond a reasonable doubt.
7. Was there any intentional risk taking such as to be deserving of punishment?

[13] I am also mindful that in this situation "all the circumstances" must include the fact that the Accused was driving past emergency vehicles with their emergency lights activated. In relation to this I have considered the provisions of Section 106 [E] of the **Motor Vehicle Act** which states:

> **Speed limit when passing emergency vehicle**
>
> **106E (1)** No person shall drive a vehicle on a highway past an emergency vehicle, that is stopped on the roadway or a shoulder adjacent to it and exhibiting a flashing light, at a speed in excess of
>
> (a) the speed limit but for this Section; or
>
> (b) sixty kilometres per hour,
>
> whichever is less.

[14] Mr. Burke argues as well that the law as set forward in the case of **R. v. W.(D.)**[1991] 1 S.C.R. 742 must be considered here. The principles of **R. v. W.(D.)** are applicable in cases of strict liability such as this. (See **R. v. Targett** [2011] N. J. No. 80 Nfld. Prov. Ct.) This in essence means that if I accept the testimony of Mr. Burke I must find him not guilty. If his evidence is not accepted by me, but raises a reasonable doubt, again he must be acquitted. Finally if after the whole of the evidence, I'm not satisfied the Crown has proven this case beyond a reasonable doubt, I must acquit. One should always be mindful that where one accepts the evidence of the Defence as it is believed by the Court, the Court must be in a position to say that that evidence is not only believed, but it provides a defence to the charges faced by the Accused.

Analysis

[15] The evidence before this Court is inconclusive as to the rate of speed that Mr. Burke was traveling at in his vehicle. While not an essential element in of itself, the Accused's speed seems to be what brought him to the attention of Constable Edwards. I accept the Accused's evidence that he was going at approximately 80 kilometres per hour when he came upon the scene and at most was doing 90. Further, when he saw the tow trucks he began to slow down to at least 70 kilometres per hour. At that point Constable Edwards stepped out into the

oncoming lane of the Highway which surprised him and caused him to apply brakes leading to a slight skidding of his vehicle.

[16] Constable Edwards undoubtedly believed that the Accused's vehicle was going faster than what she felt it should have due in some part to the large tires that were on the Accused's vehicle which created a higher level of noise. This may have led to the perception by Constable Edwards that the vehicle was going much faster than it was. I also noted that there was no consensus among the witnesses as to what the maximum speed was in the area and that there was no reliable evidence as to what speed the vehicle of the Accused was actually traveling at. I cannot say because of this with any degree of certainty that the Accused, when he reached the first emergency vehicle, was going greater than 60 kilometres per hour. All of the factors including substantial reasonable doubt as to the speed of the vehicle leaves me with a reasonable doubt as to the overall guilt of the Accused. Accordingly, I find him not guilty.

Paul B. Scovil, JPC.