IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Gray, 2005 NSSC 213

Decision Date: 20050608
Docket: SH 230753A
Registry: Halifax

Between:

Sherman Gray

Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	June 8, 2005, in Halifax, Nova Scotia
Oral Decision:	June 8, 2005
Written Decision:	July 18, 2005
Counsel:	Patrick Eagan, for the appellant Chris Nicholson, for the respondent

Robertson, J.: (Orally)

[1] This is an appeal from the conviction of the charge of dangerous driving, pursuant to s. 249(1)(a) of the *Criminal Code* only, and not against sentence, on the grounds set forth as follows:

1) That the learned trial judge committed material error in mistaking, misapplying or misapprehending the evidence in determining that the Appellant's driving amounted to a marked departure from the standard of care that a reasonable person would observe in the Appellant's situation;

2) That the learned trial judge committed material error in mistaking, misapplying or misapprehending the evidence in determining that the Appellant appreciated a significant risk of danger and the risk was intentionally or recklessly undertaken or, alternatively, that the Appellant did not appreciate a significant risk of danger because of recklessness or wilful blindness;

3) That the learned trial judge committed a material error in mistaking, misapplying or misapprehending the evidence in his application of the standard in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, with respect to the evidence as a whole and credibility in light of the findings that the learned trial judge made with respect to the evidence of the complainant;

4) That the learned trial judge committed an error in law in failing to apply the test as set out in *R. v. Hundal*, [1993] 1 S.C.R. 867, with regard to the driving of the Appellant.

THE RELIEF SOUGHT is that the conviction for dangerous driving to set aside and an acquittal entered.

[2] This afternoon counsel highlighted all the findings of fact made and those not made relating to the fact that the judge had some doubt of Mr. Webster's evidence. Generally speaking though, the facts that were found, in my view, were summarized by the respondent and the respondent said:

> The facts as found by the learned trial judge were essentially that the Appellant came up the street and saw a Commissionaire writing a ticket behind his vehicle. He told the Commissionaire that he was either moving or leaving. The Commissionaire said either as soon as I'm finished writing the ticket or as soon as I'm finished and the Commissionaire was about to sign the ticket. The Commissionaire was standing directly behind the vehicle and the Appellant got in the vehicle started it up and backed up towards the Commissionaire. The Commissionaire had moved to one side. The vehicle either brushed or narrowly missed the Commissionaire who was either spun around and struck the vehicle or struck it out of anger and either way bruised his arm. The vehicle took off. The learned trial judge found that the Appellant did not look to see if the Commissionaire was still behind the van knowing he may well have been.

[3] I think that appropriately summarizes it. The standard of review is set out in *R. v. Boyce*, [2004] N.S.J. 493 (N.S.S.C.). MacDonald, A.C.J.S.C. (T.D.) (As he then was) outlined the standard of review in summary conviction appeals. He applied the test at para. 8 as stated by Cromwell J. In *R. v. Nickerson*, [1999] N.S.J. No. 210 (C.A.), which was cited by Oland J.A. in *R. v. Ryan*, [2002] N.S.J. No. 514, 2002 NSCA 153 when she was discussing the standard of review in summary conviction appeals and the quote which is appropriate is:

> Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. Burns*, [1994] 1 S.C.R. 6565 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[4] In *R. v. Binaris*, [2000] 1 S.C.R. 381 the test for an appellate court was confirmed determining whether a judgement is unreasonable or cannot be supported by the evidence was set out in *R. v. Yebes*, [1987] 2 S.C.R. 168 namely: whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered. In *Yebes, supra,* in discussing the function of an appellate court, the Supreme Court of Canada stated:

> The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting, judicially, could reasonable have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence.

[5] The law that relates to the judge's findings of guilt is found in *R. v. W.(D), supra*, Cory J. stated:

> The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses.

[6] This is significant to Judge Chisholm's findings. Clearly he can accept and did, all, some or none of a witness' evidence, in making his finding of facts. He did not accept the appellant's version of events and accepted some but not all of S/Cst. Webster's evidence.

[7] In applying *R. v.W.(D)* Judge Chisholm although he did not use the precise wording of Cory J. , he considered the suggested text and I find that he did so. And of course, the test that is outlined by *W.(D)* is

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by the evidence of the guilt of the accused.

[8] The balance of the law that is relevant in this proceeding would be found in *R. v. Hundal, supra,* and reference was also made to *R. v. MacGillvray.* In *R. v. Hundal, supra,* the objective test is stated as follows:

> It follows then that a trier of fact may convict if satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place. In making the assessment the trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation.

[9] Cory J. also said in *R. v. Hundal, supra*:

> Negligent driving can be thought of as a continuum that progresses, or regresses, from momentary lack of attention giving rise to civil responsibility through careless driving under the provincial *Highway Traffic Act* to dangerous driving under the *Criminal Code.*

[10] The appellant also cites *R.v Wilson*, [2002] 225 Sask R. 90, 34 M.V.R. (4th) 122, in arguing that the appellant's action of backing up his van may have been careless and imprudent but his driving was not so egregious as to constitute a marked departure sufficient to establish dangerous driving.

[11] With respect to the reasonableness of the learned trial judge's findings that the conduct of the appellant reversing the van amounted to a marked or significant departure from the standard of care of a reasonable prudent person, I note that the appellant has raised the issue of the conduct of the S/Cst Webster placing himself

between the van and another parked car and suggested that it was unreasonable and imprudent for him to be there and he should have as any normal pedestrian placed himself out of harms way. However, the judge made findings of fact relating to S/Cst. Webster's position on the street.

[12] He did not accept the appellant's version that the sidewalk and gutter were clear. He did find that S/Cst. Webster was appropriately located behind the van where presumably he was there to record the license plate particulars etc., in the process of given his ticket.

[13] He accepted the Commissionaire's evidence on this point and I accept as well that it was reasonable for S/Cst. Webster to be behind the van as he was.

[14] The learned trial judge stated at p. 67:

> I on the evidence have no doubt that Mr. Gray knew that the Commissionaire had been at the back of the van writing out a ticket and either he checked his mirrors and could see that the Commissionaire was still behind the van when he put the van in reverse, or having known that the Commissionaire was at the back of the van he did not check his mirrors or his rear windows to determine that the commissionaire had left the area.

[15] The learned trial judge continued and said:

> He, having been told that the Commissionaire was intending to remain and finish the ticket, it was not reasonable for him to back up in those circumstances. Putting the van in reverse and backing up where he knew the commissionaire had been and likely still was behind the van, in my view, demonstrates a marked departure from the standard of care expected of any driver. Therefore, I am satisfied beyond a reasonable doubt with respect to count 2 that the accused operated his vehicle in a manner that was dangerous to the public in putting his vehicle in reverse and backing up, knowing that the commissionaire had been and likely still was behind the van without making sufficient checks to ensure that he was not putting the Commissionaire in danger by backing up.

[16] I find it is significant that the appellant did not wait to receive the ticket. It is clear from Judge Chisholm's finding that (1) he knew or likely knew that the commissionaire was behind the van and (2) he chose to leave, without receiving the ticket. He knew or ought to have known the danger of reversing his van under these circumstances.

[17] I can see no reason to upset the learned trial judge's findings on these first two issues. His verdict was not unreasonable and I believe it was supported by the evidence.

[18] With respect to issue #3, the application of *W.(D.)* I also find in my view that the trial judge did apply the appropriate test in making his findings on the whole of the evidence before him.

[19] The trial judge review the evidence in a significant manner. All these findings we have been referring to today are from pages 61-64 of the trial judge's decision. He had great trouble with the applicant's evidence and ultimately rejected it. It is correct that at p. 65 with respect to the commissionaire's evidence he said:

> while I prefer the evidence of the Commissionaire on most points I am not convinced beyond a reasonable doubt that the incident at the back of the van in terms of the alleged contact with the commissionaire and the bump to the vehicle occurred exactly as the Commissionaire stated.

[20] His words in that regard are quoted by both counsel and you will find those on p. 66.

[21] However, I will also say that I do not find that the reasons put forth by the appellant to explain his behaviour i.e. presence of a vehicle in front of the van or that the size of the van affected his capacity for sighting someone behind the van, excuse his conduct. The trial judge made reasonable findings that could be supported by the evidence with respect to the appellant's act of dangerously

reversing when he knew or could reasonably expect S/Cst. Webster to be behind the van.

[22] Also the fact that the trial judge gave the appellant the benefit of doubt respecting the charge of intentional assault does not in my view impact significantly on the reasonableness of the verdict of dangerous driving.

[23] With respect to issue #4 we have already touched on it. The applicant says they might have been careless or imprudent but not dangerous and that the judge's finding was not supported by the facts. I would disagree with that position. I find that the trial judge's decision was reasonable in his consideration of the totality of the evidence before him.

[24] I also find that the trial judge properly applied *R. v. Hundal, supra,* and *R. v. MacGillvray, supra.* The trial judge found that with respect to the mental element that the appellant:

> having known that the Commissionaire was at the back of the van he did not check his mirrors or his rear windows to determine that the commissionaire had left the area. (Transcript at p. 66)

[25] As we have canvassed, he had some doubts about the thump made at the rear of the van but in his decision he certainly found that Mr. Gray knew of the presence of the commissionaire behind his van. He did not believe Mr. Gray. He did not accept Mr. Gray's evidence that he thought the commissionaire had moved on. The decision on this point was certainly consistent with the evidence of Mr. Gray, respecting his knowledge that the thump came from commissionaire who was angry.

[26] I do not think that the trial judge made too much of that point but he along with all of the facts before him assessed Mr. Gray and rejected his evidence. He was not required to accept all of the evidence to S/Cst. Webster. He pursuant to *W.(D.)* had the right to accept some, all or none of the evidence of all of the witnesses. In that respect he properly applied *W.(D.).* He did carefully assess all of the evidence and correctly applied the law.

[27] I cannot find any reason to interfere with his judgement, in light of the obligation on me in reviewing his decision for its reasonableness, pursuant to the standards imposed on me by *R. v. Boyce.*, etc.

[28] I dismiss Mr. Gray’s appeal.

Justice M. Heather Robertson