

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Delaney*, 2009 NSSC 111

Date: 20090325

Docket: Hfx 303424

Registry: Halifax

Between:

Her Majesty The Queen

Respondent

v.

Timothy S. Delaney

Appellant

Judge: The Honourable Justice M. Heather Robertson

Heard: March 25, 2009, in Halifax, Nova Scotia

Decision: March 25, 2009 (**Orally**)

Written Release: April 8, 2009

Counsel: Trevor Smedley, law student, for the appellant
Kishan R. Persaud, for the respondent

Robertson, J. (Orally):

[1] Thank you counsel for your excellent submissions.

[2] The appellant appeals a traffic violation conviction of the offence of failure to yield pursuant s. 125(1) of the *Motor Vehicle Act*.

[3] The appellant's position is that the learned adjudicator treated the offence as an absolute liability offence and did not give consideration to the defence of *due diligence*. The appellant says that the pedestrian traffic signal came on when the appellant was so near the crosswalk, he needed to proceed through to avoid being hit from behind had he slammed on his brakes, to accommodate the pedestrian who stepped off the boulevard three lanes away from his vehicle.

[4] The Crown disagrees with this view and says its case was fully made as found by the learned adjudicator.

[5] I have read the transcript and decision carefully as well as the authorities properly cited.

[6] We all agree that my task is to review the adjudicator's decision for its reasonableness absent an error in law. Further, it is not my job to reinterpret the facts found and replace them with my own view.

[7] Having reviewed the learned adjudicator's decision, I am of the view that he treated the offence as an absolute liability offence and did not give sufficient consideration to the defence of *due diligence*, in his analysis of the facts.

[8] I have read his decision as a whole, yet certain lines of the decision stand out, in his characterization of the offence. In particular at p. 34 lines 11-22 he stated:

I have got to be satisfied about a number of things. First of all, it does not say the driver of the motor vehicle shall yield the right-of-way to a pedestrian lawfully in a crosswalk, providing the stop can be made safely. It does not say that at all.

So your observation about worrying about whether or not you could or somebody was going to run into the back of you, is not a defence to this matter. You have

an absolute obligation to stop if this pedestrian is in the crosswalk and it is not whether you saw the pedestrian in the crosswalk or whether you did not see the light, you have an absolute obligation.

[9] And at p. 35 at lines 6-10 he is referencing whether there were visible lines on the crosswalk:

... But event if there were not, there was a flashing light and by you own evidence you had 43 feet, according to you, when you saw that light flash. It should have been more than enough time for you to hit the brakes, more than enough time, sir.

[10] And at p. 36 line 10:

... Unless the evidence was to show, to my satisfaction, that your vehicle was basically front wheels on the line as the pedestrian stepped into the crosswalk, I would not acquit.

[11] With respect to his finding of facts, although he accepted Constable Nicholson's evidence at page 8 lines 4 to 10 as to the operation of the pedestrian flashing light, I was concerned that Constable Nicholson did not have particular recollection of the event, and could not remember the presence of a van that did stop as the pedestrian stepped off the boulevard notwithstanding that Constable Nicholson testified he had a clear and unobstructed view at p. 9 lines 10 - 12 and lines 15 - 22. He said, "I do not recall quite honestly."

[12] One appreciates that the police officers stationed at this intersection were preventing many drivers from ignoring their obligation under s. 125 at this site, particularly as pedestrian safety is a pressing public issue.

[13] It would have been more helpful had the adjudicator weighed the police evidence against that of the defendant Mr. Delaney. The adjudicator seemed to conclude that even if Mr. Delaney only saw a brief flash of the pedestrian signal he had an absolute obligation to stop in any circumstance.

[14] In the result, I find that the adjudicator has made an error in law in his characterization of the offence as one of absolute liability without sufficient analysis of the defence *due diligence* defence that was offered. His words echoes:

Unless the evidence was to show, to my satisfaction, that your vehicle was basically front wheels on the line as the pedestrian stepped into the crosswalk, I would not acquit.

[15] In the circumstance, this matter should be returned to the Provincial Court for re-trial and the current verdict quashed.

Justice M. Heather Robertson