

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Hunter, 2013 NSSC 61

Date: 20130220

Docket: Hfx No. 405244A

Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Catherine Hunter

Respondent

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: November 7, 2012

Counsel: Katherine E. Salsman, for appellant
(Respondent did not appear.)

Moir J.:

Decision Under Appeal

[1] Ms. Hunter was acquitted on a charge of failing to yield the right of way when entering a highway, contrary to s. 123(1) of the *Motor Vehicle Act*. The Crown appeals.

[2] Ms. Hunter was leaving a gas station and wanted to cross heavy traffic on a city street to make a left turn. A driver coming from Ms. Hunter's left on the close side of the street stopped and yielded the right of way by waving Ms. Hunter out. She checked for traffic coming from her right on the other side of the sheet, saw there was none, and pulled out. When she passed the stopped car, Ms. Hunter was slammed from the left by a vehicle that was passing the stopped car.

[3] Adjudicator Stephen Mont acquitted Ms. Hunter.

I am not sure that Ms. Colley [the driver of the passing car] was in a single line of traffic and then tried to overtake the stopped car that was motioning Ms. Hunter on

Thus, the evidence left "a reasonable doubt as to just what happened here".

Crown Position

[4] At trial, the Crown argued that it did not matter whether the passing vehicle had a lane to itself. The court should "not be led down the road of where these lanes start and where they finish".

[5] However, the Crown also submitted "there's no suggestion that the Colley vehicle was traveling to the left of centre or doing anything improperly".

Adjudicator Mont reached a different conclusion when he assessed the evidence and concluded that there was a reasonable doubt that the passing vehicle "was in a single lane of traffic and then tried to overtake the stopped car".

[6] On appeal, the Crown continues its position that it does not matter whether the passing vehicle's driver was wrong to attempt to pass. It says that s. 123(1) requires proof of "only a few limited facts":

- a. That the defendant was entering a highway;

- b. That they failed to yield the right of way to a vehicle; and
- c. That the vehicle to which they failed to yield the right of way was approaching on the highway.

The Crown provided the required proof:

Each of these elements was made out by the Crown, and was not substantially disputed by the defence. It was clear from the evidence that Ms. Hunter was entering onto the highway from a parking lot, that Ms. Colley was approaching along that highway, and that their vehicles then collided. Colliding with a vehicle is not consistent with yielding to it, and therefore Ms. Hunter did not yield.

[7] The Crown offers this criticism of Adjudicator Mont's decision:

The decision of the adjudicator appears to be based on a misconception that the defendant only has to yield to the vehicle on the highway if it is being operated fully in compliance with the *Motor Vehicle Act*. The section does not state that a vehicle shall yield the right of way to vehicles legally approaching on the highway. He conflated the issue of determining if the defendant was guilty of the offence with whether or not she was at fault for the accident.

[8] The Crown also submits that its position is supported by the decision of Judge Ross in *R. v. Steele*, [2000] N.S.J. 226 (Prov. Ct.). That was a case under s. 123(1).

Standard

[9] The Crown has a right of appeal. The standard on a question of law is correctness: *Ulnooweg Development Group Inc. v. Wilmot*, 2007 NSCA 49 at para. 25. The Crown takes no issue with the Adjudicator's assessment of the evidence.

Issue

[10] The only question is one of law. Subsection 123(1) reads: "The driver of a vehicle entering a highway shall yield the right of way to all vehicles approaching on the highway." The question is about a driver's duty to yield to another who is stuck in stopped traffic without a passing lane and who, unseen, pulls out to pass. This question turns on the meaning of the phrase "approaching on the highway".

Disposition

[11] The criticism of the adjudicator's decision advanced by the Crown does not give full credit to his assessment of the evidence. He did not dismiss the case

because the driver of the passing vehicle may also have been at fault for the collision. For reasons expressed by Judge Ross in *R. v. Steele*, such reasoning is erroneous. But, that was not Adjudicator Mont's reasoning.

[12] The acquittal was based on a reasonable doubt as to whether Ms. Colley was stopped in a line of traffic, then pulled out to pass when she had no passing lane. In that circumstance, was the Colley vehicle "approaching on the highway" when the Hunter vehicle entered it?

[13] The phrase "approaching on the highway" has to be understood in context: *Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. 2. It is part of a regulatory regime that assumes its parts are working. So, provisions about rights of way have to be understood in relation to provisions about maintaining a careful lookout, keeping within passing rules, obeying traffic signals, and so on.

[14] So, for example, a vehicle that is too far away to be seen by a driver when he enters a highway is not "approaching on the highway" under s. 123(1), even though it is travelling on the same highway toward the entering vehicle: *Stevens v. Corkum*, [1971] N.S.J. 116 (S.C., A.D.).

[15] Another example might be a driver who enters a highway with a stop sign nearby. A vehicle required to stop before it gets to the point of entry is, literally, approaching on the highway, but the phrase might have to be understood in the context of a regulatory regime that forbids the driver from continuing the approach. Understood in a context that requires some allowance for the perception of the entering driver, it may be that the car already on the highway is approaching the stop sign not the entering vehicle.

[16] If the Colley vehicle was stopped in traffic, it was not then approaching the Hunter vehicle, even in a literal sense.

[17] In *Steele*, Judge Ross makes the point that s. 123(1) is focussed on the driver who enters a highway, not the drivers of vehicles already on it. That is consistent with *Stevens v. Corkum*. The observation of the driver entering the highway is what determined whether the other was approaching. When read in context, the phrase "approaching on the highway" has a sense that involves the perception of the driver of the entering vehicle, i.e. an approach the driver can see or could foresee at the time the driver decides to enter.

[18] When she entered the street, Ms. Hunter had no vehicles approaching her from the right and stopped vehicles to her left. If there were only two lanes, she had no reason to expect Ms. Colley 's violation, no reason to perceive a vehicle approaching her in that way. On the question of a third lane, that is to say whether Ms. Colley pulled out of the blue, the adjudicator found reasonable doubt.

Conclusion

[19] Adjudicator Mont applied the correct interpretation of s. 123(1) of the *Motor Vehicle Act*. The appeal is dismissed.

J.