

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Temple, 2004 NSSC 191

Date: (20040927)
Docket: "CR"SD213965
Registry: Digby

Between:

Her Majesty The Queen

Informant

v.

Denise Marie Temple

Defendant

Judge: The Honourable Justice Allan P. Boudreau

Heard: September 21 and 22, 2004, in Digby, Nova Scotia

Oral Decision: September 27, 2004

Counsel: Rosalind N. Michie, for the Crown
Christopher Manning, for the Defence

By the Court:

INTRODUCTION:

- [1] During the early morning hours of April 18, 2003 Denise Marie Temple exited a parallel parking spot on the main street through Digby by backing up and colliding with the car parked behind her vehicle, and then putting her car in forward and pressing the acceleration to the floor. Ms. Temple's car squealed tires all the while exiting the parking space and while her car veered left and then straightened out and went directly across the street, striking Brandy Cook in the process. Ms. Cook was seriously injured.
- [2] As a result, Denise Marie Temple is charged on a two count indictment dated September 21, 2004 with dangerous driving of a motor vehicle causing bodily harm to Brandy Cook and criminal negligence in the operation of a motor vehicle causing bodily harm to Brandy Cook, contrary to sections 249 (3) and 221 of the Criminal Code, respectively.
- [3] It is agreed by the parties that the 249 (3) charge is an included offence in the 221 charge and that Ms. Temple can therefore not be found guilty of both counts.

ISSUE:

[4] It is common ground that Brandy Cook suffered serious bodily harm when she was struck by the motor vehicle operated by Ms. Temple. The main question is whether Ms. Temple was operating the motor vehicle in a criminally negligent manner or in a manner that was dangerous to the public.

FACTUAL BACKGROUND:

[5] Ms. Temple and Ms. Cook have been acquaintances for many years. They went to school together and it appears they had some sort of a friendship back then. Ms. Temple moved away after high school and had returned to the area a few years prior to April of 2003. The two became reacquainted because Ms. Temple was dating a friend of Ms. Cook's boyfriend; however, the relationship between the two women was not good. Ms. Temple was labelled as a troublemaker and she was not liked by Ms. Cook. Each time they met during the period leading up to April of 2003, they argued over boyfriends, called each other nasty names and they had been physical toward one another on some occasions, but nothing really serious. Ms. Cook was not in favour of Ms. Temple dating her boyfriend's friend, Robert Whalley. Ms. Temple and Mr. Walley had broken up a few weeks prior to April 18, 2003. Because of an assault charge against Ms. Temple, she was subject to

an undertaking not to have any contact with Mr. Whalley; however, she was still having contact with Mr. Whalley and driving a car registered and insured in his name. Ms. Cook was not in favour of Ms. Temple continuing to have contact with Mr. Whalley and she made no bones about that. When Ms. Temple and Ms. Cook would meet at local drinking establishments, they would almost always have nasty verbal exchanges.

[6] During the evening of April 17, 2003, Ms. Cook, her boyfriend Tony Hall, and some of their friends, including Mr. Whalley, had gone to a local tavern for supper, then to their friend's, Norma and Brent Lewis' house, then back to the tavern around 10:30 in the evening. Every one was having drinks at the tavern, except Norma Lewis who was the designated driver. Some time between 11:00 p.m. and 12:00 a.m., Ms. Temple arrived at the tavern. Ms. Temple has testified that she had gone there with a friend from the valley, a Johanna Green.

[7] It is not clear if Ms. Temple and Ms. Cook had words at the tavern. However, between 12:00 a.m. and 1:00 a.m., probably closer to 12:00 a.m., Ms. Cook, Mr. Hall, Norma and Brent Lewis left the tavern and went to Club 98 in Digby. Ms. Cook and Mr. Hall testified that they left the tavern

in order not to be around Ms. Temple. Mr. Whalley stayed behind and he later went to Club 98 in a taxi, I think he said by himself.

[8] Ms. Temple testified she stayed away from the group at the tavern because she was bound by an undertaking not to have any contact with Mr. Whalley.

Ms. Temple testified that she and Ms. Green went to the Club 98 around 1:00 a.m.; however, no one specifically recalls Ms. Green being with Ms. Temple.

[9] Ms. Temple testified that she approached Mr. Whalley at the bar in Club 98 and asked him to buy her a drink. She said she was using the pretext that Mr. Whalley owed her money regarding the insurance on his vehicle which she was driving. Ms. Temple testified that Ms. Cook interceded and told her to leave Mr. Whalley alone and that Ms. Cook complained to staff at Club 98 that Ms. Temple was harassing Mr. Whalley. Ms. Cook did not acknowledge such an incident but testified that she complained to staff after the bathroom incident which I will discuss later.

[10] Ms. Cook testified that, later on that evening as their group was getting ready to leave Club 98, she went to the washroom and met Ms. Temple there by chance. The defence argued that Ms. Cook followed Ms. Temple to the washroom. The evidence is inconclusive as to how the two came to be in the

washroom together, and, in my view nothing critical turned on that because it is not possible to determine who assaulted who first in the washroom.

Another person, whom Ms. Temple called Sherry, was apparently in the washroom when the two met there and left when hostilities began between Ms. Cook and Ms. Temple; however, this person was not brought forward.

[11] In any event, a physical altercation occurred between Ms. Temple and Ms. Cook resulting in Ms. Cook leaving the washroom first, apparently without using the washroom. By this time Norma Lewis was coming down the stairs to locate Ms. Cook in order to leave the Club. Ms. Lewis testified that she encountered Ms. Cook outside the washroom in somewhat of a sweat and that Ms. Temple came out of the washroom, had tears in her eyes, brushed by Mrs. Lewis and went upstairs. Ms. Temple apparently had some blood on her because a drink glass she had been holding on to broke in her hand during the altercation in the washroom.

[12] Ms. Cook testified that she complained to the owner/manager of the Club, Mr. Kenley and that Ms. Temple was shown the door. Ms. Temple denies being asked to leave; however, Dean Sauve, who was the doorman on duty that night, testified that he got what he described as a nod from the owner/manager Mr. Kenley, which Mr. Sauve took to mean that Ms. Temple

should leave. Mr. Kenley testified that he could not recall making any deliberate sign; but he stated his recollection of the details of that evening were somewhat vague. He could not even recall who was the doorman on duty that night. However, he did recall Ms. Temple exiting the Club when the two women had been near him at the bar but he could not recall Ms. Temple saying anything.

- [13] It does not appear that Ms. Temple had to be physically removed from the Club. Mr. Sauve testified that Ms. Temple was calling Ms. Cook a fucking bitch, fucking whore, and that, as Ms. Temple was leaving, she stopped at the door, turned towards Ms. Cook and said, "I'll get you, you whore". He said Ms. Temple left the Club, crossed the street and went to sit in her car.
- [14] It appears that Mr. Whalley was already standing outside the Club when Ms. Temple left because she went by him and hit him in the head as she was leaving. Mr. Whalley could not recall what, if anything, she said but he said she appeared in a "crazy, wild mood".
- [15] It appears that Ms. Temple was in her car anywhere from 10, 15 to 20 minutes before Ms. Cook and the rest of the group came out of the Club. Ms. Temple testified she was sitting in her car smoking a cigarette and waiting for Ms. Green; however, no one recalled seeing Ms. Green or

anyone else being with Ms. Temple at Club 98. Ms. Green was apparently present in the Court Room during the second day of the trial; however, she did not testify, although, Exhibit 10 - Agreed Statement of Facts indicates that Constable Walton spoke to Ms. Green at some time later, but he did not obtain a statement from her. Richard and Jody Lupton, who had not been drinking that evening, were parked in their car in the parking space directly behind Ms. Temple's car while waiting for someone in Club 98. Mrs. Lupton testified that there was no vehicle parked directly in front of Ms. Temple's car. She said she could see right through the windows of Ms. Temple's car, which is a compact car, and that there was nothing parked directly in front. She was very certain of that. Mr. Lupton could not recall if any vehicle was parked in front of Ms. Temple's car. However, it is important to note that Joseph Cormier, an off duty paramedic who had been at Club 98 that night but not drinking because he had to work early the next morning, crossed the street in a cross walk, a short distance from where the Temple vehicle was parked. He said that, as he crossed the street, his attention was drawn to a stationery car, with it's lights on high beam, stopped up the street. He said he crossed the street only to hear the noise of a crash and saw the same vehicle on the sidewalk across the street. Mr.

Cormier did not see the impact to Ms. Cook but he nevertheless rushed to the scene and provided initial assistance until the duty paramedics arrived.

[16] Mr. Cormier's evidence supports the evidence of Mrs. Lupton's that there was not a vehicle parked directly in front of Ms. Temple because it was her car's head lights on high beam which attracted his attention.

[17] Ms. Cook, Mr. Hall and the rest of their group came out of the Club and they were making their way toward the Lewis' Ford Explorer to go home. Apparently Mr. Whalley was lagging behind and Ms. Cook turned to go and bring him along. It was around this time that Mr. Hall observed Ms. Temple parked across the street. Ms. Cook also noticed Ms. Temple parked there and she started walking aggressively across the street toward Ms. Temple's car, followed by Mr. Hall who grabbed her coat in order to dissuade her from going to Ms. Temple's car. Ms. Temple and Ms. Cook were shouting at each other by this time. Ms. Cook's arm came out of her coat sleeve and the entire coat came off. Mr. Hall said he grabbed Ms. Cook again and that Ms. Cook then agreed to turn around and leave. The overwhelming preponderance of the evidence indicates that Ms. Cook and Mr. Hall did not at any time go as far as the centre line of the street before their motion toward Ms. Temple's car stopped.

- [18] It is about this time that several witnesses heard Ms. Temple shout to Robert Whalley words about his insurance. Most say they heard Ms. Temple shout, “This is your insurance”, while Ms. Temple testified she shouted, “This is all about your insurance”.
- [19] In any event, it was then that Ms. Temple put her car in reverse, smashed into the front of the Lupton vehicle, then put her car in forward, wheels squealing and came out of the parking space in the manner shown on the two sketches contained in Corporal Andrew Landers’ report. The Temple vehicle struck Ms. Cook tossing her to the curb side of the side walk on the north side. The weight of the evidence indicates that Ms. Cook was struck on the north side of the centre line of the street, one or two metres from the centre line. Mr. and Mrs. Lupton stated that Ms. Cook had not gotten far across the street before she stopped or turned around. Mr. & Mrs. Lupton testified that it appeared to them that Ms. Temple was taking direct aim at Ms. Cook. Mr. Lupton testified that he thought Ms. Temple would just drive away, but that she just shot across the street. Mrs. Lupton testified that Ms. Cook was on her way back when she was hit. She said it appeared to her she was getting close to the sidewalk when she got hit. Mrs. Lupton, as did all

the witnesses, testified that there was no other traffic at the time. She said there was lots of room for the Temple vehicle to pull out.

[20] Ms. Cook testified that she had gone about half way in the north lane of the street, towards Ms. Temple's car, before she stopped. That the two were shouting at each other. She said that Mr. Hall got her to turn back and that she was on her way back when she heard the tires squeal and some shouting, that she turned around to see Ms. Temple's vehicle just about upon her with Ms. Temple grinning or laughing at her. Ms. Cook said she was turning sideways looking over her shoulder when she was struck on her right leg.

[21] Corporal Landers testified that Ms. Temple's car direction was fairly straight when it hit Ms. Cook. He also stated that where Ms. Cook was deposited was consistent with witnesses' statements that the victim was moving or making an effort to move away from the vehicle, toward the north, at the time of the impact. Corporal Landers also testified that Ms. Cook was most probably struck while the car was still accelerating, but certainly before any brakes were applied.

[22] There is some conflicting evidence as to whether the Temple car moved backward and forward before it came to rest against the fence on the north side of the sidewalk; however, in my view, the fact that this cannot be

ascertained with any degree of certainty is not significant for the issues to be decided. There was understandably a lot of commotion and confusion at the time.

[23] Ms. Temple testified that she had been in a physical altercation started by Ms. Cook in the washroom of Club 98 earlier that evening. That when she saw Ms. Cook followed by Mr. Hall coming across the street toward her vehicle, that she panicked, and wanted to leave the area in a hurry, and that she lost control of her car.

[24] At one point in her direct examination she said she saw Ms. Cook coming across the street and that she saw Mr. Hall trying to restrain her; but later when asked a question which I considered to be leading, as to whether she thought Mr. Hall was trying to help Ms. Cook, she answered in the affirmative. Ms. Temple also testified that she was not afraid that Ms. Cook was capable of beating her up. She said she just did not want to fight her.

[25] Ms. Temple testified that she nevertheless panicked and put her car in reverse, struck the car parked behind her, while at the same time trying to complete rolling up her window, which she says was only half way up. She testified that she then put her car in forward, grabbed the steering wheel with her right hand, while still trying to complete rolling up her window, floored

the accelerator and pulled the steering wheel of her car hard left with her right hand. She said she heard a noise and knew she had struck something, but she said she thought it was a vehicle parked in front of her. She said she never saw Ms. Cook after her vehicle started to pull out of the parking space because she was focussing on Mr. Hall, who, by all accounts was near Ms. Cook. Ms. Temple testified she did not see Ms. Cook at or before impact or at any time after leaving the parking space. Yet, when she was asked by defence counsel to mark Exhibit 11 with the spot where her vehicle struck Ms. Cook, she did so unhesitatingly!

[26] Exhibit 10, the Agreed Statement of Facts also indicated that Ms. Temple's first words to Constable Jamal Gray, who was the first officer on the scene, were "I didn't mean to Jamal".

ISSUE:

[27] The main factual issue to be decided is whether Ms. Temple operated her motor vehicle in the manner in which she did out of panic and fear for her safety, or whether she did for some other reason, possibly anger or rage.

[28] It should be noted that Ms. Temple is not charged with intentionally attempting to run Ms. Cook over with her car. She is charged with intentionally operating the motor vehicle in the manner alleged, not as an

inadvertent or accidental reaction to a threatening situation, but for some other reason.

THE LAW:

[29] First Charge - Section 249(3) of *The Criminal Code*.

DANGEROUS OPERATION OF A MOTOR VEHICLE

249(1) Everyone commits an offence who operates

(a) a motor vehicle in a manner that is dangerous to the public having regard to all circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

Cases have interpreted this section as follows:

It is unnecessary for the Crown to prove that the lives or safety of others were actually endangered. The offence is proved where the Crown establishes that the driving complained of was dangerous to the public, that is; either the public actually present at the time of offence or the public which might reasonably have been expected to be in the particular vicinity at the time . . .

. . . This offence requires proof of a “marked” departure from prudent conduct. *R. v. Rajic* (1993), 80 C.C.C. (3d) 533, 21 C.R. (4th) 208 (Ont.C.A.), . . .

. . . ***Mens rea* [fault]** - The appropriate *mens rea* (state of mind) for this offence is based on a modified object test. As a general rule, personal factors need not be taken into account and the accused may be convicted if it is proven that, viewed objectively, the accused was driving in a manner that was dangerous to the public, having regard to all of the circumstances. . .

. . . An explanation, such as the sudden onset of an unexpected illness would negate liability if a reasonable person in the position of the accused would not have been aware of the risk . . .

. . . In *R v. Creighton*, [1993] 3 S.C.R. 3, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189, McLachlin J. writing for a majority of the court suggested the following approach regarding proof of such offences. The first question is whether the *actus reus* is established, that is the act, the criminal action. This requires that the negligence constitute a marked departure from the standards of a reasonable person in all the circumstances of the case. This may consist in carrying out the activity in a dangerous fashion, or in embarking on an activity when in all the circumstances it is dangerous to do so. The next question is whether the *mens rea*, is established, that is the state of mind. Normally the *mens rea* for objective foresight of risking harm is inferred from the facts. The standard is that of the reasonable person in the circumstances of the accused. The normal inference that a person who committed a manifestly dangerous act failed to direct their mind to the risk and the need to take care may be negated by evidence raising a reasonable doubt as to the lack of capacity to appreciate the risk. Short of incapacity, personal factors are not relevant whether those factors might indicate, for example, either a lack of experience or a special experience. . .

[30] Second Charge - Section 221 of *The Criminal Code*.

CRIMINAL NEGLIGENCE

221(1) Every one is criminally negligent who

(a) in doing anything shows wanton or reckless disregard for the lives or safety of other persons.

Criminal negligence does not require proof of intention or deliberation, indifference being sufficient. Thus, the accused may be convicted on proof of driving amounting to a marked and substantial departure from the standard of a reasonable driver in circumstances where the accused either recognized and ran an obvious and serious risk to the lives and safety of others, or alternatively, gave no thought

to that risk: *R. v. Sharp* (1984), 12 C.C.C. (3d) 428, C.R. (3d) 367, 26 M.V.R. 279 (Ont. C.A.) . . .

. . . proof of conduct which reveals a marked and significant departure from the standard which could be expected of a reasonably prudent person in the circumstances will justify a conviction. The decision must be made, however, on a consideration of the facts existing at the time and in relation to the accused's perception of those facts. Thus, an honest and reasonably held belief in the existence of certain facts may be a relevant consideration in assessing the reasonableness of the accused's conduct . . .

. . . The clearest explanation of principle may be found in *R. v. Sharp, supra*, where the Court of Appeal held that, while the jury may find the required fault in the nature of the accused's driving which amounts to marked and substantial departure from the standard of a reasonable driver in the circumstances, the accused may be acquitted if there is an explanation which arises from the evidence that would account for the deviant conduct in a manner which would negate the element of fault, such as a cause resulting from circumstances beyond the accused control, for example, a sudden mechanical malfunction. . .

[31] In discussing whether the objective or subjective approaches to fault should be used the Supreme Court of Canada had this to say:

In *R. v. Anderson*, which is a Supreme Court of Canada decision of the late Justice Sopinka [1990] 1 S.C.R. 265, 53 C.C.C. (3d) 481, 75 C.R. (3d) 50 (7:0), the court returned to the question of criminal negligence in the context of a driving case. Sopinka J. for the court, while not attempting to resolve the objective/subjective issue, pointed out that fundamental to either approach is a finding that the conduct of the accused constituted a marked departure from the norm. He also pointed out that, as the risk created increases, the objective and subjective approaches begin to converge, since the easier it is to conclude that both a reasonably prudent person would have foreseen the consequences [the objective approach] and that the particular

accused must have foreseen the consequences [the subjective approach].

[32] The Defence referred me to *Regina v. Sharp*, and contends that the fact that Ms. Temple's fear for her safety resulted in panic should negate the fault or blame worthiness of her state of mind and resulting actions. The defence contends that Ms. Temple's alleged state of mind upon seeing Ms. Cook and Mr. Hall coming across the street provides an explanation and would account for the deviant conduct. It would have to amount to conduct which was beyond the control of Ms. Temple in order to negate fault, as was stated by Morden J. A. at page 434 of *R. v. Sharp, supra*;

“ . . . A jury should not find fault, and hence that the accused is guilty, if there is an explanation which arises from the evidence that would account for the deviant conduct in a manner which would negative the element of fault. A cause resulting from circumstances beyond the accused's control, for example, a sudden malfunction of the steering mechanization would afford such an explanation. In this case the real problem is that the Jury is being instructed that an intention was required. Intention, while it may be an aggravating feature of criminal negligence, is not an essential element.

ANALYSIS:

[33] Based on the above quoted case authorities, it would appear that Ms. Temple's conduct, to negate fault, would have to have been acts or actions over which she had no control. Those are the actions of exiting the parking space in the manner in which she did, by flooring the accelerator of her car

and steering hard left at the same time, and continuing in that mode for some considerable distance while pointing directly across the street. The defence contends that Ms. Temple had no control over those actions because she reacted out of a state of panic or shock, akin to the “automaton” argument, caused by some fear precipitated by Ms. Cook proceeding approximately one third or so of the way across the street while the two were shouting at each other, with Mr. Hall near by.

[34] In this case Ms. Temple testified as to her actions that night and how they came about. She said she panicked and floored her vehicle in that state in order to get out of there. Assuming for the moment that I would find such a reason would excuse Ms. Temple from blameworthiness or fault in this situation, which I am not at all convinced that it would, but assuming such, if I believed her, I would have to acquit her in accordance with the tests outlined in the case of R. v. W.D..

[35] I can say unequivocally that I do not believe Ms. Temple when she says she panicked or was in shock when she took the measures which she did in leaving that parking space. I do not believe that there was a vehicle parked directly in front of her. I accept the testimony of Mrs. Lupton and Mr. Cormier which clearly negates that assertion by Ms. Temple. I do not accept

that she feared Ms. Cook or Mr. Hall which caused her to panic or be in an involuntary state of mind. Her evidence was riddled with inconsistencies. She stated she was not afraid that Ms. Cook could beat her up. She only included Mr. Hall in the alleged perceived threat after having previously testified that Mr. Hall was restraining or attempting to restrain Ms. Cook. She testified she had the presence of mind to call out to Mr. Whalley and make some comment about his insurance, which all other witnesses say was a split second before commencing her manoeuvre. Ms. Temple also testified that she recalls having her car lights on high beam because she observed the high beam indicator on her dash board. It is not reasonable that a person in a panic would remember those details or even pay attention to them. She had also just finished a rather nasty verbal exchange with Ms. Cook. All of this is totally inconsistent with her alleged state of panic or shock. She would have the court consider that she was already in some state of shock when she left the Club; however, she took the time to cuff Mr. Whalley in the head outside the Club while making some comment at him. She testified that she stayed away from Mr. Whalley at the Tavern because she was subject to an undertaking to have no contact with him, yet she later cozyed up to him at the Club 98 bar in an attempt to get him to buy her a drink. In the final

analysis, I do not believe Ms. Temple's testimony and I do not accept that she was in a panic or state of shock which caused her to unintentionally operate her car in the way she did. If anything, her actions were prompted by other considerations such as anger or rage because of a longstanding feud or discord between Ms. Cook and Ms. Temple.

[36] Even though I do not believe Ms. Temple, in accordance with *R. v. W.D.*, I have to consider whether her testimony raises a reasonable doubt. In view of my analysis, I find that it does not.

[37] I still have to go on to consider, on the basis of all the evidence, whether I am satisfied beyond a reasonable doubt that the Crown has proven Ms. Temple's guilt on one or the other of the two counts contained in the indictment.

[38] I find that Ms. Cook had at least partially turned around and that she was in the process of attempting to return to her original side of the street, being the north sidewalk, when she was struck by Ms. Temple's car. This is consistent with the evidence of several witnesses, including that of Corporal Landers, the R.C.M.P. accident reconstruction expert. I find that there was nothing impeding Ms. Temple's orderly exit from her parking stall, if she had decided to do so. I find that whatever motivated Ms. Temple to use her

vehicle in the way she did, it was not panic or fear for her own safety. I do not accept that she had any such fear or panic.

[39] The manner in which she operated her motor vehicle was not only dangerous to the public, having regard to the large number of persons who were exiting Club 98 at the time, but it also showed a wanton and reckless disregard for the lives and safety of those persons, especially the persons of Ms. Cook and Mr. Hall whom Ms. Temple had just seen in the street. While the injury to Ms. Cook is serious enough, Ms. Temple can only consider herself fortunate that more people were not injured, or even killed.

[40] Considering all of the evidence, I am satisfied that the Crown has proven all of the elements of the Section 221, criminal negligence causing bodily harm to Ms. Cook charge beyond a reasonable doubt and I find her guilty of that count.

[41] In view of the stated position of both the Crown and the Defence regarding Count #1 - Dangerous Operation - That count is dismissed.

J.