Regina v. Beauchamp

[1953] O.R. 422-434

ONTARIO
[COURT OF APPEAL]
PICKUP C.J.O. and J.K. MacKAY and F.G. MacKAY JJ.A.

10th DECEMBER 1952.

Motor Vehicles — Offences — Driving without Due Care and Attention — The Highway Traffic Act, R.S.O. 1950, c. 167, s. 29(1) — Elements of Offence — Standard of Care to be Applied — Necessity for "Criminality" in Accused's Conduct.

While the same facts may, and in many cases do, give rise to both civil and criminal proceedings, there is nevertheless no necessity, in dealing with criminal or quasi-criminal conduct in relation to the operation of motor vehicles, for entering into a discussion or consideration of the negligence that will support a civil action.

To support a charge under s. 29(1) of The Highway Traffic Act the evidence must prove beyond reasonable doubt that the accused drove in the manner prohibited by the subsection, viz., without due care and attention or without reasonable consideration for others. The standard of care and skill to be applied is well established, and is not that of perfection. A driver is required to exercise a reasonable amount of skill, and to do what an ordinary prudent person would do in the circumstances. The use of the term "due care", which means the care owing in the circumstances, makes it clear that, while the legal standard of care remains the same in the sense that it is always what the ordinary prudent men would do in the circumstances, the factual standard is constantly shifting, depending on road, visibility, weather conditions, traffic conditions that exist or may reasonably be expected, and any other conditions that an ordinary prudent driver would take into consideration. The standard is an objective one, fixed in relation to the safety of other users of the highway, and in no way related to the degree of proficiency or experience attained by the individual driver whose conduct is in question.

It is not enough, however, to support a conviction under s. 29(1), that the accused's conduct should be shown to fall below this standard. Since the subsection creates an offence that is quasi-criminal in nature, it must also appear that the accused's conduct has been of such a nature that it can be considered a breach of duty to the public, and as such deserving of punishment by the State.

Rex v. Stewart, [1947] O.W.N. 357; Rex v. Nickel, [1947] O.W.N. 774, disagreed with; Regina v. Seabrook, [1952] O.R. 471; Regina v. Parsons (1952), 7 W.W.R. (N.S.) 359, considered; other authorities referred to.

AN APPLICATION by the accused for leave to appeal, and an appeal, from the judgment of Madden Co.Ct.J., in the County Court of the United Counties of Prescott and Russell, dismissing an appeal from a conviction by a magistrate for driving without due care and attention or without reasonable consideration for others, contrary to s. 29(1) of The Highway Traffic Act, R.S.O. 1950, c. 167.

10th December 1952. The application and appeal were heard by PICKUP C.J.O. and J.K. MACKAY and F.G. MACKAY JJ.A.

G.A. Martin, Q.C., for the accused, appellant: We seek leave to appeal on two grounds of law alone: (1) that there was no evidence to support the conviction, and (2) that the conviction is bad in law in that it sets out two offences in the alternative.

[THE COURT reserved judgment on the motion for leave to appeal, and directed that argument proceed on the merits of the appeal.]

1. The County Court Judge, by affirming the conviction in this case, virtually requires a standard of perfection in driving. The Legislature surely could not have intended to make a man liable to imprisonment for a mere momentary failure of attention. My submission is that the prosecution must prove a want of attention amounting to indifference to the safety of others, although I concede that it need not go as far under this section as is required on an indictment for criminal negligence, as laid down in Andrews v. Director of Public Prosecutions, [1937] A.C. 576, [1937] 2 All E.R. 552.

This is a penal provision, and it must require something more than a mere error in judgment or miscalculation. The magistrate must find indications of a want of care before he can find an absence of due care and attention. This accused had no reason to anticipate the situation that arose, and he did not know until he was actually on the street that his rear-view mirror was not functioning properly. [F.G. MACKAY: Would the effect of the subsection be different it the word "due" were omitted?] Yes; that word implies that the care and attention must be related to the particular circumstances of the case.

The first case dealing with this subsection in Ontario is Rex v. Stewart, [1947] O.W.N. 357, 88 C.C.C. 409, and the later case of Rex v. Nickel, [1947] O.W.N. 774, 90 C.C.C. 121, is in direct conflict. The learned trial judge in this case does not refer to either of these cases, but he must have been applying the standard laid down in Rex. v. Stewart; otherwise he could not have convicted. [PICKUP C.J.O.: I am not sure, from reading his reasons, that he was proceeding on that basis.] The judgment in Regina v. Seabrook, [1952] O.R. 471, 103 C.C.C. 7, 14 C.R. 223, does not settle the difficulty, or decide whether anything more than civil negligence is required.

2. The conviction is for driving without due care and attention or without reasonable consideration for others using the highway. This is a conviction for two distinct offences, in the alternative, and both of the offences were charged in the information, in violation of s. 710(3) of The Criminal Code, R.S.C. 1927, c. 36.

Rex v. Surrey Justices; Ex parte Witherick, [1932] 1 K.B. 450, is direct authority for my proposition, and also points out that under the corresponding English section reasonable consideration is required only for others actually on the highway, and not for those who may come on to it, or who may be expected there, as is the case under s. 285(6) of The Criminal Code, enacted by 1938, c. 44, s. 16. The judgment in Rex v. Rousseau, [1938] O.R. 472, 70 C.C.C. 252, [1938] 3 D.L.R. 574, is not in conflict with the English case. The section there considered was entirely different, and the report does not indicate that the Surrey Justices case was cited to the Court. Further, there is a substantial error in the judgment in Rex v. Rousseau, in the statement at p. 475 that there are no English statutory provisions corresponding to s. 723(3) of The Criminal Code: Paley on Summary Convictions, 9th ed. 1926, p. 191.

Section 723(3) cannot save this conviction, as was held in Rex v. Rousseau. It refers to the description of "any offence", which must mean a single offence, and cannot apply to a provision, such as s. 285(4) of The Criminal Code, as re-enacted by 1930, c. 11, s. 6 and amended by 1935, c. 56, s. 4 and 1947, c. 55, s. 10, which itself creates different offences: Rex v. Higgins, 63 O.L.R. 101, 50 C.C.C. 381 at 383, [1929] 1 D.L.R. 629. The judgment in Thomson v. Knights, [1947] K.B. 336, [1947] 1 All E.R. 112, is distinguishable. Nor does s. 725 as re-enacted by 1948, c. 39, s. 24, help, because again it refers to "the offence" that may be "committed in different modes". [F.G. MACKAY J.A.: Can it not be said that s. 29(1) creates one offence, driving carelessly, in one of the ways specified?] It might be so held if the question were res integra, but I submit that the decision in Rex v. Surrey Justices; Ex parte Witherick, supra, is a binding decision on the point.

I refer also to Rex v. Madill, [1943] 1 W.W.R. 365, 79 C.C.C. 206, [1943] 2 D.L.R. 570; Rex v. Disney (1933), 24 Cr. App. R. 49; Rex v. Manheim (1926), 30 O.W.N. 317.

C.P. Hope, Q.C., for the informant, respondent: 1. There is ample evidence of improper driving in this case. It is incumbent on anyone backing a car, and a fortiori a long bus with a "blind spot" behind it, to make sure that there is nothing behind that he can run into. The accused should have had someone on the street guiding him. [F.G. MACKAY J.A.: Does that not depend on the circumstances? The standard of care must vary.] My understanding of "due care" is proper care in all the circumstances, and my submission is that the care in this case was not "due". The basis on which the trial judge made his findings in this case was that the accused was "driving blind". He brings his decision directly within Regina v. Seabrook, supra.

It is not necessary in this case to decide whether the subsection requires more than "civil negligence", or to resolve the conflict in the reported cases. [F.G. MACKAY J.A.: If an accident results from lack of skill, is it within the subsection?] If the lack of skill results in driving in the way set out in the subsection the driver will be liable to conviction under it. [J.K. MACKAY J.A.: That argument involves a divorce of the idea of lack of care from any act of the mind.] The fact of driving without the requisite skill involves an exercise of the mind.

2. On this point I rely entirely on Rex v. Rousseau, supra. It is a judgment of this Court, and this Court is bound by it, notwithstanding the English judgment that has been cited. [PICKUP C.J.O.: Do you concede that if we come to the conclusion that this subsection creates two distinct offences the conviction is not cured by ss. 723 and 725?] I think I must concede that.

G.A. Martin, Q.C., in reply. Rex v. Rousseau, supra, did not decide anything about s. 29(1), but dealt with a section worded in an entirely different way. The only way in which that judgment can be justified is by saying that the Court considered that the words in the section there under consideration were used synonymously, or in amplification of each other.

Cur. adv. vult.

15th April 1953. The judgment of the Court was delivered by

F.G. MACKAY J.A.:— The appellant was convicted at the town of Rockland, in the county of Russell, on the 4th April 1952, of unlawfully driving a motor vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway, contrary to s. 29(1) of The Highway Traffic Act, R.S.O. 1950, c. 167, and fined the sum of $5 and costs. On appeal to His Honour Judge

Madden on a trial de novo, the appeal was dismissed and the conviction was affirmed. The defendant now asks leave to appeal to this Court pursuant to the provisions of s. 769A of The Criminal Code, R.S.C. 1927, c. 36, enacted by 1947-48, c. 39, s. 34.

The appellant, a motor bus driver employed by the Colonial Coach Company, was charged as a result of an accident which occurred at about 7 a.m. on the 20th March 1952 on Laurier Street in the town of Rockland. Laurier Street runs east and West. On the north side of the street there was a public garage known as Dupuis' Garage, in which some of the Colonial buses were kept overnight. One Mannie, driving west on Laurier Street, stopped his car on the north said of the street at a point about 60 feet east of the entrance of the Dupuis garage and went to the garage. He said that at the time he stopped his car there were two passenger buses on the street -- one parked on the north side facing west between his car and the Dupuis garage, the second one also facing west about opposite the first one and on the south side of the street. As he went into the garage a man called to him that his car was backing up and he found that the second bus had backed up and struck his car. The driver of this bus was the accused.

The evidence of the accused was that he drove the bus out of the garage to permit a third bus to get out; out of the garage on to the street he looked to the east and Mannie's car was not then parked on the street nor did he see it approaching; that on entering the street he turned to the west and stopped in the middle of the street, intending to back his bus into position on the north side of the street behind the bus that was already there; that he was stopped for a few seconds only to permit the bus following him to get out; that this third bus came out and drove away, going east on Laurier Street; that he then turned in his seat and looked through the back window of his bus, looked in the rear-view mirror located inside the bus and at a mirror located on the left fender. This last mirrror, he said, was loose and owing to the vibration was useless as a rear-view miror. He did not see Mannie's car and proceeded to back very slowly into position on the north side of Laurier Street and, in doing so, struck the Mannie car.

A witness for the prosecution, one Fred Lessard, who is the owner of a garage on the south side of Laurier Street opposite Dupuis' Garage, said that he was standing on the south sidewalk; that he saw the accused drive his bus out on to the street; that the bus stopped momentarily -- in chief he said for less than a minute, and in cross-examination he said for a few seconds -- and that the bus then proceeded to back at a pace that he described as "very, very slowly, barely moving", and that just as it was coming to a stop it bumped the car very lightly; he had not previously noticed the parked car.

From this evidence it is clear that Mannie came along and parked his car during the very short interval in which the bus driven by the accused was standing on the street before backing into position at the north curb. As a result of the collision the bumper, grille, fender and headlight of Mannie's car were damaged.

While the notice of appeal sets out a number of grounds of appeal, at the hearing in this Court counsel for the appellant relied on two grounds only: (1) that there was no evidence which in law justified a conviction; and (2) that the charge was bad for duplicity.

In regard to the first ground, we were referred to a number of cases from which it appears that there is a difference of judicial opinion as to whether an offence under s. 29(1) of The Highway Traffic Act is made out by proof of such negligence as would entitle a plaintiff in a civil action to damages. The wording of s. 29(1) of the Ontario Act is the same as that of s. 12 of the English Road Traffic Act, 1930, c. 43, and the traffic Acts of many of the common law Provinces in Canada contain sections the same as or similar to s. 29(1) of the Ontario Act.

The most recent Ontario cases are: Rex v. Stewart, [1947] O.W.N. 357, 88 C.C.C. 409; Rex v. Nickel, [1947] O.W.N. 774, 90 C.C.C. 121; and Rex v. Seabrook, [1952] 471, 103 C.C.C. 7, 14 C.R. 223.

In Rex v. Stewart, His Honour Judge Factor says: " ... I have concluded that all degrees of negligence, including civil negligence, are included in the words of s. 27 [now s. 29(1)] of The Highway Traffic Act."

In support of this conclusion he refers to and quotes from the case of Andrews v. Director of Public Prosecutions, [1937] A.C. 576, [1937] 2 All E.R. 552; McCrone v. Riding, [1938] 1 All E.R. 157; and McLean v. Pettigrew, [1945] S.C.R. 62, [1945] 2 D.L.R. 65. In Rex v. Nickel, His Honour Judge Harvie, after considering the same cases and Rex v. Stewart, says: "The present Ontario Act is crystallized from previous legislation covering so-called 'reckless driving' and confines itself to the different and lower category of careless driving, which, in my view, contemplates and was intended to contemplate a higher degree of negligence than that giving rise to an action in the civil courts for the mere recovery of damages. The offence of careless driving is of a quasi-criminal nature. It is something which goes beyond mere error in judgment. It indicates a measure of indifference, a want of care for the matter in hand and an indifferent regard for the rights of others."

In Regina v. Seabrook (a stated case after a conviction under s. 29(1) of The Highway Traffic Act), McRuer C.J.H.C., after careful consideration and discussion of the decisions in Rex v. Stewart, Rex v. Nickel, and the English authorities referred to in these cases, and the further cases of Kingman v. Seager, [1938] 1 K.B. 397; Durnell v. Scott, [1939] 1 All E.R. 183; Bracegirdle v. Oxley, [1947] K.B. 349, [1947] 1 All E.R. 126; and Salmond on Torts, 10th ed. p. 61, says:

"Apart from any question arising out of a charge of manslaughter, I find the English cases dealing with s. 11 of The Road Traffic Act, 1930, of great assistance in deciding the problem before me. A careful examination of them satisfies me that there has been a tendency in Canada to apply the Andrews case in so far as it discusses degrees of negligence as related to charges laid under s. 285(6) of The Criminal Code in a way that it was not intended to be applied.

"In applying s. 285(6) to certain proved facts I can see no justification for becoming involved in consideration of the law of civil negligence or degrees of negligence. The words used by Parliament are clear, unambiguous English words. If the character of the driving is proved to be of such a nature as to come within what is described as an offence the accused is guilty. If it is not proved beyond a reasonable doubt to be such the accused should be found not guilty. I do not think that Parliament ever intended that the dividing-line between guilt and innocence should be some sort of 'no man's land' which can only be described as negligence that goes beyond a mere matter of compensation between subjects or something that is measured in relation to the involved subject of civil negligence. There seems to be no reason why the words should not be applied in their ordinary connotation as used in the English language and if they are so applied there should be no great difficulty in deciding any particular case. This would appear to be the view taken in the English Courts in three cases dealing with s. 11 of The Road Traffic Act and in one case dealing with s. 12 of The Road Traffic Act, which is substantially similar to s. 29(1) of The Highway Traffic Act of Ontario. In none of these cases did the judges discuss the question of negligence, nor is the word 'negligence' mentioned in any of them."

In Regina v. Parsons (1952), 7 W.W.R. (N.S.) 359, an appeal from a conviction under s. 66a of The Vehicles and Highway Traffic Act of Alberta, the wording of which appears to be identical with that of s. 29(1) of the Ontario Act, Sissons J., of a District Court in Alberta, discusses all of these cases and comes to the conclusion that Andrews v. Director of Public Prosecutions and McLean v. Pettigrew are authority for

the proposition that the section covers all degrees of negligence, but are not authority for the converse proposition that any degree of negligence constitutes driving without due care and attention and, further, that they are not authority for the proposition that evidence which would be sufficient to suppport a finding of negligence (or of driving without due care and attention) in a civil action is sufficient to support a conviction under this section.

In 23 Halsbury, 2nd ed. 1936, p. 649, para. 915, dealing with the relation between civil and criminal remedies for negligence, it is stated: "Where negligence consists of or involves an unlawful act or default which is an offence against the public, and renders the person who is guilty of the act or default liable to legal punishment, the negligent act or default amounts to a crime, and where such act or default results in injury to a private person, a right to take civil proceedings may ensue to such private person and co-exist with the right to award punishment in proceedings instituted at the suit of the Crown."

Dr. Mazengarb in his text-book "Negligence on the Highway", 2nd ed. 1952, at p. 266, in the opening paragraphs of the chapter on "Criminal Liability", says: "In the preceding chapters, negligence has been regarded as a tort -- a breach of duty to others which gives rise to an action for damages. We have now to consider negligent conduct as a crime, or quasi-crime -- a breach of duty to the whole community, deserving of punishment.

"An award of damages against a negligent motorist, nowadays, cannot always be regarded as a sufficient sanction, because all motorists are compelled to insure against risk of injury to third parties, and many are insured against damage which they may cause to passengers or property. In the final result, most awards of damages are paid out of funds to which both careful and careless motorists contribute. [In Ontario the provisions in regard to the unsatisfied judgment fund have a similar effect.]

"Apart altogether from ensuring that those who suffer injury receive the compensation to which they are entitled, the State is also interested in the orderly regulation of traffic on the highway, and has a potential interest in the lives and the well-being of its citizens. It seeks to achieve its ends by various means; first, by providing that motor vehicles shall not be driven on the highway unless they are properly equipped; secondly, by requiring adequate skill in driving; thirdly, by revoking the licences of those who show by their actions that they are careless of the rights of others; and finally, by punishing those who commit breaches of the laws which are considered essential for safety. The degree of negligence, the standard of proof required to support a charge, and the nature of the penalty which may be imposed all vary according to the gravity of the offence. In criminal cases, English law recognizes different degrees of negligence. It has created specific offences punishable by different maximum penalties: for example, manslaughter, dangerous driving, and driving without due care and attention."

With respect I do not agree with the reasoning in the cases of Rex v. Steward and Rex v. Nickel. To the extent hereinafter indicated I do agree with the reasoning and conclusions in the cases of Regina v. Seabrook and Regina v. Parsons. The statement in Mazengarb at p. 266 is a statement of the policy of the law rather than a statement of law and is useful in that it indicates in a general way the reasons for the different categories of punishable conduct in the operation of motor vehicles. My conclusions are that, while the same facts may, and in many cases do, give rise to both civil and criminal proceedings, nevertheless there is no necessity, in dealing with criminal or quasi-criminal conduct in relation to the operation of motor vehicles, for entering into a discussion or consideration of the negligence that would support a civil action. It is also clear that there are different degrees of criminal or quasi-criminal negligence.

Section 29(1) of The Highway Traffic Act creates a statutory offence that is quasi-criminal in its

nature: Rex v. Van Leishout, [1943] O.W.N. 746, 80 C.C.C. 361.

A crime is defined in 9 Halsbury, 2nd ed. 1933, p. 9, para. 1, as follows: "A crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment. While a crime is often also an injury to a private person, who has remedy in a civil action, it is an act or default contrary to the order, peace and well-being of society that a crime is punishable by the State. A civil proceeding has for its object the recovery of money or other property, or the enforcement of a right for the advantage of theperson suing, while a criminal proceeding has for its object the punishment of a public offence."

To support a charge under s. 29(1) of The Highway Traffic Act, the evidence must be such as to prove beyond reasonable doubt that the accused drove in the manner prohibited by the subsection, namely, without due care and attention or without reasonable consideration for others. The standard of care and skill to be applied has been long established and is not that of perfection. It is, I think, correctly stated in Mazengarb, op cit., at pp. 176-7, as follows:

"The law does not require of any driver that he should exhibit 'perfect nerve and presence of mind, enabling him to do the best thing possible.' It does not expect men to be more than ordinary men. Drivers of vehicles cannot be required to regulate their driving as if in constant fear that other drivers who are under observation, and apparently acting reasonably and properly, may possibly act at a critical moment in disregard of the safety of themselves and other users of the road.

"But the law does insist upon a reasonable amount of skill in the handling of a vehicle which is a potential source of danger to other users of the road. ... The question always is 'What would an ordinary prudent person in the position of the plaintiff have done in relation to the event complained of?'" (Pollock on Torts uses the term "average man".)

Motor vehicles are now in general use as a common means of transportation and pleasure. If too high a standard of care and skill were demanded, those people who are not capable of attaining such a standard would be deprived of the privilege of driving motor vehicles, and their use would be confined to experts, and even persons who might become experts might well be prevented from qualifying as such by experience. It must also be borne 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 reasonable doubt that this 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 term "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, wheather conditions, traffic conditions that exist or may reasonably be expected, and any other conditions that ordinary prudent drivers would take into consideration. It is a question of fact, depending on the circumstances in each case.

In this case, and in some of the cases to which I have referred, evidence has been admitted to show that the accused had a good record as a careful driver. Such evidence is not relevant on the issue of guilt or innocence. As was said by Lord Hewart C.J. in McCrone v. Riding, supra, at p. 158: "That standard is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience attained by the individual driver."

There is a further important element that must also be considered, namely, that the conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment. This further step must be taken even if it is found that the conduct of the accused falls below the standard set out in the preceding paragraphs. This principle may be somewhat difficult to apply, but I think it might be illustrated by the common example of a motorist attempting to park at the curb in a space between two other parked vehicles. Frequently one or other of the parked vehicles is bumped in the process. Damage seldom arises, because cars are equipped with bumpers, but if damage were caused it might well give rise to a civil action for damages, but it could hardly be said to be such a lack of care or attention as would be considered to be deserving of punishment as a crime or quasi-crime.

Applying these principles to the facts of this case, I am of the opinion that the appellant is right in his submission that there is no evidence to justify a conviction. The uncontradicted evidence is that the appellant looked while coming out of the garage and there was then no motor car parked on the street. He looked through the back window of the bus and also in the rear-view mirror before backing and then backed very slowly. He did not see the parked car, apparently because of the length of his vehicle, the position of his rear window and the relative position of the car at that time. It was 7 a.m. in a small town, when he might reasonably have anticipated that a car would not drive up behind his bus into a position where it could not be seen through his rear window in the very brief period of time that elapsed between his comming out of the garage and his backing up. It was clearly not such a lack of care in these circumstances as could be considered deserving of punishment. It is perhaps unnecessary to add that had the accident occurred during a busy time of the day, when traffic might reasonably have been expected, the result might have been different; nor do I entend to suggest that his conduct was not such as might give rise to civil liability.

The second ground of appeal is that the charge is bad for duplicity. Since this point was not raised in either of the Courts below, I do not think we should now permit it to be raised in this Court.

Leave to appeal should therefore be granted, the appeal should be allowed and the conviction should be quashed, the fine and any costs paid by the appellant in the Courts below to be returned to him forthwith.

Conviction quashed.

Solicitors for the accused, appellant: Mirsky, Solloway & Mirsky, Ottawa.