Indexed as:

R. v. Calconi

Between
R., and
Gianluca Calconi

[1993] O.J. No. 2342
DRS 94-01677

Ontario Court of Justice - Provincial Division
Woodstock, Ontario
Schnall Prov. Div. J.

April 7, 1993.
(5 pp.)

Criminal law — Careless driving — Carelessness, what constitutes.

Trial of the accused charged with careless driving. The accused had been driving a heavily loaded cube van. The accused testified he overreacted when he realized the van had drifted over the dividing line and the load weight shifted and he lost control.

HELD: Accused was acquitted. The prosecution had not proved beyond a reasonable doubt that the accused operated his motor vehicle without due care and attention or without reasonable consideration for other users of the road to an extent that would amount to careless driving. The accused was convicted of making an improper lane change.

STATUTES, REGULATIONS AND RULES CITED:

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 130, 154(1)(a).
L. Elliott, for the Crown.
Mr. Easterbrook, for the Defendant.

SCHNALL PROV. DIV. J.:— This nineteen year-old defendant is charged with careless driving. The evidence is as follows:

¶ 1 On the afternoon of August 10th, 1992, the defendant was driving a rented vehicle described as a cube van. He and two coworkers had left a job site west of London after a day spent dismantling a very large tent and dance floor. This equipment, together with poles and some smaller tents was packed into the back of the van. Some, although not all, of the equipment was secured.

¶ 2 The defendant and his two passengers were on their way back to Hamilton, proceeding east-bound along Highway 403. One passenger, the witness Hoover, rode in the front passenger seat. He had started driving, but after some distance, because he was tired and had a very sore back, he decided not to continue, and changed with the defendant. The other passenger, Traveris, rode in the back of the van so that he could sleep.

¶ 3 For some distance along the eastbound Highway 401, and then along eastbound Highway 403, the defendant's vehicle was followed by a car. The driver of this second vehicle, Crowther, testifies that he observed

the defendant's vehicle to cross over the line dividing the two east-bound lanes on several occasions. I accept his evidence on this point.

¶ 4 As the vehicles proceeded east along Highway 403, the defendant's vehicle was travelling in the driving lane at about 90 kilometres per hour or slightly less. Crowther decided to pass the defendant's vehicle. As he pulled along side the defendant's vehicle in the passing lane, he saw the defendant's van start to come into his lane, over the dividing line. He honked his horn, and had to take evasive action by driving his vehicle partly onto the gravel shoulder of the median.

¶ 5 When he next saw the van in his rear-view mirror, it was tipping over onto its side and then it slid along the road, coming to rest with the rear section in the median and the front section partly in the passing lane.

¶ 6 The evidence of another witness approaching from the opposite direction was that the defendant lost control, the van swerved onto its right wheels, then onto its left wheels, flipped over onto its left side and slid along the road. It then caught fire.

¶ 7 The defendant testifies that on the date of the accident, he had been a licenced driver for about two years. On the day of the accident, he had taken over driving from Hoover. Neither he nor either of his passengers had consumed any alcoholic beverages. He was travelling at no more than 90 k.p.h. east on Highway 403 and saw in his side mirror a car in the passing lane behind him. I accept his evidence on these points.

¶ 8 Some moments later, when he considered passing a truck in front of him, he looked toward his left and no longer saw the other vehicle. He says it must have been in his blind spot. The sound of a horn startled him and he abruptly swung the steering wheel to the right and then he lost control of the van.

¶ 9 The defendant concedes that when he looked to his left, his vehicle drifted into the passing lane.

¶ 10 On cross-examination, after some initial resistance, the defendant admitted that as he had been travelling along, he was in and out of control of his van as it strayed over the line dividing the two lanes. He says that he had no experience driving such a heavily loaded van. He testifies that he did not consider any other options when he realized he was having difficulty driving the van.

¶ 11 His explanation for the accident is that he over-reacted when he pulled the steering wheel sharply to the right when he realized that the van had drifted over the dividing line, and that when he did so, the weight of the load shifted, causing him to lose control.

¶ 12 The prosecution does not dispute that the van was heavily loaded, that the load was not secured, and that the load shifted.

¶ 13 As a result of the accident, the passenger Traveris, who was in the back of the van, was trapped and died in the burning wreckage.

The law:

¶ 14 Section 130 of the Highway Traffic Act under which the defendant is charged provides:

> "Every person is guilty of driving carelessly who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway..."

¶ 15 The standard of care to be exercised by a driver is that of the reasonably prudent person. Momentary inadvertence or error in judgment would not, in most circumstances, constitute careless driving. The test is an objective test, and must take into account the road, weather conditions, other traffic, visibility, and any other circumstances that the ordinary prudent driver would consider.

¶ 16 In R. v. Beauchamp, (1953) O.R. 422, the court held that even though the defendant's driving fell short of this standard, the court must take a further step and consider whether the conduct was such as to be considered

a breach of duty to the public and deserving of punishment.

Application of the legal principles to the evidence:

¶ 17 The fact that a fatality resulted from this accident is a most tragic circumstance and one which would constitute a severe aggravating factor on sentencing, but it is inappropriate to consider the result of the accident in determining whether the defendant was guilty of careless driving.

¶ 18 The court must consider all the circumstances of the driving. I accept as facts that the road was straight and dry, visibility was good, and traffic was somewhat heavy and that the defendant was not driving at an excessive rate of speed.

¶ 19 It is the prosecution's contention that the defendant is guilty of careless driving in that, knowing that he had difficulty controlling the vehicle on several occasions, he did not pull over and have one of the passengers take over. That was clearly an error in judgment. Further, the prosecution contends that the defendant's actions in allowing the vehicle to drift over the dividing line and then abruptly pulling the steering wheel to the right, causing the vehicle to start tipping and swerving, amounted to careless driving.

¶ 20 I do not agree. The combination of the improperly loaded van, the momentary inadvertence when the van drifted over the dividing line, and the startled response and over-reaction in pulling the wheel over do not amount to the standard of culpability envisaged by cases such as Beauchamp.

¶ 21 The prosecution has not established beyond a reasonable doubt that the defendant operated his vehicle without due care and attention or without reasonable consideration for other users of the road to an extent that would amount to careless driving.

¶ 22 Accordingly, I find the defendant not guilty of careless driving. I find, however, beyond a reasonable doubt that the defendant failed to drive as nearly as may be practicable entirely within a single lane and that he moved from that lane without first ascertaining that he could do so with safety and I find him guilty of this offence under Section 154(1)(a) of the Highway Traffic Act, and register a conviction accordingly.

DRS/DRS