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R. v. Card

Between
Her Majesty the Queen, and
Gary Michael Card

[2000] O.J. No. 2333

Ontario Courtof Justice
Provincial Offences Appeal - St. Thomas, Ontario
Livingstone J.

Oral judgment: January 10, 2000.
(10 paras.)

Charge: Highway Traffic Act - Speeding 140 kilometres per hour in an 80 kilometre zone

Counsel:

D.B. Walker, for the Prosecution.
G. Kober, agent for the defendant.

¶ 1 **LIVINGSTONE J.** (orally):— This, is an appeal from a conviction by Justice of the Peace Doelman against Mr. Card of the offence of speeding, namely 140 kilometres per hour in an 80 kilometre per hour zone.

¶ 2 The argument presented at the trial, which is not recorded but which is apparent from the reasons of Justice of the Pence Doelman, was that the defence of necessity is applicable and that the accused's evidence as to his understanding of the situation makes that defence appropriate in this case. In order for Mr. Kober, on behalf of Mr. Card, to be successful, in my view, on appeal this court must be satisfied that the learned justice of the peace erred in law or applied evidence improperly or misapplied evidence.

¶ 3 I agree with Mr. Walker that her reasons are somewhat confusing with respect to her assessment of the defence of necessity, or duress as she describes it. She talks about the evidence of Mr. Card and seems to assess it and weigh it and balance it as against the evidence of the Crown. On the other hand at line 20 on page 28 of her reasons, which is the paragraph Mr. Walker himself very accurately pointed out, she says: "I do not believe that the defence of duress of necessity has been made out ..." But then she goes on to say: "... and I believe that speeding is an absolute offence to which there is no defence. That it's a matter of either being speeding and or not being speeding." I cannot resolve what that paragraph means, in fairness, and with respect to the justice, of the peace.

¶ 4 The Supreme Court of Canada decision of Perka, which is referred to in the decision of Laudanski,

which was presented to Justice of the Peace Doelman, talks about the defence of necessity and that Supreme Court of Canada decision certainly delineates the unusual circumstances in which the defence might apply and the types of offences for which it is available. What Laudanski is, as I read it, is an appeal to an Ontario Court Justice from a Justice of the Peace's conviction for speeding. And as that, in my view, it is a case which is, if not binding on a justice of the peace, certainly is one which should be considered because it is a decision of her "court on appeal". In that case, although the appellant war, not successful, Justice Lampkin in what I would call "obiter", defines the circumstances which he says would be appropriate ones for the, defence of necessity and he says at page 32 of his reasons: "One instance readily comes to mind, if you were on a lonely road and there is a guy toting a pistol following you in a car, that is an emergency situation."

¶ 5 Mr. Kober argues here, and, it is clear, argued at the trial as well, that Mr. Card felt he was in an emergency situation, felt there was imminent risk to him because he was on a lonely road, a dark road, driving, he, thought, minding his own business when a vehicle speeds up behind him, follows him, does not pass him oven after he slows down and speeds up behind him when he speeds up. He admits, in my view, that he speeds up against the law, that he speeds beyond the appropriate speed for that roadway. But his explanation is that he was concerned, he didn't know what was behind him, he couldn't see who was behind bind him. He had no reason to suspect it was a police officer as he could not tell what the vehicle was in his rearview mirror and that only after it is apparent that it is a police car does he understand what is going on and he stops his car. He also gives some evidence with respect to the reason he was out there in the middle of the night in the first place, which is confirmed at the trial by his son.

¶ 6 It is clear from the justice of the peace's reasons that she does not reject that evidence as being unbelievable. She simply suggests that the "circumstances" are not credible to her, while at the same time saying even if they were, the defence of necessity should not apply because speeding is an absolute liability offence. As I stated earlier, I cannot justify or resolve what it is she is concluding and in my view, therefore, she has made an error in law.

¶ 7 Now I note also from the notice of appeal that Mr. Kober is asking that the evidence which was presented before the justice of the peace should be considered by this court and that the conviction should be quashed but no new trial ordered. Again, since I have, the evidence from the transcript before me of what took place and I have the case of Justice Lampkin from Newmarket, in my view this court is in a position to determine whether or not the defence of necessity, one, is applicable in the circumstance and, two, was available on the facts before Justice of the Peace Doelman. And in my view, succinctly, it was.

¶ 8 Certainly the circumstances Mr. Card was faced with were somewhat unusual. He put himself into that position meeting his son to exchange cash at 11 o'clock at night on a country road. But, nevertheless, when the vehicle behind him, which as Mr. Kober correctly states, is simply doing his job, investigating a stolen vehicle, and then pursuing a vehicle which he determines to be speeding, what the officer did is exactly what Mr. Card could not understand. If the officer had put his roof-lights on earlier, based on what Mr. Card did when he saw the lights, he would have stopped. Mr. Card didn't know who was behind him but what he did know was that the vehicle was not going to him, was speeding up and slowing down and caused him some fear of, as Mr. Kober put it from the Perka Case, imminent risk.

¶ 9 I am satisfied, therefore, that there was credible evidence before the justice of the peace which could have accepted as to the defence of necessity and that she misconstrued that evidence or in fact made an error in law in that the defence should not apply.

¶ 10 In my view, therefore, the conviction of Mr. Card should be quashed and any fine paid should be

returned to him and no new trial should be ordered with respect to the offence.

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