Indexed as:

R. v. Cerrato

Between
Jehu Orlando Cerrato, appellant, and
Her Majesty the Queen, respondent

[1999] B.C.J. No. 2166
New Westminster Registry No. X052652

British Columbia Supreme Court
New Westminster, British Columbia
Oppal J.

Heard: July 12, 1999.
Judgment: September 30, 1999.
(22 paras.)

Counsel:

Allan K. Hoem, for the appellant.
Vittorio Tosselli, for the respondent.

[Ed. note: A Corrigendum was released by the Court November 22, 1999. The Corrigendum has been appended to the end of this document.]

¶ 1 **OPPAL J.**:— The appellant was convicted under s. 149 of the Motor Vehicle Act of driving without due care and attention as a result of a fatal motor vehicle accident which took place on June 15, 1995 on Highway No. 1 near Abbotsford, British Columbia. He appeals from that conviction.

¶ 2 The grounds of appeal are:

(1) the learned trial Judge misdirected himself on the issue of the identity of the driver;
(2) that the learned trial Judge erred in misdirecting himself on the test for circumstantial evidence.

¶ 3 At the time of the accident the appellant was aged 21, while the deceased, Tracy Way, was aged 19. They were dating one another.

¶ 4 On the evening of June 15th the couple had attended choir practice in Ladner. After the practice they drove in separate vehicles to the appellant's residence in Surrey, where he parked his vehicle. They then drove to Chilliwack to Ms. Way's parents' residence in her vehicle. Ms. Way's vehicle was a Suzuki, which was described as a small vehicle. The appellant testified that Ms. Way drove and he sat in the passenger seat. They arrived at her parents' home at approximately 10:40 to 10:45 p.m. Ms. Way went into the residence while the appellant remained outside in her car. The appellant said that Ms. Way told him that she had been bickering with her parents. Ms. Way's father testified that she appeared to be a little "uptight and stressed out". The visit was brief. He testified that at one point he looked outside and saw the appellant seated in the passenger's seat of Ms. Way's vehicle. He said that, "He was sort of slumped against the passenger door pillow."

¶ 5 At approximately 4:16 a.m. of the following day, Constable Shantz of the Abbotsford police found the vehicle at the bottom of a grassy slope off Highway No. 1, where it had apparently struck a utility pole. The vehicle was adjacent to the westbound lanes of the roadway. He testified that he saw the deceased lying on the east side of the vehicle with the front passenger door open. He said that she was "lying prone, face up with her feet towards the passenger's door, and it appeared as if she's come from the passenger's seat of the vehicle." It was apparent to the officer that she was deceased. He testified that he then went to the driver's side and found the appellant "pinned in the driver's seat of the vehicle." He said that he was "pinned in an awkward position under the steering wheel" with his "head towards the gas pedals and his feet towards the passenger's door". He was face down.

¶ 6 The appellant was then taken to hospital. He had suffered a fracture to the lumbar vertebrae.

¶ 7 The accident took place on a four-lane freeway which is divided by a median that separates eastbound traffic from the westbound traffic. At the point where the accident took place, there is long sweeping curve to the right.

¶ 8 The appellant's position is that he was not driving the vehicle. He testified that Ms. Way drove the vehicle after they left her parents' home. He said that his last recollection of the events of the evening was when Ms. Way brought the vehicle they came to a stop at a stop sign near her parents' home. He said he remembered waking up at Vancouver General Hospital. He also said that he recalled taking his shoes off in the car. He has no other recollection of the accident.

¶ 9 The Crown also relied on the evidence of Corporal Smith, who was qualified as an expert witness in accident reconstruction. He attended at the accident scene. It should be noted that when Corporal Smith testified the appellant was representing himself. He retained Mr. Hoem later on in the proceedings. Corporal Smith testified that he was able to "give an opinion ultimately of basically how this accident may have come about". He said that the ditch on the right side, that is, the north side of the highway is approximately four metres deep. The weather conditions were overcast. He then gave his opinion as to the cause of the accident. His evidence, in part, reads as follows:

> Q So what opinion, if any, did you formulate then in terms of the direction of the travel of the vehicle and basically how it ultimately left the highway?
> A I formulated the opinion that the vehicle had left the highway as a result of the driver either not paying attention to the road straightening out, in all probability by falling asleep.
>
> (10 October 1996, p. 29)

He also testified that in his opinion that there was no evasive action taken by the driver of the vehicle by a brake application. He also formed the opinion that the appellant was seated in the driver's seat and that the deceased in the passenger seat at the time of the collision.

¶ 10 It appears that after Corporal Smith testified the case was adjourned and recommenced on March 30, 1998, at which time the appellant was represented by Mr. Hoem. On that day Corporal Smith repeated much of his evidence and in particular evidence relating to the absence of brake marks or tire marks on the asphalt. At the conclusion of that day the case was again adjourned, this time to June 11, 1998, at which time he was cross-examined by Mr. Hoem. In cross-examination he agreed that the area in which the accident occurred is subject to occasional windstorms and that a small car, such as a Suzuki, could be "buffeted by winds". He also agreed that when a car like a Suzuki is passed by a semi-trailer there is a drafting or a vortex created by the wind and it would have an effect on the movement of the vehicle. He said that the car seemed to drift over without leaving any marks. He also agreed that the area is one where, like others, animals can enter onto the highway. His evidence in part, also read as follows:

> Q And you were unable to find any evidence to indicate why the car went that way?

A That's correct.

(11 June 1998, p. 32)

¶ 11 The issues before the learned trial Judge were as follows:

(1) Was the appellant the driver of the motor vehicle?
(2) If he was, was he operating the motor vehicle without due car and attention?

¶ 12 The learned trial judge specifically rejected appellant's evidence that he was not driving. After concluding that the accused was driving, he concluded that the accused fell asleep and drove off the road. In his reasons for judgment he said, in part, as follows:

> ... I have considered that the vehicle here apparently simply left the roadway to the left in a more or less straight line where it continued down the embankment into the pole. There was nothing specific left at the scene to indicate the reason why the car left the road as it did. It was a relatively warm or at least frost-free, dry, near summer night.
>
> I have also considered that the accused told me that he was dozing earlier in the evening in that car prior to the accident. I have considered that this was very late at night after a full day's activities on the part of the accused.
>
> I have considered all the evidence here including Mr. Hoem's suggestion of possible alternatives to the theory that the accused fell asleep while driving Ms. Way's car. The only other real possibilities in my mind are that the accused was simply not paying attention for some reason and inadvertently drove off the road, or drove off deliberately.
>
> I have concluded that the Crown has proven this part of their case beyond reasonable doubt. That is to say, I have found as a fact that the accused fell asleep and drove off the road into that pole.

(26 August 1998, p.3)

ANALYSIS

¶ 13 The scope of a court sitting on appeal is well defined. An appellate court may review and re-examine the evidence but only to determine whether a trial judge's decision could reasonably be supported by the evidence. Thus, the test in determining whether a verdict was reasonable was whether the verdict was one which a court acting judicially could reasonably have rendered: see R. v. Yebes (1987), 36 C.C.C. (3d) 417 (S.C.C.). In R. v. Burke (1996) 105 C.C.C (3d) 205 (S.C.C.), the Court held that an appellate court can only set aside a verdict after considering the whole of the evidence before the trial court and then determining that the conviction could not reasonably be supported by the evidence.

Whether the learned trial Judge erred in concluding that the appellant was the driver of the vehicle

¶ 14 The evidence before the trial Judge was that the deceased was lying near the front passenger door and, according to the investigating officer, "it appeared as if she's come from the passenger seat of the vehicle". At the same time the officer found that the appellant was "pinned in the driver's seat of the vehicle". Against that was the appellant's evidence, wherein he stated that when they left the deceased's parents' home, the deceased was driving and that he had no further recollection of the events. In light of that evidence, it cannot be said that that finding could not reasonably be supported by the evidence. The learned trial Judge was entitled to infer from the circumstances that the appellant was the driver of the vehicle.

Whether the learned trial Judge erred in concluding that the appellant wad driving without due care and attention

¶ 15 The case against the appellant was entirely circumstantial. The fact that the appellant's vehicle left the highway is not conclusive of the finding that he was driving without due care and attention. While the Crown is not required to prove an intent under this provincial statute, there must be something more in the driving in order

to sustain a conviction under that section. That much was made clear in the case of R. v. Johnson (1967), 58 W.W.R. 490 (B.C.C.A.). The facts of that case are worth noting. The only evidence before the Court was that the appellant's car had left the travelled portion of the highway. A police officer found the vehicle astride a small retaining wall some thirty feet from the travelled portion of the road. There were marks on the highway indicating that the car had skidded, left the road, rolled and had come to rest in the position in which the vehicle was found. The sole issue was whether the circumstantial evidence was sufficient to warrant a conviction for driving without due care and attention. Norris J.A., at p. 491, in citing the well-known case of R. v. McIver, [1965] 2 O.R. 475 (C.A.), stated as follows:

> The rule in Hodge's Case as stated by Alderson, B. after telling the jury that the case was made up of circumstances entirely, was that before they could find the prisoner guilty, they must be satisfied, 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prison was the guilty person.'

¶ 16 Again, at p.493, he stated:

> I do not think that the learned trial judge intended to say more than that on a totality of the evidence - that adduced by the crown and that, if any, adduced by the accused - the magistrate was entitled to draw proper inferences and that the inferences leading to his conclusions must be rational ones.

¶ 17 Bull J.A. concluded at p. 495:

> At most it can be said to be a neutral and normal act in the operating of an automobile, but which may be sufficient under certain circumstances to permit an inference of lack of care and attention but under other circumstances of the presence of considerable care and attention.

¶ 18 The so-called rule in Hodge's Case has been modified by the decision in R. v. Cooper (1977), 34 C.C.C. (2d) 18 (S.C.C.). In that case the Court reaffirmed the reasoning in an earlier decision that the direction relating to the rule in Hodge's Case ought to be confined only to the issue of identification and not to whether a person had the necessary intent or had committed the offence. Ritchie J., at p. 28, stated as follows:

> At the conclusion of Judge Graburn's charge to the jury in the present case, counsel for the Crown pointed out, correctly in my view, that it had been decided in this court in R. v. Mitchell, [1965] 1 C.C.C 155, 46 D.L.R. (2d) 384, [1964] S.C.R. 471, that Hodge's Case was concerned only with the identification of the accused as being the person who had committed the crime and that it had no application to a case turning upon the intention of the accused.

¶ 19 The Court went on to state that the rule in Hodge's Case is nothing more than a formula to assist a court in applying the principle of reasonable doubt. The Court stated that the proper test in a case of circumstantial evidence is that before making a finding of guilt a court must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts.

¶ 20 In the case at bar there was more evidence than that which was offered in Johnson, supra. It is clear that the learned trial Judge relied on the opinion of Corporal Smith, wherein he stated in his opinion the accused "probably fell asleep". While the evidence of Corporal Smith was not seriously objected to, it should be noted that his opinion that "the accused probably fell asleep" comes dangerously close to offending the "ultimate issue" rule. In recent times there has been some relaxation of the rule: see R. v. Burns (1994), 89 C.C.C. (3d) 193 (S.C.C.) at p. 201. However, the closer the opinion impinges on the ultimate issue before the court, the more strictly the rules of expert testimony, such as relevance and necessity, should be applied: see R. v. Mohan (1994), 89 C.C.C. (3d) 402 (S.C.C.), at p. 414.

¶ 21 Corporal Smith's evidence ought to have been scrutinized with the utmost care, particularly when he acknowledged that it was plausible that a small car could be "buffeted by winds, that a vortex may be created by

the wind which would an effect on the vehicle's movement, and that animals can enter onto the highway at that place". In effect, Corporal Smith offered other reasons as to the cause of the accident. In the circumstances I do not think that it can be said that the guilt of the accused is the only reasonable inference to be drawn from the proven facts. Corporal Smith's evidence offers alternative inferences which appear to be equally consistent to the inferences that the appellant drove without due care and attention. Those were all relevant factors in determining the cause of the accident. From Corporal Smith's evidence it appears that it was equally consistent that the accident could have occurred as a result of other causes. In the circumstances, it cannot be said the conviction could be reasonably supported by the evidence.

¶ 22 In summary, while there was evidence before the Court from which it could reasonably be inferred that the appellant was the driver of the vehicle, the evidence relating to whether he was driving without due care and attention was equivocal at best and therefore fell short of the standard of proof required in a criminal case. Accordingly, the appeal is allowed and the conviction is set aside.

OPPAL J.

* * * * *

CORRIGENDUM

Released: November 22, 1999

Counsel for the Crown has asked for a clarification. He has asked whether the Court ordered a new trial or whether there is an acquittal. This is clearly not a case for a new trial. The appropriate verdict here is an acquittal.

OPPAL J.

QL Update: 991006
cp/i/drk/jjl