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Indexed as:

R. v. Francisty

Between
Her Majesty the Queen, respondent, and
Ivan Francisty, appellant

[1997] O.J. No. 2118
File No. 94-1667902700

Ontario Court of Justice (Provincial Division)
Central East Region
Libman Prov. J.

May 16, 1997.
(9 pp.)

Motor vehicles — Regulation of vehicles and traffic — Meeting other vehicles — Right of way — Intersections — Signals and warnings — Offences — Appeals.

Appeal under the Provincial Offences Act of a conviction for failing to stop on the right for an emergency vehicle. The grounds of the appeal were that the justice of the peace erred in determining that the emergency police vehicle came to a stop at the intersection prior to the collision. The appellant claimed the trial judge failed to consider all the discrepancies in the evidence and erred in his interpretation of section 159(1)(a) of the Highway Traffic Act. Section 159(1)(a) required drivers to bring their vehicles to a standstill as near as is practical to the right-hand curb upon the approach of an emergency vehicle. The appellant argued that the section applied only in cases where the emergency vehicle approached from behind or in front, not from the side. The appellant claimed that he entered the intersection prior to the police cruiser and on a green light.

HELD: Appeal dismissed. The reasons for judgment of the justice of the peace displayed no failure to appreciate the evidence, including the inconsistencies relied upon by the appellant, but resolved them in favour of the respondent. The appellate court also found that the appellant's interpretation of section 159(1) was incorrect. The section was not to be interpreted as restricting from its ambit the angles upon which emergency vehicles might enter intersections.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, ss. 1(1), 144(1)(b), 144(18), 144(20), 159(1)(a).
Provincial Offences Act, ss. 135, 136(2).

Counsel:

G. Krelover, for the appellant.
A. Barkin, for the respondent.

¶ 1 **LIBMAN PROV. J.**:— This is an appeal under s. 135 of the Provincial Offences Act following the appellant's conviction for "failing to stop/right emergency vehicle" pursuant to s. 159(1)(a) of the Highway

Traffic Act. The main issues on appeal are the reasonableness of the findings of fact made by the Justice of the Peace and his interpretation of s. 159(1)(a) of the Highway Traffic Act.

History of the Proceedings

¶ 2 On 19 November 1994 the appellant was issued a certificate of offence for fail to stop on right for emergency vehicle, the particulars being 1:54 a.m. at Dunlop Street West at Anne Street North, Barrie. His trial commenced on 8 September 1995 before Justice of the Peace R.E. Leggate; the evidence was taken on two subsequent dates and Reasons for Judgment were delivered on 15 November 1996 at which time the appellant was found guilty. The set fine of $90.00 was imposed.

¶ 3 By way of notice of appeal dated 29 November 1996, the appellant seeks an acquittal or, in the alternative, an order for a new trial. The main grounds of appeal, as paraphrased by me, are that:

1. The Justice of the Peace erred in determining, by failing to consider all the discrepancies in the evidence, that the emergency police vehicle came to a stop at the intersection prior to the collision.
2. The Justice of the Peace erred in his interpretation of s. 159(1)(a) of the Highway Traffic Act.

¶ 4 The appeal was argued on 9 May 1997. Following oral argument, judgment was reserved.

Summary of the Facts

¶ 5 It is common ground that in the early morning hours of 19 November 1994 a collision occurred in the intersection of Anne and Dunlop Streets in Barrie. An emergency police vehicle responding to a domestic violence call, driven by Constable Hettinga, was travelling south on Anne Street and entered the intersection facing a red light; the appellant and his passenger, Aaron Bastien, were in a 1994 Acura Integra, travelling west on Dunlop Street, returning to Collingwood after spending the late evening in downtown Barrie. The latter had a green light at the intersection.

¶ 6 The main factual issues in dispute involved whether the emergency police vehicle stopped in a safe manner prior to entering the intersection (as permitted by the exception in s. 144(20) of the Highway Traffic Act) and whether Constable Hettinga activated his siren or flashing red lights beforehand (as required by s. 159(1)). The officer and two civilian witnesses, Robert Rodger and John Dickson, testified that he did so, although their evidence differed as to whether both siren and lights were employed. Conversely, the appellant and his passenger maintained that the officer neither stopped nor sounded any warning siren or flashing lights prior to the collision.

¶ 7 Given the nature of this appeal by means of a "review" pursuant to s. 136(2) of the Provincial Offences Act, and the appellant's contention that the Justice of the Peace's findings of fact were unreasonable and not supported by the evidence, I propose to consider the facts in more detail when discussing the first ground of appeal.

Relevant Legislative Provisions

¶ 8 Section 144(1)(b) of the Highway Traffic Act defines "emergency vehicle" as:

> a vehicle while used by a person in the lawful performance of his or her duties as a police officer.

Subsections (18) and (20) state:

> (18) Every driver approaching a traffic control signal showing a circular red indication and facing the indication shall stop his or her vehicle and shall not proceed until a green indication is shown.

(20) Despite subsection (18), a driver of an emergency vehicle, after stopping the vehicle, may proceed without a green indication being shown if it is safe to do so.

Section 159(1)(a) states:

159(1) The driver of a vehicle, upon the approach of an ambulance, fire or police department vehicle or public utility emergency vehicle upon which a bell or siren is sounding or upon which a lamp is producing intermittent flashes of red light, shall immediately bring such vehicle to a standstill.

(a) as near as is practical to the right-hand curb or edge of the roadway and parallel therewith and clear of any intersection;

¶ 9 "Intersection" is defined in s. 1(1) of the Highway Traffic Act as meaning:

the area embraced within the prolongation or connection of the lateral curb lines or, if none, then of the lateral boundary lines of two or more highways that join one another at an angle, whether or not one highway crosses the other;

Position of the Parties

¶ 10 In his very able and thorough submissions, Mr. Krelove, for the appellant, argues that the Justice of the Peace made findings of fact which are unreasonable by virtue of the inconsistencies in the evidence, even amongst the Crown's own witnesses. He particularly take issue with the finding that the emergency police vehicle stopped, having activated its flashing red lights, prior to entering the intersection in question. It is further the position of Mr. Krelove that the wording of s. 159(1)(a) of the Highway Traffic Act is such that it applies only in cases where the emergency vehicle approaches another vehicle from behind or in front, but not from the side, as occurred in the case at bar.

¶ 11 Ms. Barkin, for the respondent, submits that the findings of fact made by the Justice of the Peace were supported by the evidence and than an examination of the Reasons for Judgment displays no failure to appreciate the evidence, particularly the inconsistencies relied upon by the appellant. With respect to s. 159(1)(a), Ms. Barkin submits that there is nothing in its wording which suggests that it restricts the angles upon which emergency vehicles approach an intersection and that such an interpretation would be contrary to the clear intention of the provision.

Analysis

Reasonableness of the Findings of Fact and Assessment of the Evidence

¶ 12 An appellate court acting under s. 136(2) of the Provincial Offences Act is to conduct the appeal by means of a review, that is a reconsideration of the trial proceedings. This provision reflects the informal nature of appeals in respect of Part I and II proceedings. Put another way, this form of appeal was clearly intended by the Legislature to be very broad: appellate relief is available as of right and there are no restrictions on the sorts of issues which may be raised: R. v. Stephenson (1984), 13 C.C.C. (3d) 112 (Ont. C.A.); R. v. Murray (1983), 22 M.V.R. 66 (Ont. H.C.); R. v. Anderson, 28 November 1985, Doc. 2716/85 (Ont. S.C.).

¶ 13 In this case, evidence was taken over the course of several court appearances and the parties were provided with transcripts of the proceedings. Following the submissions of counsel, the learned Justice of the Peace delivered lengthy Reasons for Judgment. Pursuant to my jurisdiction as the "reviewing" court, I have considered the transcripts of evidence, including the trial exhibits and diagram of the intersection submitted on appeal, as well as the submissions of counsel.

¶ 14 The case for the Crown was that the emergency police vehicle driven by Constable Hettinga stopped prior to entering the intersections and did so upon activating its flashing red lights. Thereafter, it was contended,

the appellant entered the intersection, striking the cruiser. The evidence in support thereof was provided by the officer and two civilian witnesses.

¶ 15 Robert Rodger testified that he was southbound on Anne Street when he observed a police car in the middle lane with its emergency lights on, proceeding to the intersection of Anne and Dunlop. He did not hear a siren; however, the cruiser's lights were on the whole time. The witness was "absolutely positive" that the police car came to a "complete stop" before proceeding through the red light in the intersection. He estimated that it was stopped for ten seconds. He then noticed a red Acura go through the intersection "a little bit over the speed limit" and collide with the police car; the Acura veered to the left to try to avoid the accident. According to the witness, the cruiser entered the intersection first. Mr. Rodger was about ten car lengths back from the police car at the time. In his opinion, there was "ample time" for a vehicle to stop at the intersection to let the cruiser go through.

¶ 16 The officer driving the cruiser, Constable Hettinga, testified that he received a radio call at approximately 1:37 a.m. to attend an address on Innisfil Street in Barrie with respect to a "violent domestic dispute". He was driving a uniform car equipped with full emergency lights, roof lights, sirens, wigwag front headlights, side alley lights and rear flashers. The master emergency switch in the cruiser activated all the lighting systems; a manual switch located to the rear operated the siren. According to the officer, he activated all his emergency equipment, including lights and sirens, approximately half a kilometre north of the Dunlop and Anne intersection.

¶ 17 At the intersection in question, Constable Hettinga testified that he made a "complete stop" for the red light he was facing, southbound on Anne Street. He made sure that the master emergency light systems were working and that his sirens were activated. He estimated that he was stopped for ten seconds. The officer then "monitored" the intersection, that is, he looked both in a left and right direction on Dunlop Street to make sure there were no other vehicles. He then proceeded slowly through the intersection, in the curb lane. As he was doing so, a car approaching from the east, proceeding westbound on Dunlop Street, hit the front left hand corner panel and headlight area of the cruiser. It was travelling approximately 30 kilometres per hour; there was no sound of braking. A "light impact" occurred. The appellant was the driver of this car. Road conditions were clear and dry; it was a clear night. In cross-examination it was conceded that the officer, according to the motor vehicle accident report (Exhibit 1), was only one-fifth of the way into the intersection whereas the appellant's vehicle went four-fifths of the way through it.

¶ 18 The investigating officer, Constable Sutton, arrived at the accident scene at approximately 2:01 a.m. It was cool and dry at the time. He observed "minor damage" to the left front fender of the cruiser, to the driver's side quarter panel head lamp area, which he estimated as $1,000.00 damage; the complete nose cone of the Acura vehicle was shifted and damaged as well as the right front quarter panel area above the tire and fender on the passenger side. The officer's estimate for this damage was $2,500. A photograph of the appellant's motor vehicle (Exhibit 2) was tendered into evidence, depicting the damage described above.

¶ 19 Dunlop Street West has a total width at this location of 17.5 metres. Anne Street North at Dunlop Street has width of 18.7 metres. Constable Sutton determined that the approximate point of impact was 4.9 metres south and 2.8 metres east of the northwest curve of Dunlop Street at Anne Street North. This location was in the centre westbound land for traffic travelling west on Dunlop and in the curb lane for traffic travelling southbound on Anne Street. The officer further testified that visibility for a southbound motorist on Anne Street with regard to the approach of westbound traffic would be "reasonably clear", with "good visibility" approximately 150 metres east of the intersection. With respect to a westbound motorist on Dunlop Street approaching the intersection, Constable Sutton considered that visibility would be "reasonably clear" as well, with approximately 100 metres of visibility.

¶ 20 The theory of the defence was that it was the appellant who first entered the intersection, and did so upon the light turning green. Moreover, it was argued, there was no advance warning by the police vehicle which struck the appellant's vehicle.

¶ 21 The appellant testified in his own defence. On the evening in question, he and his passenger, Aaron Bastien, were returning to Collingwood after having been to Ruannes, a restaurant/bar in downtown Barrie. The

appellant was driving his 1994 Acura Integra. They left Ruannes just after 1:00 a.m. and stopped for a pizza on Dunlop Street. The appellant then continued along Dunlop, going west towards Collingwood.

¶ 22 According to the appellant, he came to a stop for a yellow light at the Anne and Dunlop Street intersection. He was travelling in the middle lane. After the light turned green, he proceeded and three-quarters of the way into the intersection he was struck on the right from passenger side, in the tire area, by the cruiser. According to the appellant, there was "absolutely nothing" by way of flashing lights on the cruiser. Neither did he hear any siren. He did not see the police car beforehand. The appellant had a clear view of the intersection; visibility was "excellent". In cross-examination, the appellant maintained that Constable Hettinga did not turn on his emergency lights until after the collision, approximately five seconds later.

¶ 23 Aaron Bastien, the appellant's passenger, stated that their motor vehicle was stopped in the centre land at the intersection of Anne Street and Dunlop Street, waiting for the red light to turn green. They then proceeded along Dunlop when the police car hit them. The witness did not observe any flashing lights or anything "in the nature of a police cruiser" prior to the collision.

¶ 24 In reply evidence, John Dickson indicated that on the day in question he was driving a small pick-up truck west on Dunlop Street. He was stopped for a red light at the intersection of Anne and Dunlop Streets. When the light turned green, he proceeded through the intersection. About three-quarters of the way across it, he noticed "red flashing lights" out of the corner of his eye. These lights were coming from the north on Anne Street. He observed that it was a police car travelling south on Anne Street with its emergency lights on. Mr. Dickson kept proceeding through the intersection, looking in his rear view mirror at the police car. He saw it slow down at the intersection before looking away. The witness was not in a position to say whether the cruiser came to a stop. He did not hear a siren. The next thing that happened was that he heard a collision; he observed a red Honda had struck the cruiser. He thought this occurred in the middle lane. His view of the intersection was not obstructed in any way.

¶ 25 The learned Justice of the Peace commenced his Reasons for Judgment by reviewing the evidence in detail. He considered that estimates of time and distance and speeds in situations that are "emergency in nature" were "rather fragile". After referring to the relevant provisions of ss. 144 and 159 of the Highway Traffic Act, he concluded:

> I believed that is established by two witnesses, particularly Mr. Roger's (sic), and the police officer driving the car himself, that the motor vehicle did, in fact, stop. The last witness, Mr. Dixon (sic), didn't see it stopped, but certainly he saw it slowing before it entered the intersection. So I believe that the police motor vehicle was properly at the intersection with its lights going, stopped, ready to proceed through. The obligation then is that he should proceed through with an appropriate amount of care and caution. The section, in my view, allows him to pass through a red light, but not without exercising reasonable care, attention and caution. The indication from his evidence is that he stopped, that he looked both ways, that he saw other vehicles stopped. And after being there for ten seconds, and I've already alluded to my concern over the ten seconds issue as being frankly rather long, given the circumstances, but be that as it may, clearly there was a stopping of this motor vehicle.
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> ...
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> It's clear to me that the Dixon vehicle passed through the intersection and saw the police vehicle approaching. It is equally clear to me that there was a clear field of view, at least 100 metres to the north, from 1550 metres, or 150 yards, I believe, back from this intersection. I question, frankly, whether Mr. Francisty was in fact stopped through a cycle of lights or not. Since the evidence of Dixon is that he was in the middle lane, and he saw the accident directly behind him, after he had passed through the intersection.
> Be that at it may, I believe that the police motor vehicle had its lights activated, that it was there to be seen, and some reaction should have been taken by Mr. Francisty. Obviously, the requisite reaction, which I think common sense would dictate in this case, that he should have

brought his vehicle immediately to a standstill, was not taken. And therefore, I will register a conviction on this offence.

¶ 26 With respect to the appellant's argument that the Justice of the Peace did not adequately deal with the inconsistencies in the evidence and that his findings of fact are therefore unreasonable, I have had the benefit of Mr. Krelove's thorough review of the evidence and cogent submissions. He particularly takes issue with the Justice's failure to refer to the fact that there were differences in opinion in the Crown's case as to what lane of traffic Constable Hettinga was driving his vehicle; how far the officer's car proceeded through the intersection prior to the collision; that Mr. Rodger reviewed his evidence in the presence of Constable Hettinga prior to testifying; and that an independent police force was not called upon to investigate the accident.

¶ 27 In my opinion, a full and fair reading of the Reasons for Judgment displays no failure on the part of the Justice of the Peace to appreciate the evidence, particularly the inconsistencies relied upon by the appellant. There can be no doubt that the competing theories as to the driving conduct of the appellant and police officer before entering the intersection were clearly before the trier of fact. He resolved these questions adversely to the appellant. That is, he found as a fact that the officer stopped prior to proceeding through the red light and that his emergency lights were activated beforehand and thus should have been seen by the appellant.

¶ 28 Notwithstanding the broad jurisdiction of a reviewing court pursuant to s. 136(2) of the Provincial Offences Act, the court, in my view, must be chary of subjecting the reasons below to microscopic scrutiny or merely substituting its opinion for that of the trier of fact in the absence of a clear basis for doing so. I do not think, having regard to the record of this case, that appellate intervention is warranted here.

¶ 29 The factual issues requiring resolution in this Highway Traffic Act case were essentially twofold: did the emergency police vehicle stop prior to entering the intersection against a red light and then proceed in a safe manner (s. 144(20)) and did the appellant, upon the approach of an emergency vehicle with its siren sounding or red lights flashing, stop and pull over to the right (s. 159(1)(a)). The Justice of the Peace made express findings of fact on these issues. There is no basis for the argument, in my view, that he was not alive to the competing theories of the parties and the evidence in support thereof.

¶ 30 That the Justice did not express an opinion, for example, respecting the difference of opinion amongst the Crown's own witnesses as to in which lane the cruiser was driving or accident location does not, with respect, detract from the essential findings of fact. Neither does it strike me as significant that he did not elaborate upon bias of "contamination" of evidence with respect to the witness Rodger reviewing his evidence in the presence of Constable Hettinga. The Justice similarly did not comment on the appellant's admission that he discussed the evidence of the Crown's witnesses with Mr. Bastien prior to the latter's testimony. A review of the Reasons for Judgment makes it apparent that the totality of these issues, particularly the evidence vital to the defence, were considered by the court below.

¶ 31 Accordingly, this ground of appeal must fail.

Highway Traffic Act, s. 159 (1)(a)

¶ 32 The Justice of the Peace rejected the appellant's contention that this provision applies only in the case of emergency vehicles which approach other vehicles from either the front or the rear, but not from the side, as in the case at bar. I agree. The words "upon the approach" in s. 159(1) must be given, in my view, their ordinary dictionary meaning of "to draw closer to" or "to come very near to," that is, "an act or instance of approaching." There is no ambiguity in the wording of s. 159(1) or other basis for departing from this meaning.

¶ 33 Contrary to Mr. Krelove's position, I am unable to apprehend any meaningful difference in the potential for danger posed by emergency vehicles which approach other vehicles from the front or rear as opposed to the side. Indeed, it seems to me that a case can be made for the latter as constituting the direction or "approach" most likely to result in collision, and thus most obviously in need of regulation. See, for examples of such accident cases, Leach v. Hubbs (1947), 90 C.C.C. 45 (Ont. H.C.); Windsor Ambulance Service Company Limited v.

Pankevicz, [1951] O.W.N. 607 (H.C.); R. v. Hammond (1978), 1 M.V.R. 210 (Ont. Co. Ct.); R. v. Kurtzman (1991), 66 C.C.C. (3d) 161 (Ont. C.A.).

¶ 34 I cannot therefore accept the submission that this provision should be interpreted in a manner which will have the effect of restricting from its ambit the angles upon which emergency vehicles may enter intersections. I do not think that the Legislature could have intended such an interpretation, the result of which would at once severely restrict, if not largely frustrate, the application of this section of the Highway Traffic Act, while unnecessarily increasing the potential for collisions involving emergency vehicles.

¶ 35 The submission of Mr. Krelove that s. 159(1) requires motor vehicles to keep clear of emergency vehicles only in certain situations, depending upon their direction or angle of approach, must be rejected.

Disposition

¶ 36 The appeal is dismissed.

LIBMAN PROV. J.

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