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R. v. Hales

Between
Her Majesty the Queen, appellant, and
Ruth Hales, respondent

[1995] O.J. No. 735
DRS 95-11206

Ontario Court of Justice (Provincial Division)
Sault Ste. Marie, Ontario
Greco Prov. J.

March 17, 1995.
(18 pp.)

Motor vehicles — Offences — Failing to stop at a red light — Defences — Necessity, whether available for absolute liability offence.

This was an appeal from the acquittal of the respondent was charged with failing to stop at a red light. The offence occurred in an attempt by the respondent to avoid a sudden and imminent collision between her vehicle and that of an oncoming driver who was travelling the wrong way on the one-way street. The trial judge accepted the respondent's plea of necessity and dismissed the charge.

HELD: The appeal was dismissed. The defence of necessity was available to an accused charged with an absolute liability offence as the mental element of voluntariness in such cases went at least in part to the element of actus reus. On the facts of this case, the respondent's action, when measured on the basis of society's expectation of appropriate and normal resistance to pressure, amounted to involuntariness, and society would accept her action as being quite normal and most appropriate given the circumstances in which she all of a sudden found herself.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 4, 5, 7(3).
Highway Traffic Act, s. 144(18).

Counsel:

R. Clark, for the Crown.
C. Thompson, for the respondent.

REASONS FOR JUDGMENT

¶ 1 **GRECO PROV. J.**: — This is a Crown appeal from the decision of Justice of the Peace Wardell dismissing a charge brought against the defendant Hales under section 144(18) of the Highway Traffic Act of Ontario, the allegation being that the defendant did fail to stop for a red light.

¶ 2 Two questions are posed of the court in this appeal:

(1) Is the defence of necessity available to the defendant?
(2) If such a defence is available do the facts of this case show that necessity existed?

¶ 3 I begin by making the observation that the offence charged here is one of absolute liability as that type of offence was set out by the Supreme Court of Canada in the celebrated case of Regina v. The City of Sault Ste. Marie, wherein, Dickson J. had this to say with respect to the three types of offenses which then became known to Canadian jurisprudence:

> "1. Offenses in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
> 2. Offenses in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offenses may properly be called offenses of strict liability. Mr. Justice Estey so referred to them in Hickey's case.
> 3. Offenses of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault."

¶ 4 It is put that, with respect to offenses of absolute liability, it is still incumbent upon the Crown, as it always is, to establish actus reus and that there is nothing in the judgment in Sault Ste. Marie related to offenses of absolute liability which relieves the Crown of that obligation.

¶ 5 It is further put that the issue as to whether or not it is not open to the accused to exculpate himself by showing that he was free of fault would be a non-issue, so to speak, if the Crown has failed to prove actus reus beyond a reasonable doubt. The question related to the inability to so defend oneself is not triggered at all unless actus reus has been established. That remains the threshold issue.

¶ 6 A question to be considered, therefore, in deciding whether actus reus has been established is a simple question really, although it may become complicated as one moves along through the cases. The question is what is meant by the term actus reus? My purpose for posing this question may, to some at least, appear to be a bit idiotic, however, the reason I proceed as I do is because I am of the view, that while a person charged with an absolute liability offence may not defend himself by showing that he was free of fault, there is nothing in the judgment of Dickson J. which would indicate that such a person cannot defend himself by raising a doubt as to whether actus reus has been established at all, or beyond a reasonable doubt. So, then, what is meant by the term actus reus and what mental element, if any, forms part of the actus reus? Most of the cognoscenti have usually thought of the mental element of a crime as being referrable to the mens rea aspect of the crime, and, needless to say, in many cases it does.

¶ 7 It is put, however, that the mental element of voluntariness in most cases forms a part of the element of the crime known as actus reus. It is further put that if the alleged wrongful act of the accused was not his voluntary act, then it may be said that the act done although it was done by the accused cannot be ascribed to him as being his wrongful act, with the result that the Crown, in such a case, will have failed to prove the only thing the Crown need prove in absolute liability offenses, i.e., actus reus, with the further result that in such circumstances the charge against the accused would have to be dismissed -- but dismissed on that basis, i.e., that the Crown has failed to prove actus reus, not dismissed on the basis that in the mens rea sense the accused was free of fault, i.e., that he took all reasonable care to prevent the event from happening.

¶ 8 In Regina v. King, 1962 S.C.R. 746, **Taschereau J.** (as he then was) put it this way:

> "It is my view that there can be no actus reus unless it is the result of a willing mind at liberty to make a definite choice or decision, or in other words, there must be a will-power to do an

act whether the accused knew or not that it was prohibited by law."

¶ 9 While it may be presumptuous of me to say so, I make so bold as to suggest that when Dickson J. says, as he did, that it is not open to the accused to exculpate himself by showing that he was free of fault in absolute liability offenses, he was only speaking in terms of that part of the mental element involved in the commission of an offence which related to an awareness on the part of the accused in respect o;f those consequences which may flow from his actions and that he should not be taken as having meant that the accused could not exculpate himself where the mental element of concern related to actus reus, i.e., whether or not the act was the wilful voluntary act of the accused.

¶ 10 It is suggested that a person might very well know what he is doing and yet not be doing what he is doing of his own free will. While he may be found to possess "mens rea" related to what he knew what it was that he was doing, actus reus may be absent because the mental element of voluntariness, which would be necessary to establish actus reus, would be absent.

¶ 11 In Regina v. Daviault 1994 33 C.R. (4th) 165, Cory J. had this to say:

> "If the mental element of voluntariness related to actus reus rather than the men rea, then the result must be the same. The actus reus requires that the prohibited criminal act be performed voluntarily as a willed act."

¶ 12 It is put that the courts might be taken to mean when the courts are engaged in deliberations involving those types of offenses concerning which the Crown is not required to prove men rea, such as absolute liability offence, that the courts have in mind and have reference only to the part of the mens rea element which related to awareness on the part of the accused, an awareness also of the circumstances surrounding the event, and that conversely the courts do not have in mind that part of mens rea which has relation to whether or not the act was one which was voluntary in nature, an act brought about by the free will of the accused.

¶ 13 I think it is fair to say that there would be no crime committed unless it is found that the accused person himself brought about all of the elements of the crime by an act on his part, which act was a voluntary act. For example, it is put that an accused would not incur liability which is criminal in nature if the act complained of was an act committed when the accused was in a state of automatism.

¶ 14 Reference is invited to the decision of Regina v. Walker 1979, 5 M.V.R. 114 at pages 124-5, wherein Zalev, Co. Ct. J., as he then was, made the following observations:

> "88. The driver or operator of a vehicle...
>
> (a) upon approaching a stop sign at an intersection, shall bring the vehicle or car to a full stop at a clearly marked stop line or, if none, then immediately before entering the nearest crosswalk or, if none, then immediately before entering the intersection..."

The penalty for contravention is a fine of not less than $20 and not more than $100. Bearing in mind those matters set forth above by Dickson J., together with the extracts from the judgment of Estey C.J.H.C., in R. v. Hickey, supra, I have come to the conclusion that the offence under s. 88 (a) of The Highway Traffic Act falls within the third category, i.e., absolute liability. I do not suggest that each offence under The Highway Traffic Act is one of absolute liability. Each must be considered separately in the light of the foregoing principles.
Having arrived at that conclusion I turn to two further extracts from the judgment of Dickson J. in R. v. Sault Ste. Marie, supra. The first is at p. 373 of the report [C.C.C.]:

> "We have the situation therefore in which many courts of this country, at all levels, dealing with public welfare offenses favour (i) not requiring the Crown to prove mens

> rea, (ii) rejecting the notion that liability inexorably follows upon mere proof of the actus reus, excluding any possible defence." (The italics are mine.)

The second passage is also at p. 373, as follows:

> "In this doctrine it is not up to the prosecution to prove negligence, instead, it is open to the defendant to prove that all due care has been taken.
> This burden falls upon the defendant as he is the only one who will generally have the means of proof.
> This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever." (The italics are mine.)

If Dickson, J. is to be taken literally then this appeal would have to be dismissed on the finding of fact, indeed, the admission, that the appellant did not stop for the stop sign. Did His Lordship really mean that a driver who drove through a stop sign on the orders of his kidnapper who was holding a gun to his head would have no defence at all? What if the driver was a five-year-old child who had somehow managed to set the car in motion? What if the driver was suffering from a condition of non-insane automatism? These are some of the matters raised in Colin Howard's test Strict Responsibility (1963). On a reading of the whole judgment, particularly his formulation of the three categories, it appears to me that Dickson J. was directing his mind to the defence of reasonable care which was raised in the case before him. I do not believe that he directed his mind to those defences which I have mentioned. In any event, having held that the offence under consideration was a category two offence, His Lordship's statement that absolute liability denies an accused any defence whatsoever must be considered as obiter dicta.
I have come to the conclusion that there are defences which may be raised notwithstanding the characterization as one of absolute liability. It is unnecessary for me to draft a list of such defences, and I refrain from doing so. I simply note that Professor Howard considered infancy, coverture, compulsion, insanity, automatism, intoxication, necessity, impossibility and inevitable accident, arriving at varying conclusions. After defining strict liability offenses as those in which the necessity for mens rea or negligence is wholly or partly excluded, Professor Howard conceded that if there were no possible defence the appropriate term would be "absolute liability." After referring to F.B. Sayre's article Public Welfare Offenses (1933), 33 Col. L. Rev. 55 (also referred to by Dickson J. in R. v. Sault Ste. Marie op cit., p. 364), Professor Howard disagrees with Sayre's conclusion that since no mental element is required in regulatory or public welfare offenses the very basis of most of the general defences to crime is removed and therefore these defences become irrelevant."

¶ 15 I take the view, and I so find, that even when dealing with offenses of absolute liability it is open to the accused to defend himself by raising a defence aimed at negating actus reus and that this is particularly so when the element of voluntariness is the issue raised by the accused, since the element of voluntariness may go to the element of actus reus.

¶ 16 The defence relied upon here is that of necessity.

¶ 17 In Regina v. Perka et al v. The Queen 1984, 14 CCC (3d) 385, Dickson J. had this to say:

It is now possible to summarize a number of conclusions as to the defence of necessity in terms of its nature, basis and limitations:

(1) the defence of necessity could be conceptualized as either a justification or an excuse;
(2) it should be recognized in Canada as an excuse, operating by virtue of s. 7(3) of the Criminal Code;
(3) necessity as an excuse implies no vindication of the deeds of the actor;
(4) the criterion is the moral involuntariness of the wrongful action;

(5) this involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure;
(6) negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity;
(7) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle;
(8) the existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law;
(9) the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril;
(10) where the accused places before the court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt."

¶ 18 Sections 4 and 5 require that the conduct of the accused be involuntary, the words "involuntariness" and "moral involuntariness" being used.

¶ 19 By section 7 it is established that actions or circumstances which indicate that the wrongful act was not truly involuntary disentitle the accused from relying on the defence.

¶ 20 In applying the law as set out, supra, in order to determine whether or not the defence of necessity has been made out, the facts surrounding the commission of the offence must be scrupulously examined. The facts will make the law, the law will not make the facts. Maybe the defence of necessity has been made out here on the facts but then again maybe it has not been established. On the day of concern the respondent was driving her motor vehicle in an easterly direction in the eastbound lane (second lane from the curb) on Bay Street in this city. Bay Street is a one-way street designed for eastbound traffic. The evidence would indicate that she was travelling approximately 40 km.p.h., well within the 50 km.p.h. limit. She was approaching the intersection of Bay and Elgin Streets. All of a sudden, and without any warning whatsoever to her a motor vehicle being operated by one Plante swung wide onto Bay Street from Elgin Street and began travelling toward, not away from, the respondent's vehicle, travelling in a westerly direction. Obviously, Plante was travelling the wrong way on the one-way street. At this point in time the respondent was approximately 65 feet from the corner of Bay and Elgin Streets.

¶ 21 Needless to say, the respondent was completely startled by the fact that the Plante vehicle was heading in her direction especially since he was partially in her lane.

¶ 22 Faced with this unexpected predicament she swerved her car quickly to the right in order to avoid what she perceived would be a collision between her car and that of Plante. In doing so, i.e., in swerving to the right, her car went through a red light where she was involved, unhappily, in a collision within the intersection of Bay and Elgin with a third vehicle.

¶ 23 The total elapsed time was approximately one or two seconds.

¶ 24 I will begin by saying that when the respondent swerved her vehicle as she did so because she was faced with an imminent risk, that risk being that she would have been struck by the Plante vehicle. Her manoeuvre then was made to avoid a direct and immediate peril. I am satisfied on a review of the evidence that had the Plante vehicle not done what was done the respondent would have proceeded straight ahead and would have stopped at the red light.

¶ 25 Quaere? Did she swerve voluntarily? Well, to the extent that she had control of the vehicle and deliberately swerved to the right, her actions were her controlled actions but in my view those actions were not done of her own free will. They were actions which were forced upon her by the intervening act of Plante and in that respect -- going to the element of actus reus -- her actions were anything but voluntary. Had Plante not done what he did she would have swerved. She would have voluntarily continued on in a straight line and would have stopped at the red light.

¶ 26 I find then that her action in swerving and thus going through the red light was involuntary.

¶ 27 It has been suggested that there were other legal means or measures which she could have taken to avoid the collision and avoid going through the red light. Perhaps she could have sounded her horn; perhaps she could have applied her brakes. If there are other reasonable legal alternatives available to the accused, the accused is disentitled from relying on the defence of necessity.

¶ 28 The real question to be asked now is in relation to her involuntary manoeuvre. In this regard the involuntariness is to be measured, it is to be measured on the basis of society's expectation of what might be appropriate and normal resistance to pressure -- in this case -- the specific type of pressure she was under.

¶ 29 In my view the peril which the respondent was facing was real, was imminent and was so pressing that immediate action was called for on her part. Furthermore, the time available to her to reflect upon what to do was very limited, one or two seconds, so limited, in my view, as to prevent her from exercising patience and from involving herself in lengthy self-examination and deliberation. Something had to be done immediately.

¶ 30 In retrospect one might say oh well, she could have applied her brakes -- and yet we do not know how effective that action might have been given the scenario she was facing.

¶ 31 In my view her action when measured on the basis of society's expectation of appropriate and normal resistance to pressure, amounted to involuntariness, and society, in my view, would accept her action as being quite normal and most appropriate given the circumstances in which she all of a sudden found herself. Society would not expect her to review in her mind in that short time all other alternatives available to her when she had but one or two seconds within which to make a decision.

¶ 32 It is put, that given the factual situation with which she was presented, even a degree of negligence on her part would not disentitle her to the necessity defence -- and I do not find on the facts presented here that she was culpable of any negligence.

¶ 33 In my view as well, the swerving and passing through the red light was not disproportionate to the imminent evil she was facing, not out of proportion at all.

¶ 34 It is put that at the moment of concern she was so involved in avoiding the collision that she was then oblivious to the colour of the light or that she might end up in the intersection.

¶ 35 In conclusion, therefore, I find that:

(1) the defence of necessity is available to an accused charged with an absolute liability offence since the mental element of voluntariness in such cases goes at least in part to the element of actus reus;
(2) on the facts of this case the defence of necessity has been established and the Crown, in my view, has not shown that necessity was absent.

¶ 36 The Crown appeal is, therefore, dismissed.

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