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R. v. Namink

Between
William Namink, appellant, and
Her Majesty the Queen, respondent

[1979] O.J. No. 317

Ontario County Court
County of Middlesex
Killeen Co. Ct. J.

Oral judgment: September 24, 1979.
(5 pp.)

Counsel:

M. Epstein, for the appellant.
I.A. MacDonald, for the Crown.

¶ 1 **KILLEEN CO. CT. J.(orally)**:— The appellant here was charged with careless driving, under Section 83 of The Highway Traffic Act, arising out of an accident which took place on the evening of February 24, 1979, at approximately 10.50 p.m., on Highway No.4, in the County of Middlesex.

¶ 2 The evidence disclosed that one Mr. Clandeboye was driving north on Highway No.4 roughly 45 miles per hour, and had just come around a curve to the right in the moments before the accident which gives rise to this charge. Highway No.4 at this point was a two-lane road. One lane in each direction. There was a painted centre line, and the accident occurred at a point north of the curve and at a place in the road where passing movements were permitted.

¶ 3 There was no evidence of excessive speed on the part of the accused in the moments leading up to this accident. Indeed, it would appear from the evidence of all the witnesses who testified, that both cars, that driven by Mr. Namink, and that driven by Mr. Clandeboye, the car ahead of appellant, were being driven in a normal and reasonable fashion, bearing in mind the time of day, 10.50 p.m., and the road conditions.

¶ 4 The accused, after traversing the curve to which I have already referred, decided to pass Mr. Clandeboye's vehicle. There were cars far off in the distance, to the north, which were proceeding southward, but they were not a problem to a person in the position of Mr. Namink wishing to make a passing movement past the Clandeboye vehicle.

¶ 5 The evidence disclosed that the road conditions were normal, and relatively safe, and indeed no witness was positive that there was ice, or icy patches on this road at all in the zone where the accident occurred, although the accident did occur on February 24, a winter day. As Mr. Namink pulled his vehicle out to the left, and on to the south lane to make his move, he had no difficulties until he got up beside, or almost beside, the Clandeboye vehicle. He testified that at this point his car suddenly skidded, or went into a spin sideways, which caused a sudden loss of control resulting in an impact between the front end of his

vehicle and the left rear corner of the Clandeboye vehicle.

¶ 6 Both the accused, and his passenger, who testified, said that this sudden loss of control was unexpected, unanticipated, and happened so quickly that, in effect, there was no possibility of evasive action, which would have prevented the collision which did ensue. The accused, and his witness, thought that a possibility that their vehicle struck an icy spot, which caused the loss of control, existed, but it is clear they were not certain this was the reason for the loss of control. They gave this, as perhaps, their best explanation because Mr. Namink was driving at a reasonable rate of speed, was alert before the accident and really no other explanation seemed reasonable, or appropriate.

¶ 7 The learned trial judge in his reasons, in effect, found as a fact that on the physical evidence before him there was no indication of ice, and seemed to direct his mind, in his reasons for judgment, to the proposition that, there being no evidence of ice, the accused person must necessarily be guilty as charged, because it would appear from his reasons that he felt the accused was attempting to justify his conduct on the single premise that ice had caused the loss of control.

¶ 8 With all due deference to the learned trial judge, I think that the direction of his mind to this one issue of ice or no ice was somewhat of a displacement of his duty to consider the totality of the evidence, as it related to the charge before the court. The presence, or absence, of ice on this charge would not be the sole and conclusive determinant of guilt or innocence, as it seems to me.

¶ 9 Was, therefore, the accused guilty of careless driving? That is the question. Was the accused guilty of conduct from which the court could infer, beyond a reasonable doubt, that the accused was driving without due care and attention, or without reasonable consideration for other users of the highway.

¶ 10 It is trite to say that this is a quasi-criminal charge, and that to make out a charge under this section the evidence must bespeak conduct deserving of punishment in the way of a conviction under this section of our Highway Traffic Act. Mere momentary inattention, or a simple kind of error of judgment, does not bespeak the kind of conduct over which the net of this section is cast.

¶ 11 Here I see no evidence of the kind of conduct aimed at in this section. At best, and I put it that way, "at best" there was momentary inattention here, and mere momentary inattention is not enough to justify a conviction under this section. There is no evidence of speed here, no evidence of risk taking in the passing movement, and whether the effective cause of this accident was momentary inattention or sudden slippage on an icy patch, which could not be anticipated, the criteria for conviction under this section cannot, in law, be made out. In other words, the evidence here is so fragile that a conviction on that evidence cannot be supported in law.

¶ 12 The appeal must, therefore, be allowed, the conviction will be expunged, and the fine remitted to the accused.

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