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R. v. Reber (Ont. Ct. (Prov. Div.))

Between
Her Majesty The Queen, Appellant, and
Edward Alden Reber

[1992] O.J. No. 1979

Ontario Court of Justice - Provincial Division
Toronto, Ontario
Stone Prov. Div. J.

Heard: September 14, 1992
Judgment: September 16, 1992
(6 pp.)

Original Charge: Careless driving.

Paul Bellefontaine, for the Crown.

Paul Greenway, for the Respondent.

STONE PROV. DIV. J.:— This is a Provincial Offences Act appeal by the Crown against the acquittal of Edward Alden Reber on a charge of Careless Driving contrary to the Highway Traffic Act. This appeal turns on the correct interpretation of R. v. McIver [1965] 4 C.C.C. 182 (OCA), affirmed [1966] S.C.R. 254.

FACTS

The only evidence before the trial court was that of Constable Delisle. He testified that he investigated a single vehicle accident on Harwood Avenue (a four lane street) near a "T" intersection, in Ajax. He found a hydro pole on the northeast corner of that intersection which had fresh scratches and dents in it and it appears he also found debris from the relevant vehicle there. There was no measurement as to the location of the hydro pole vis-a-vis the travelled portion of the road, but the main part of the severely damaged motor vehicle was located on the travelled portion of Harwood Avenue, 10 metres south-west of the pole. The apparent accident had occurred in a 50 kph zone, on a wet road (although the rain had stopped), and seemingly after daylight. The learned Justice of the Peace ruled that a voir dire on voluntariness was not required in the circumstances of the case, and admitted a statement of the accused that indicated he was the driver at the time of the accident.

There was no evidence before the Court as to exactly how this accident took place.

THE JUDGMENT IN THE COURT BELOW

The most important part of the Judgment of the learned Justice of the Peace is as follows:

> "The decision that the Crown mentioned is regarding R. v. McIvor (sic). When such a collision occurs, it is up to the defence to prove that it is caused by some means by which the driver is not to blame; by some mechanical defect or other such thing.
>
> Up to this point there is no evidence to the fact that (inaudible) to the Crown. The only inference that I can draw from this on the facts alleged to the court, is that Mr. Reber was

driving the Honda and slid into the hydro pole. However, no reason has been given for this collision.

I find as fact that Mr. Reber was, in fact, the driver of the vehicle that night. It was a Honda motor vehicle, licence 748 NTN. But however, there is no evidence before the court that he was driving carelessly, that he swerved to avoid a stray animal or whatever. And for that reason I will dismiss the charge.

MR. GREENWAY: Thank you, Your Worship.

MR. McGUIRE: I'm sorry, I didn't hear the last comment.

THE COURT: There is no evidence that purports that there was all sorts of reasons why Mr. Reber swerved for an animal, a pedestrian, something like that. There is no evidence before the court --

MR. McGUIRE: That what happened,

THE COURT: Yes, and there's no evidence that it didn't happen.

ANALYSIS

In McIver (supra) a number of basic principles were applied. First, the trial court must base its decision upon the proven facts and any inferences that may properly be drawn therefrom. Although the Court may apply common sense in determining whether an accused has been proven guilty beyond a reasonable doubt, it may not speculate as to the existence of circumstances which would amount to a reasonable doubt or which would deny a reasonable doubt. With respect, the learned Justice of the Peace in this case allowed himself to speculate as to the existence of a stray animal or pedestrian on the roadway which could, in turn, have justified the respondent in swerving and ultimately colliding with the hydro pole. Simply put, there was no evidence of any such obstruction on the roadway, and the suggestion of existence of such an obstruction went well beyond the application of mere common sense.

Second, McIver seems to settle the law that where a motor vehicle accident occurs in circumstances where the only reasonable explanation for the accident is that the accused drove carelessly or without due care and attention, then in the absence of an acceptable explanation, the trier of fact may draw the inference of carelessness or lack of due care and attention, and convict the accused.

Third, in raising the explanation, in a situation where careless driving could otherwise be inferred, due diligence must be shown, and that on a balance of probabilities. Sometimes, the existence of due diligence may be able to be inferred from the Crown's case itself. Where that has not occurred, however, the accused risks conviction if he or she does not explain the reasonable steps taken to drive properly and/or avoid the accident. A mechanical breakdown may afford a full defence, and in some cases the weather will have created such a situation that the most prudent, cautious and responsible driver could not have avoided the accident.

It is not inappropriate that an accused should bear this onus of establishing diligence on a balance of probabilities, since his or her actions are peculiarly within his or her own knowledge. A bystander can only guess, or in some cases try to infer, what an accused actually saw, heard or felt, and how the driver's responses flowed from those sensations. I consider the logic of the Supreme Court of Canada in Wholesale Travel Group Inc. v. The Queen (1991), 67 C.C.C. (3d) 193, and Regina v. Ellis-Don Ltd. (1992), 71 C.C.C. (3d) 63, reversing 61 C.C.C. (3d) 423 (OCA), to apply.

To be clear, and contrary to some trial judgments I have seen, McIver does not stand for the proposition that in respect of every motor vehicle accident, someone must have driven carelessly. McIver does not diminish the required standard of quasi-criminal conduct required to make out the offence of careless driving. Not all accidents require an explanation: the driver of a car which has left the road and sustained minor damage during a whiteout in the wintertime would seem to have no case to meet. Where, however, a car has sheared off fence

posts and skidded 200 feet through a field, then there is an available inference of careless driving, the whiteout does not amount to an explanation, and McIver would call upon the driver to provide one sufficient to prove due diligence on a balance of probabilities.

A fourth point in McIver is the application of the rule in Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136. As the Crown contended before me, the rule in Hodge's Case "not only that those circumstances were consistent with [the accused] 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 prisoner was the guilty person", has been undermined in recent years by appellate authority. I take the proper test to be, in assessing circumstantial evidence, whether the accused has been proved guilty beyond any reasonable doubt, and whether guilt is the only reasonable inference available from the proven facts.

APPLICATION TO THE PRESENT CASE

As I have already indicated, the learned Justice of the Peace appears to have embarked upon impermissible speculation as to obstructions on the roadway. While it is true that there was no evidence before the learned Justice of the Peace as to how far the hydro pole was from the roadway, His Worship clearly found that the accused drove a motor vehicle which collided with the hydro pole with sufficient force as to inflict severe damage and (it would appear from the evidence) injury. A prima facie case existed from which careless driving could be properly inferred. Had the Justice not embarked upon consideration of possible obstructions on the roadway, he would have had to almost certainly draw that inference. Then, in the absence of a credible explanation of due diligence, the result of the trial would necessarily have been different. The Crown's appeal must succeed.

As to the proper relief, I have considered substituting a verdict of guilt in light of the facts found by the Justice of the Peace and in the absence of evidence to the contrary. However, I am troubled by His Worship's expressions of "no evidence", particularly where followed by an inaudible part of his judgment which is not transcribed before me. I therefore conclude that the interests of justice require a new trial, which should be held before a different Justice of the Peace.

APPEAL ALLOWED, NEW TRIAL ORDERED.