COURT FILE No.: Kitchener 4460 999 00 88846194 00
Citation: *R. v. Richards*, 2009 ONCJ 651

ONTARIO COURT OF JUSTICE

B E T W E E N :

R.

— AND —

JANIS RICHARDS

2009 ONCJ 651 (CanLII)

Before Justice of the Peace M. A. Cuthbertson
Heard on 17 September 2009
Reasons for Judgment released on 22 December 2009

Charge: s. 130 HTA – Careless Driving

Cases cited:
R. v. W.(D.), [1991] 1 S.C.R. 742
R. v. Beauchamp (1953), 16 C.R. 270
R. v. Ereddia, [2006] O.J. No. 3421
R. v. Namink, [1979] O.J. No. 317
R. v. Reiber, [2007] O.J. No. 2921
R. v. Wilson (1971), 1 C.C.C. (2d) 466

Statutes cited:
Highway Traffic Act, s. 130, 144(18)
Provincial Offences Act, s. 55

R. Schmidt ..... for the prosecution
J. Richards ……..on her own behalf

JUSTICE OF THE PEACE CUTHBERTSON:

1: THE BACKGROUND

[1] Just after midnight on 3 February 2009, thick fog blanketed the area of the intersection of Queens Blvd and Fischer-Hallman Road in the City of Kitchener. Officer D. Nelson of the Waterloo

Regional Police Service while on general patrol was northbound at about 60 kilometres per hour (kph) on Fischer-Hallman Rd traveling towards Queen's Blvd. He described the roads as moist or wet due to the heavy fog. He stated the visibility was approximately 50 metres only.

[2] Officer Nelson saw a motor vehicle approaching from his right on Queen's Blvd traveling at about 40 kph. He was facing a green traffic signal while the vehicle approaching from his right had a red signal. He first noticed the vehicle when it was only about 10 metres from the intersection. At that point he was approximately 20 metres north of the intersection. The approaching vehicle according to the officer did not stop which forced him to brake hard to avoid a collision. He subsequently stopped the vehicle and charged the driver Janis Richards with the offence before this Court. After the incident, he checked the operation of the traffic lights and was satisfied they were cycling correctly.

[3] Ms Richards testified that as she approached the intersection, she looked to her left and "if that car was within a 50 metre range I should have seen him". Ms Richards submitted that a tall wall obstructed the officer's view of her approaching vehicle. She submitted that the officer would have had to be within 27 feet of the intersection to see her car. In fact, this was consistent with Officer Nelson's statement that he first saw her vehicle when it was approximately 10 metres (about 30 feet) from the intersection. Ms Richards made a right turn at the light and was subsequently stopped by the officer. She testified that she had stopped at the light before turning. She did not dispute that the light she was facing was red.

2: THE LAW

[4] Section 130 of the Highway Traffic Act (HTA) states:

> Every person is guilty of the offence of driving carelessly who drives a vehicle or street car on a highway without due care and attention or without reasonable consideration for other persons using the highway and on conviction is liable to a fine of not less than $200 and not more than $1,000 or to imprisonment for a term of not more than six months, or to both, and in addition his or her licence or permit may be suspended for a period of not more than two years.

[5] Section 144(18) of the Highway Traffic Act states:

> 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.

[6] Section 55 of the Provincial Offences Act (POA) states:

> Where the offence as charged includes another offence, the defendant may be convicted of an offence so included that is proved, although the whole offence charged is not proved.

3: ISSUES BEFORE THE COURT

[7] The following issues require consideration:

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(a) Did Ms Richards stop at the red traffic light?

(b) If the answer to a) is No, did Ms Richards commit the offence of careless driving pursuant to s. 130 HTA?

(c) If the answers to both a) and b) are No, is s. 144(18) HTA an included offence under s. 130 HTA, pursuant to s. 55 POA?

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4: ANALYSIS

4.1 Did Ms Richards stop at the red traffic light?

[8] This is a matter which requires a credibility analysis as set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[9] Officer Nelson was an intelligent witness who was aided in his recollection of the events by his notes. He was in a good position to observe the events. He could see the intersection and the approaching vehicle despite the limited range of visibility of 50 metres. He testified that he watched Ms Richards' vehicle close on the intersection without showing signs of an intention to stop. At that point he braked to avoid what he perceived to be an imminent collision. His testimony was given without partiality. It was provided with an air of honesty and sincerity. His evidence was consistent and not shaken in cross-examination. It made common sense. In my view, his testimony was both credible and trustworthy.

[10] Ms Richards was also an intelligent witness. Her recollection of that night was not assisted by notes. Her observation of the events at that intersection was clouded by her lack of observation of the approaching police cruiser with its headlights on. Her own statement that she should have seen him if he was within 50 metres of the intersection reinforces her lack of observation.

[11] Ms Richards as noted earlier misstated in her testimony, distances that Officer Nelson had stated in his (ie: that he saw her when she was 10 metres from the intersection). As well, her suggestion of inconsistencies in the officer's notes over the timing of events was without question, an error. Yet she continued to attempt to defend an indefensible position. These challenges led to an air of partiality in her testimony.

[12] I note her evidence of stopping at the red light was very sparse. She stated after commenting on an excerpt from the officer's notes "Again reflexively I do stop. I've been driving for many years but when I brought it to the officer's attention that I did stop, he disputed it and to avoid argument I let it go". Nothing else such as an estimate of how long she stopped, where she stopped, what she saw when stopped etc., was offered in evidence. While not definitive of whether she stopped or not, this lack of detail raises serious doubt's in the Court's mind as to her ability to recall the events.

[13] I also note Ms Richards was not aware that she was being observed by the officer, as she had not noticed his approach. While I did not find that Ms Richards was deliberating trying to be dishonest or insincere in her testimony, I am of the opinion her recollection of her actions was weak as she had no reason at the time to think they may later be called into question.

[14] I did not find Ms Richards testimony on stopping at the red light to have an air of credibility. It appeared to have been provided more by way of convenience than conviction. This evidence was not trustworthy and I reject it.

[15] Therefore, I accept Officer Nelson's evidence and find Ms Richards did not stop at the red light.

4.2 Did Ms Richards commit the offence of careless driving pursuant to s. 130 HTA?

[16] In *R. v. Beauchamp* (1953), 16 C.R. 270, the Ontario Court of Appeal stated the standard for careless driving is a constantly shifting one which depends on the road, visibility, weather and traffic conditions as well as other conditions which an ordinary driver would take into consideration. In the matter at bar, clearly the visibility was limited by the fog. Nonetheless, Officer Nelson acknowledged that his visibility extended to 50 metres which provided a limited range of view for Ms Richards. While the road was wet from the fog, no evidence suggested Ms Richards could not stop due to road conditions. No evidence was led there were adverse traffic conditions. Officer Nelson testified that he was travelling at 60 kph and Ms Richards at approximately 40 kph. Therefore, Ms Richards' was driving at a reasonable speed for the conditions of limited visibility and wet roads which existed that night. In my view, it cannot be said that she was driving "without due care and attention or without reasonable consideration for other persons using the highway".

[17] In *R. v. Ereddia*, [2006] O.J. No. 3421 (OCJ), Justice Fairgrieve also commented on the standards for a conviction of careless driving. He stated:

> **(6)** The offence of "driving carelessly", created by s. 130 of the Highway Traffic Act, is defined as driving on a highway "without due care and attention or without reasonable consideration for other persons using the highway". The law has been clear for decades that in order to make out the offence under s. 130, the driving must be of such a nature that it amounts to a breach of one's duty to the public and is deserving of punishment: see R. v. Beauchamp (1953), 16 C.R. 270 at p. 278 (Ont. C.A.). A driver is not held to a standard of perfection, and a mere error of judgment is not necessarily sufficient to establish the offence: see R. v. Wilson (1971), 1 C.C.C. (2d) 466 (Ont. C.A.). Careless driving, generally speaking, requires proof of a departure from the standard of care that a reasonably prudent driver would have exercised in the circumstances, and normally involves, I would think, conduct that includes other less serious Highway Traffic Act infractions.
>
> **(7)** Mr. Klaiman, counsel for the appellant, also referred in his factum to the pertinent judgment of Killeen Co. Ct. J. in R. v. Namink, [1979] O.J. No. 317 (QL), where, at para. 10, the learned County Court judge stated as follows:
>
> > 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 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

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bespeak the kind of conduct over which the net of this section is cast."

[18] Ms Richards was driving reasonably under the conditions but failed to stop for the red light. Her failure to stop at that light almost caused an accident. However, as per *Ereddia* and *Namink*, her failure to stop was more consistent with a 'mere momentary inattention, or a simple kind of error of judgment' than the offence of careless driving. Her actions did not 'bespeak the kind of conduct over which the net of this section is cast'.

[19] Therefore, I find that she did not commit the offence of careless driving.

4.3 Is s. 144(18) HTA an included offence under s. 130 HTA, pursuant to s. 55 POA?

[20] In *R. v. Reiber*, [2007] O.J. No. 2921, in paragraphs 12-16, this Court reviewed case law on included offences and the application of s. 55 POA. In essence, the case law holds that for an offence to be an included offence, the essential elements of the included offence must be contained within the original offence or in the count on the charging certificate or information.

[21] The count on the charging certificate stated only an offence of 'Careless Driving' without any reference to a charge of 'Failing to Stop for a Red Light'. As such, the charging certificate did not inform Ms Richards of the possibility of having to defend herself against a charge under s. 144(18) HTA.

[22] As noted above, the actual wording of s. 130 HTA does not contain the essential elements of s. 144(18) HTA. Therefore, as per my findings in *Reiber*, s. 144(18) is not an included offence within s. 130 HTA.

5: DECISION

[23] The charge of Careless Driving under s. 130 HTA against Ms Richards is dismissed.

[24] Further, Ms Richards despite failing to stop for the red light, cannot be found guilty of an offence under s. 144(18), as it is not an included offence within s. 130 HTA nor was she informed on the charging certificate of the possibility of having to defend herself against this charge.

Released: December 22, 2009

Signed: "Justice of the Peace M. A. Cuthbertson"

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