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R. v. Sagevicius

Between
Her Majesty the Queen, and
Jonas Sagevicius and Peter Hubbard

[1999] O.J. No. 353

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

February 11, 1999.
(18 pp.)

Criminal law — Preliminary inquiry — Procedure — Reasons for committal — Offences against person and reputation — Motor vehicles — Dangerous driving — Causing death or bodily harm.

This was a preliminary inquiry in which the Crown sought committal Sagevicius and Hubbard on charges of criminal negligence causing death, dangerous driving causing death. The Crown also sought to commit Hubbard on the charge of failing to remain at the scene of an accident. The accused were involved in a motor vehicle accident. Smith, who had been drinking at a restaurant, entered the highway with McKenna as a passenger. He noticed a red car driving erratically, followed by a black car. He believed the black car was chasing the red car. After Smith drove on for another minute or two, McKenna screamed a warning then leaned towards him. Smith looked out the passenger window and saw a black car coming towards his car. To avoid a collision, he turned his wheel towards the shoulder. He lost control of the car and its back end came around towards his left. His car went straight across the other lanes, causing a number of collisions. When his car came to a rest, a small red car was impaled in its passenger side. McKenna, was killed instantly. Another eyewitness recorded the number plate of the black car. Its registered owner was Hubbard. When questioned by police at his home, Hubbard told police that he had seen the accident. There was no evidence of recent visible damage to his vehicle. However, its passenger side low beam headlight did not work. He was arrested for failing to remain and dangerous driving. Sagevicius was the driver of the red car. He was interviewed at the scene of the accident and was observed to have an odour of alcohol on his breath. He told police that he was trying to make a lane change when he suddenly noticed a car in front of him, and that he applied his brakes and spun into the guide rail. The theory of the Crown was that the black and the red car were engaged in a game of chicken on the busiest highway in North America.

HELD: Both accused were discharged on the offence of criminal negligence causing death, but were committed on the charge of dangerous driving causing death. Hubbard was committed on the charge of failing to remain at the accident scene. There was evidence upon which a jury could find that the drivers of the black and red cars were Hubbard and Sagevicius. The driving conduct said to found criminal negligence consisted of unsafe lane changes, speeding, erratic driving, and blocking motions. The jury could not properly characterize such conduct as exhibiting wanton or reckless disregard for the lives or safety of others. However, as to the charge of dangerous driving causing death, it was open to the jury to conclude that the accused's driving represented a gross departure from the standard of a reasonably prudent driver. The element of causation was satisfied at this stage if it was shown that the accused's driving was a substantial, though not necessarily the only, cause of the victim's death. A reasonable jury properly instructed could return a verdict of guilty on the count of failing to remain. The issue of Hubbard's contemporaneous knowledge of the accident, if any, was to remain for another forum.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 219, 220, 221(2), 249(4), 251(2), 252(2), 548(1)(a), 548(1)(b), 561(1)(a).
Highway Traffic Act, s. 200(1).

Counsel:

No counsel mentioned.

LIBMAN PROV. J. (endorsement):—

Introduction

¶ 1 Following the conclusion of the taking of evidence over 14 days, at the accused persons' preliminary inquiry on charges of criminal negligence causing death and dangerous driving causing death, as well as failing to remain at the scene of an accident in the case of Mr. Hubbard alone, Crown counsel seeks an order that the accused stand trial in accordance with s. 548(1)(a) of the Criminal Code. Defending counsel submit that the accused should be discharged on all counts in the information: s. 548(1)(b).

The Test for Committal at a Preliminary Inquiry

¶ 2 In order to commit the accused to stand trial on any of the respective charges, there must be evidence before the court upon which a reasonable jury properly instructed could return a verdict of guilty. See United States of America v. Sheppard (1976), 30 C.C.C. (2d) 424 (S.C.C.) at 427.

¶ 3 Campbell J. described the task set by Sheppard in R. v. McIlwain (1988), 67 C.R. (3d) 393 (Ont. H.C.J.) at 399 as "to weigh or balance in the scales or to measure or to ponder and examine the force of evidence to determine whether or not it is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty". This is the sole purpose for which the evidence is to be weighed or scrutinized at the preliminary inquiry. The weighing of the evidence for competing inferences, frailties or contradictions has no place in the Sheppard test. Neither does the dubious nature of the Crown's case or the reliability of the evidence or concerns about its weight: Dubois v. The Queen (1986), 25 C.C.C. (3d) 221 (S.C.C.); Mezzo v. The Queen (1986), 27 C.C.C. (3d) 97 (S.C.C.).

Review of the Evidence

¶ 4 I should record at the outset that counsel for the accused and the Crown have stated that following the release of these Reasons, but prior to any formal commitment for trial, consideration will be given to re-election to trial by provincial court judge in accordance with s. 561(1)(a) of the Criminal Code. Accordingly, I propose to say no more about the evidence than is necessary for the purposes of these proceedings, although counsel have expressly invIted me to do so where the circumstances warrant.

¶ 5 It is common ground that the evidence adduced through the technical collision investigator (MacGillivray) and accident reconstructionist (Seaton) does not assist the Crown in attributing fault for the fatal accident.

¶ 6 Road conditions in the area of the accident scene (Highway 401 westbound express lanes near Allen Road) were good and in dry condition on the evening of 13 March 1997. A light wind was blowing. There are no fixed obstructions for the three westbound lanes of traffic at this location. However, the overhead lighting in this area has subsequently been improved by the installation of "clover leaf" or six-light circular poles.

¶ 7 In order to secure a committal, the Crown must particularly rely upon the observations of the driver of the white Chevrolet Camaro (Cleary Smith) containing the deceased passenger, Susan McKenna, as well as those of the independent eye-witness motorist, Venu Thampi.

¶ 8 There is evidence that the trier of fact may accept that Cleary Smith's ability to drive a motor vehicle at the time of the fatal accident was impaired due to the consumption of alcohol. The provincial police failed to secure evidence as to his blood alcohol concentration not interviewing him until several days afterwards. Moreover, whereas Smith has testified that he consumed two 20 ounce pint glasses of Smithwicks beer while in the company of the deceased prior to resuming his travels on the highway, the Exhibit 12 bar bill from the King George's Arms restaurant indicates that he consumed an additional pint glass containing 20 ounces of Smithwicks. [See Note 1 below]

Note 1: According to Exhibit 14, a document from the Guinness Import Company, Smithwicks is an amber ale brewed in Ireland. It has a content of 5% alcohol by volume.

¶ 9 The evidence of Smith in summary form is as follows. Having resumed his driving on the 401 Highway after consuming a considerable amount of alcohol over a one and one-half hour period at the King George's Arms restaurant on Victoria Park, just north of the highway, Smith moved into the westbound express lanes. Traffic was moving "well at a good speed". He estimated this rate of speed as being at least 100 kilometres per hour.

¶ 10 Smith's attention was subsequently drawn to a small red car speeding up in the third (slow) lane. The witness was in the fast or passing lane (lane 1) at the time. This red car passed Smith and the other cars around him "very quickly". It proceeded to go in front of a tractor-trailer which was ahead of Smith in the middle lane (lane 2). There it began changing lanes in an erratic manner, causing other cars to brake. The tractor-trailer likewise put its brake lights on.

¶ 11 According to the witness, this red car was a "smaller compact car". It seemed to be a small import vehicle.

¶ 12 As a result of the driving actions of the red car, traffic in the area slowed down. Smith took his foot off the accelerator, prepared to apply his brakes if necessary. He estimated that his speed and that of traffic around him slowed to approximately 90 kilometres per hour.

¶ 13 Once the red car moved in front of the tractor-trailer, a second car passed in the same lane. This vehicle, a larger black car, was travelling "very rapidly". It too began to change lanes, causing vehicles to apply their brakes in all three lanes. Like the red car, the black car passed Smith on the right side. He estimated its speed as "well over" 120 kilometres per hour.

¶ 14 When the black car passed the transport truck, the red car changed from lane 1 to lane 2, back to lane 1 and returning to lane 2. [See Note 2 below] Other motor vehicles were around the red car. Smith could not see if the red car signalled these lane changes as brake lights were going on and off at the same time. These lane changes appeared to be "continuous". However, the black car was gaining on the red car, tailgating it. He did not see the black car make any lane changes. There was one car length between these two cars. He thought one car was chasing the other.

Note 2: In the continued examination of Smith on 18 September 1998, he testified that these lane changes actually occurred in lanes 2 and lane 3.

¶ 15 It was Smith's evidence that after driving for "about another minute or two", Ms. McKenna screamed "Oh, my God" or "Look out", leaning well towards him. Smith then looked out the passenger window and saw the black car coming towards his car. The witness testified that he was in the middle of lane 1 at this time; the black car was in the extreme left part of lane 2, encroaching upon lane 1.

¶ 16 To avoid a collision with the black car Smith turned his wheel towards the shoulder. As his car approached the guide-rail [See Note 3 below], he turned the wheel back towards lane 1. He did not think his car

struck the black car. However, he was unable to control his car and the back end of the car came around towards his left; it was not responding to steering. Smith applied the brakes hard. His car went out of control.

Note 3: The words "guide-rail" and "guard-rail" are used interchangeably by the various witnesses throughout these proceedings. For ease of reference, I have used the word "guide-rail" since it appears on the schematic diagram (Exhibit 5) of the accident scene. See further Exhibit 10, a detailed version of Exhibit 5, containing Sgt. Seaton's calculations.

¶ 17 This was Smith's last observation of the black motor vehicle. He heard skidding sounds and his car going straight across the other lanes, the front end of his car travelling northwest. There were a number of collisions. One was with another car and another with the guide-rail.

¶ 18 When his car came to a rest he noticed that a small red compact car was impaled in the passenger's side door of his car. He believed this was the same red car he described earlier. However, he could not be sure that it was the same car. Neither could he say that the black car he saw chasing the red car and the black car coming at his vehicle moments before the crash were the same motor vehicle.

¶ 19 The witness suffered a bruised shoulder, very sore arms and a small scrape. He was taken by ambulance to North Hospital. Smith felt "absolutely crushed" and was "sobbing heavily" upon learning of the death of his passenger, Ms. McKenna. The time of the fatal accident is acknowledged as being at 7:52 p.m., that is, the time specified in the information.

¶ 20 A forensic toxicologist, Dr. Joel Mayers, testified that a person of the same age, height and weight of the witness Smith who consumed 60 fluid ounces of beer over the time period in question would have had a blood alcohol concentration of between 75 and 95 milligrams of alcohol in 100 millilitres of blood at approximately 7:52 p.m. Dr. Mayers was of the opinion that there would be at least one aspect of impairment, such as the ability to make judgments about distance, speed, "choice reaction times", perception of time and narrowing of one's visual field in most individuals given this blood alcohol level. In his expert opinion, a person having the blood alcohol level of Mr. Smith should not have been driving a motor vehicle. [See Note 4 below]

Note 4: In Dr. Mayers' expert opinion, a person is "at risk" once is or her blood alcohol concentration exceeds 50 milligrams of alcohol in 100 millilitres of blood. Dr. Mayers also determined that the deceased's blood alcohol concentration was 47 milligrams of alcohol in 100 millilitres of blood. See Exhibit 3. According to both Smith and the Exhibit 12 bar bill from the King George's Arms restaurant, Ms. McKenna had two glasses of red wine.

¶ 21 The ambulance attendant who dealt with Smith, Chris Olynyk, did not detect any odour of alcohol on him. Neither did the provincial constables who spoke with him in the hospital, Cannata and Belair. The latter learned from Smith, though, that he had consumed two beers earlier that evening. [See Note 5 below] Another officer, Adair, testified that she subsequently became aware of Smith's alcohol consumption and believed that the "lead investigator" Shields needed to obtain a blood sample in order to conduct a "proper investigation". She also advised Shields that a statement needed to be taken from Smith "as soon as possible".

Note 5: Cf the Exhibit 12 bar bill from the King George's Arms restaurant showing that Smith in fact ordered three 20 ounce pints of Smithwicks. In his four page statement to Officer Belair, Smith made no mention of drinking before the accident. He only admitted this after being asked a "standard question" as to alcohol consumption: Transcript, 19 October 1998, Evidence of N. Belair, pp. 95-97, ll. 28-17.

¶ 22 Smith was formally interviewed by the police on the afternoon of 18 March 1997. He did not provide an authorization for access to his medical records until nine months later. According to Adair, she was asked by Shields to conduct the interview with Smith but she was unable to do so any earlier due to the funeral and her own schedule. Shields, in turn, explained the delay in interviewing Smith because he was not feeling "up" to

being interviewed earlier. She had left a message for him the day after the accident; however, Smith never called back.

¶ 23 The only other eye witness to the accident is Venu Thampi. He was driving in the westbound express lanes of the highway at approximately 110 kilometres per hour. He passed a trailer truck approaching Leslie Street. As he was in the passing lane he noticed a small red car, like a Honda Civic, moving at a "considerable speed". The witness moved to the right lane to let it pass. This car contained two young men.

¶ 24 After "another two or three minutes", Mr. Thampi caught up with the red car. There was another car ahead of it. This car was a black four-door mid-sized vehicle. They were both slowing down. The cars were in the area of Avenue Road at the time.

¶ 25 According to the witness, the first car (the black car) did not want to move out of its way for the red car. The two cars were "pretty close" to each other. The red car flashed its lights at the black car; the black car, though, put on its brake lights, slowing down.

¶ 26 There was no traffic in front of the lead black car blocking its path; the traffic flow ahead of it was "very, very open". Due to the actions of these two vehicles, the witness put on his right signal and moved two lanes over from them so as to "be safe and away from these people".

¶ 27 Mr. Thampi observed that as he was moving to the right lanes, the red car tried to move to its right but the black car also moved to the right, blocking it. They were travelling at about 90 to 100 kilometres at the time. The red car then moved back to the left lane; the black car did the same thing in the front. The two cars appeared to be "zigzagging", changing lanes in a continuous manner; they were "very, very close" to one another. No other cars, though, were cut off or affected by these movements.

¶ 28 As a result of the these two cars slowing down "considerably at that point", the witness passed them, approaching the Keele Street collector lanes. He noticed in his rear-view mirror that the right front head-light of the black vehicle was not working. The driver of this car was a man with kind of long grey hair; he was wearing glasses and appeared to be in his late 40's or early 50's.

¶ 29 Approaching the exit to the collector lanes at Keele Street, Thampi noticed a white car "zooming in", that is, appearing suddenly. This white car, a Trans-Am, was in the middle lane. The red car then made a quick lane change to its right, striking the white car. [See Note 6 below] There were sparks as the cars hit the guide-rail. Mr. Thampi was about 100-200 yards or "a fair distance" ahead of the cars at this time. The collision happened within "a very short time" of Mr. Thampi watching the lane changes and noticing that the black car's headlight was out, that is, "maybe a minute or two" afterwards.

Note 6: It is the position of all counsel that Mr. Thampi is wrong in putting the red car in lane 1 and the white car in lane 2 at the time of the collision. This evidence conflicts, of course, with that of Smith, the driver of the white car, who testified that he was driving in lane 1 when the black car came at him, immediately preceding the accident. The physical evidence at the accident scene supports this portion of Smith's evidence respecting his lane of travel. The skid marks left by the white car commence in the mid to northern portion of lane 2 and continue in lane 3 whereas the yaw tire marks created by the red car similarly appear in lanes 2 and 3 [see note 12 for an explanation of yaw marks]. Sgt. Seaton, the Crown's expert accident reconstructionist, testified that while he could not state where these two vehicles were prior to this point, the angle of the skid marks made by the white (Smith) car made it more probable that it was coming from within lane 1 as opposed to lane 2. Sgt. Seaton also noted that there was a Camaro tire mark on the front left portion of the Renault, this mark occurring on account of contact between these two cars before the Renault hit the guide-rail: Transcript, 17 September 1998, Evidence of R. Seaton, pp. 68-71, ll. 5-3. However, Seaton could not state definitively that the circular abrasion mark on the rear left side of the Renault came from the Camaro: Transcript, 17 September 1998, p. 83, ll. 13-32.

¶ 30 Having witnessed the accident, Thampi called 911 to report it. The witness then noticed the black car "speeding away"; the driver was "just focusing straight and driving". He agreed that the black car was "just driving normally at that point", maintaining the speed limit. In order to get its licence plate number he pulled in behind it, scribbling it down on a piece of paper. Mr. Thampi then exited the highway at Weston Road. [See Note 7 below]

Note 7: Constable Shields spoke with Mr. Thampi later on in the evening. However, she failed to record this conversation in her notebook and it did not come to the attention of counsel until Thampi's evidence during the preliminary inquiry.

¶ 31 It is common ground that the licence plate recorded by Mr. Thampi, 049 YMN, is that of a black 1993 Mercury Topaz. The registered owner is the accused Hubbard. [See Note 8 below]

Note 8: Although Mr. Thampi described the black car as having four doors, it actually is a two door vehicle.

¶ 32 The provincial police attended at Mr. Hubbard's Mississauga address on the evening of the accident, arriving at 8:41 p.m. The lead investigator, Shields, did not know who dispatched the officers (Goncalves, Landry and Garant) to attend at his address. Prior to being cautioned Mr. Hubbard told the police that he had been out in his car one half hour ago on the 401 Highway. He admitted seeing the accident. [See Note 9 below]

Note 9: Constable Goncalves, the statement taker, testified that he considered Mr. Hubbard to be a suspect "to a slight degree" at the time of this interview. I note, however, that this officer used the word "suspect" in his notebook referring to Mr. Hubbard. See Transcript, 16 September 1998, Evidence of D. Goncalves, pp. 29-31, ll. 15-25. Moreover, Constable Landry testified that he advised Goncalves that there were allegations of racing surrounding the dangerous driving of the black vehicle prior to their arriving at the Hubbard residence: Transcript, 16 September 1998, Evidence of C. Landry, pp. 42-43, ll. 12-8. The latter also advised Goncalves that they were investigating a fatality [Transcript, 16 September 1998, Evidence of C. Landry, p. 57, ll. 17-23]; however, Goncalves testified that he was not sure if there had been a fatality prior to setting out to interview Hubbard [Transcript, 16 September 1998, pp. 28-29, ll. 23-24].

¶ 33 There is no evidence of any recent "visible damage" to the Hubbard motor vehicle. The right low beam passenger side headlight was found, however, not to be working. It is also acknowledged that there was no evidence of alcohol consumption by Mr. Hubbard at the time the police arrived at his home. Indeed, he was "very polite" and cooperative with the police, appearing to be "friendly, calm". Hubbard was subsequently arrested for failing to remain under the Highway Traffic Act and dangerous driving. He was released from custody later that evening without charges being laid.

¶ 34 The driver of the red or maroon car (a 1995 Renault) at the accident scene, Mr. Sagevicius, was interviewed by Constable Homayoun at approximately 8:30 p.m. The officer also interviewed his passenger, Leo Doherty. Mr. Sagevicius produced his driving documents; there was an odour of alcohol on his breath. The accused provided a statement, without the benefit of caution beforehand, explaining that he was travelling in lane 2 at about 110 kilometres per hour, looking to see if he could move into lane 1. He was unable to do so. He then noticed a "dark green" car in front of him. He applied his brakes and spun into the guide-rail. Mr. Sagevicius further stated that he did not notice this car "basically until it was right in front of me". He thought it cut in front of him from lane 3. Following this statement he was allowed to leave the scene. [See Note 10 below]

Note 10: "The next day, 14 March 1997, one of the lead investigators, Constable Adair, arranged for Mr. Sagevicius to give a videotaped statement. He had previously been given his rights to counsel and cautioned. The accused declined to make any. Notwithstanding this, the accused was kept in the video from 9:20 a.m until 12:01 p.m. It was put to Adair that at one point she said to him, "How could you live with yourself ... That's your decision, you go ahead, you make the decision". Adair could not recall saying this. See Transcript 13 November 1998, evidence of H. Adair, pp. 35-39, ll. 27-19.

¶ 35 With respect to the submission of both Mr. Hellyer and Mr. Isenstein that there is no evidence upon which a reasonable jury properly instructed could find that the drivers of the red and black motor vehicles are, respectively, the accused Sagevicius and Hubbard, I must respectfully disagree. I appreciate that neither Smith or Thampi can be positive that the red and black cars they observed driving erratically were the same red and black cars in the vicinity of the accident scene. Neither are they able to positively identify the drivers of either motor vehicle as the accused. However, the evidence of the proximity of these cars to the accident scene,

including the statements of each accused as to his presence in this very location, permits the trier of fact, in my view, to draw the permissible inference that it was these accused men who were driving the red and black motor vehicles on the evening in question.

Criminal Negligence Causing Death, Criminal Code, s. 220

¶ 36 I now wish to turn to the issue as to the characterization of the accused persons' driving conduct.

¶ 37 The case for the Crown is essentially that the motor vehicles driven by the accused Sagevicius and Hubbard were racing each other and engaged in a game of "chicken" on the busiest highway in North America. [See Note 11] Mr. Lightfoot submits that the evidence of Smith describing the red car tailgating the black car and making erratic lane changes supports the allegation of racing whereas Mr. Thampi's evidence of the black car blocking the red car from changing lanes grounds the theory of reckless game playing. In the Crown's view, the totality of the evidence is such that it is open to the trier of fact to return a verdict of guilty on the count of criminal negligence causing death.

Note 11: See the evidence in cross-examination of Constable MacGillivray, Transcript, 15 September 1998, p. 4, ll. 18-25.

¶ 38 As the brief review of the evidence upon which the Crown relies indicates, it will be most difficult for the trier of fact to reconcile the observations of the driving conduct of the red and black car as related by Smith and Thampi. This is particularly so in terms of their description of the actual accident, the former describing the black car coming towards the white car whereas the former sees the red and white car colliding. Indeed, the trier may well consider that the driving actions of Smith should have likewise merited investigation and censure by the provincial police.

¶ 39 Neither does the expert evidence adduced by the Crown particularly bolster its theory. Sgt. Seaton, in his reconstruction of the accident, determined that the motor vehicle driven by Mr. Sagevicius, the red Renault, was travelling at approximately 105 kilometres per hour, that is, just over the speed limit, at the start of its yaw mark. [See Note 12 below] The absence of debris at the accident scene also means that any contact between the red and white cars before the accident would have been minimal. Indeed, the tire mark on the front part of the Renault is consistent with the white car coming into contact with it east of the yaw mark; the yaw marks are consistent, further, of the red car taking "evasive steering action" in order to avoid being struck by the white car.

Note 12: A yaw mark is a tire mark evidencing striations in the road, indicating a rolling tire sliding sideways. Unlike a skid mark, there is no braking action involved; the yaw mark results from the steering action of the motor vehicle. Sgt. Seaton considered that the yaw mark in question was "very characteristic" of a yaw mark: it started abruptly, there were no deviations in the striations or radius of that curve, it was decreasing and it did not show any evidence of interruption. See further in this regard the Exhibit 8 excerpt from Rudolph Limpert, Motor Vehicle Accident Reconstruction and Cause Analysis, 4th ed., p. 329; Exhibit 9, Lynn B. Fricke, Traffic Accident Reconstruction, 1st ed., p. 72-43.

¶ 40 There is no physical evidence respecting the speed of travel or path of the (Hubbard) black car. As for the (Smith) white car, it left a skid mark 29 metres in length. These marks indicated a four wheel lock up. that is, braking action on all four tires. Its speed at the time it struck the guide-rail was approximately 73 kilometres per hour. In summary, Sgt. Seaton is unable to give a "definitive answer" as to the position of any of the vehicles at points east to the tire marks indicated on Exhibit 5; neither is he able to offer an opinion as to the cause of the accident. The respective actions of the Chevrolet and Renault motor vehicles going into skid and yaw and subsequently striking the guide-rail occurred "fairly close in time". More particularly, he could not attribute any fault to Mr. Sagevicius or the Renault in terms of the cause of the accident.

¶ 41 Criminal negligence is defined by s. 219 of the Criminal Code as comprising conduct, whether by acts of commission or omission, which "shows wanton or reckless disregard for the lives or safety of other

persons". Each accused is charged with the offence under s. 220 of causing the death of Susan McKenna by criminal negligence.

¶ 42 It is admitted that the death of Ms. McKenna was caused by the white car in which she was riding striking the guide-rail, which piece dislodged and entered the passenger compartment of the Chevrolet through the windshield. [See Note 13 below] This piece of the guide-rail which speared the white car was 14 feet long. [See Note 14 below] Ms. McKenna was killed instantly. The passenger side of the Chevrolet and the driver side of the Renault also came into contact with each other. Tragically, this accident appears to have been a "survivable impact". [See Note 15 below]

Note 13: The post-mortem examination report, admitted into evidence on consent, is Exhibit 2. The cause of death is specified as "massive laceration of neck associated with multiple blunt force injuries".

Note 14: Shields also attempted to seize the other pieces of the broken guide-rail from the scene. However, she had to return to the scene to retrieve one of the missing pieces as the wrong piece had been brought in. There is no reference to this in her notes. Shields was subsequently relieved of her duties as the officer-in-charge prior to the commencement of the preliminary inquiry.

Note 15: Transcript, 15 September 1998, Evidence of Constable MacGillivray, p. 36, ll. 3-18. The issue of possible metal fatigue of the guide-rail was also raised. However, no evidence was lead on point at this juncture of the proceedings.

¶ 43 The test for criminal negligence was stated by the Court of Appeal for Ontario in R. v. Sharp (1984), 12 C.C.C. (3d) 428 as not requiring proof of intention or deliberation, the element of indifference being sufficient. Hence, an accused may be convicted of the s. 220 offence upon proof of driving conduct which amounts to a marked and substantial departure from the standard of a reasonable driver in circumstances where he or she either recognized and ran an obvious and serious risk to the lives and safety of others or, alternatively, gave no thought to such risk.

¶ 44 In R. v. Waite (1989), 48 C.C.C. (3d) 1 (S.C.C.), a motor vehicle case, the majority agreed that proof of conduct which reveals a marked and substantial departure from the standard of behaviour expected of a reasonably prudent person in the circumstances will justify a conviction for criminal negligence. Conversely, a subjective test obtains in the case of criminal negligence respecting acts of omission: R. v. Tutton (1989), 48 C.C.C. (3d) 129 (S.C.C.).

¶ 45 It is clear that this objective test for criminal negligence continues to be the law in Ontario, at least as it relates to the mens rea for criminal negligence in the operation of a motor vehicle. See R. v. Nelson (1990), 75 C.R. (3d) 70 (Ont. C.A.); R. v. Cabral (1990), 54 C.C.C. (3d) 317 (Ont. C.A.); R. v. Gingrich (1991), 6 C.R. (4th) 197 (Ont. C.A.).

¶ 46 Section 220 makes it clear that the conclusion that there is a wanton or reckless disregard is to be drawn from the conduct which falls below the standard: R. v. Anderson (1990), 75 C.R. (3d) 50 (S.C.C.) at 54. It is this requisite element of reckless disregard for the lives or safety of others, as opposed to a marked departure from the standard of reasonable conduct, which sets the criminal negligence offence apart from that of dangerous driving, the latter being an included offence of criminal negligence pursuant to s. 662(5) of the Criminal Code: R. v. Fortier (1998), 127 C.C.C. (3d) 217 (Que. C.A.); R. v. Landreville (1994), 91 C.C.C. (3d) 274 (Que. C.A.).

¶ 47 At this stage of the proceedings it must be recalled that the quality of the evidence, including its strength and reliability, plays no role in the application of the Sheppard test for committal. Indeed, any doubt on the evidence is to be resolved in favour of the Crown: R. v. Cowden, [1947] O.W.N. 1018 (H.C.J.); Ex Parte Hill, [1970] 2 C.C.C. 264 (Ont. H.C.J.).

¶ 48 Mr. Lightfoot, for the Crown, with his customary fairness, concedes that the evidence of tailgating and erratic lane changes described by the witness Smith does not ground a prima facie case of criminal negligence. He submits, however, that the observations of Mr. Thampi respecting the blocking motions of the

black car against the red car, taken together with the other evidence, justifies the accused persons' committal for this offence.

¶ 49 With respect, while I accept the concession made in respect of the evidence of the first witness, I am unable, after much anxious consideration, to accept the submission that it is open to a reasonable jury properly instructed to return a verdict of guilty of criminal negligence on the totality of the evidence before me.

¶ 50 The driving conduct said to found the criminal negligence offence consists, essentially, of unsafe lane changes, speeding, erratic driving and two "blocking motions" by one of the (black) cars at reduced speeds which did not affect traffic other than the (red) targeted car. I am mindful of the fact that these actions occurred on an extremely busy highway, at night, not long after rush hour.

¶ 51 In my respectful opinion, it is not open to a reasonable jury properly instructed to characterize such conduct as exhibiting a "wanton or reckless disregard for the lives or safety of other persons", notwithstanding its manifestly imprudent manner. It follows that the accused must be discharged in accordance with s. 548(1)(b) of the Criminal Code in respect of the first count in the information, criminal negligence causing death.

Dangerous Driving Causing Death, Criminal Code, s. 249(4)

¶ 52 As for count two, dangerous driving causing death, I have concluded that a different result must obtain. The Crown is entitled to a committal under s. 548(1)(a) on this charge. My reasons for arriving at this result are as follows.

¶ 53 The offence of dangerous driving is established under s. 249 of the Criminal Code upon proof of a marked departure from prudent conduct: R. v. Rajic (1993), 80 C.C.C. (3d) 533 (Ont. C.A.); leave to appeal to S.C.C. refused, 83 C.C.C. (3d) vi; R. v. Morgan (1996), 21 M.V.R. (3d) 81 (Ont. C.A.); R. v. Bartlett (1998), 124 C.C.C. (3d) 417 (Ont. C.A.);

¶ 54 As in the case of criminal negligence, the mens rea for dangerous driving is based upon a modified objective test. The accused may be convicted of the s. 249 offence where it is proven that, viewed objectively, the accused was driving in a manner that was dangerous to the public, having regard to all of the circumstances. In making this determination, the trier of fact must be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation: R. v. Hundal (1993), 79 C.C.C. (3d) 97 (S.C.C.); R. v. MacGillivray (1995), 97 C.C.C. (3d) 13 (S.C.C.).

¶ 55 In my respectful opinion, it is open to a jury to conclude that the driving actions of the accused represented a gross departure from the standard of a reasonably prudent driver. The erratic driving manoeuvres of the black and red cars as described by Mr. Smith and Thampi, occurring on a busy highway, at night, constitute a prima facie case of "the higher level of fault defined by a marked departure from the standard of care that a prudent driver would have exercised having regard to all of the circumstances": R. v. Rajic, supra, p. 539.

¶ 56 With respect to the issue of causation, it will be observed that s. 249(4) requires proof that the underlying dangerous driving offence "thereby causes the death of any other person". This element of causation will be satisfied where the evidence shows that the driving conduct of the accused was at least a contributing cause of the death of the victim outside the de minimis range. See R. v. Pinske (1988), 6 M.V.R. (2d) 19 (B.C.C.A.); aff'd (1989), 100 N.R. 399 (S.C.C.).

¶ 57 The position of the defence is that the causation chain has been broken on account of the separation in time and distance between the driving conduct of the accused and the ultimate fatal accident. It is also submitted by Mr. Isenstein that the driver of the deceased's motor vehicle, Smith, was impaired by alcohol and that the trier of fact might reasonably find that it was his driving which resulted in the accident.

¶ 58 I am unable, on the basis of the record before me, to give effect to these submissions. The issue for determination requires scrutiny only of whether the accused persons' driving conduct has been proven to be a substantial, though not necessarily the only, cause of the injury or death to the victim. So long as it is a

contributing cause and something more than de minimis, the requisite causal element has been established: R. v. Pinske, supra; R. v. Larocque (1988), 5 M.V.R. (2d) 221 (Ont. C.A.); R. v. Rajic, supra, pp. 534-535. See, more recently, R. v. Barnes, [1999] O.J. No. 119 (19 January 1999, Doc. C27286 Ont. C.A.) at paras 11-12.

¶ 59 The manner in which a "sober" person may have driven a motor vehicle in similar circumstances is, in my respectful opinion, irrelevant to this determination. Indeed, the fact that there may have been faulty driving or impairment on the part of Smith does not shield the accused from liability Hence, in R. v. Stephens (1991), 27 M.V.R. (2d) 24 (Ont. C.A.), the causation test was satisfied notwithstanding that the victim's vehicle entered an intersection against a red light where it was struck by the accused whom, while under the influence of alcohol, had failed to keep a proper lookout and was driving at an excessive speed.

¶ 60 Indeed, in R. v. Rotundo (1993), 47 M.V.R. (2d) 90 (Ont. C.A.) the court considered that the requisite causal element was satisfied in a case of criminal negligence causing death and criminal negligence causing bodily harm where there was no physical contact between the accused's car and that of his victims. The accused had been jointly involved in a racing venture on a major highway, creating a grave risk of death or injury to other users of the highway; what happened was held to have come within the ambit of that risk.

¶ 61 In this case, it is my respectful view that a reasonable jury properly instructed could find that the driving conduct of the accused persons was a contributing cause of the death of Ms. McKenna beyond the de minimis range.

¶ 62 The fact that the trier of fact may ultimately be persuaded that it was the driving actions of only one of the cars that caused the accident, that is, the (Hubbard) black car going toward the (Smith) white car according to Smith; or the (Sagevicius) red car colliding with the (Smith) white car according to Thampi; or indeed, perhaps Smith's own inability to avoid a collision; is not to say that the underlying dangerous driving actions of the accused are too remote in terms of time or distance from the fatal accident. It follows that the accused must be ordered to stand trial in relation to count 2, dangerous driving causing death.

Failing to Remain at the Accident Scene, Criminal Code, s. 252

¶ 63 Finally, there is the issue of the charge of failing to remain at the scene of an accident against Mr. Hubbard, contrary to s. 252 of the Criminal Code. This offence is made out where it is established that the accused failed to perform any of the statutory duties enumerated in the section: R. v. Roche (1983), 34 C.R. (3d) 14 (S.C.C.). At this stage of the proceedings the Crown is additionally entitled to rely upon the presumption of intent pursuant to s. 252(2).

¶ 64 It will be recalled that the evidence conflicts as between Thampi and Smith as to whether the black car was involved in the accident. The former makes no mention of this other than to say that the driver of the black car left the area driving in a normal manner; the latter sees the black car coming towards him but does not testify that it actually strikes his vehicle. There is no physical evidence at the accident scene implicating the black car's role in the collision. To the contrary, there is an absence of any recent visible damage on Mr. Hubbard's motor vehicle at the time it was inspected at his home by the police, within an hour of the accident.

¶ 65 Contemporaneous knowledge of the accident by the accused is a requisite element of the failing to remain offence which must be proven by the Crown: R. v. Slessor, [1970] 2 C.C.C. 247 (Ont. C.A.). While the doctrine of wilful blindness may be resorted to in reliance thereof, it is not sufficient that the accused should have known of the accident. See in this regard Sansregret v. The Queen (1985), 18 C.C.C. (3d) 223 (S.C.C.); R. v. Crocker, 3 October 1990 Doc. C.A. 160/90 (Ont. C.A.).

¶ 66 I observe that s. 252(1) of the Criminal Code refers to the driver of a motor vehicle that "is involved in an accident with ... a vehicle ..."; conversely s. 200(1) of the Highway Traffic Act speaks of "... every person in charge of a vehicle... that is directly or indirectly involved in the accident ..." [emphasis added]. The Code has used this phrase since the reenactment of this offence in the new CrimInal Code of 1955. [See Note 16 below]

Note 16: Section 221(2). The provision was part of the same section setting out the former offence of criminal negligence in the operation of a motor vehicle: s. 221(2). Subsection (3) contains the presumption of intent which now appears as s. 252(2). In Martin's Criminal Code, 1955, the learned author's annotation for ss. 221(2) and (3) states that these provisions are taken from the former s. 285(2). Section 285(2) was worded in part as follows:

> (2) Whenever, owing to the presence of a motor vehicle on the highway, an accident has occurred to any person or to any horse or vehicle in charge of any person, any person driving the motor vehicle is guilty of an offence ... if, with intent to escape liability either civil or criminal, he fails to stop his vehicle, tender assistance, and give his name and address. Such failure shall be prima facie evidence of an intent as aforesaid.

As noted by Hutcheon J.A., on behalf of the court, in R. v. Hansen (1988), 46 C.C.C. (3d) 504 (B.C.C.A.) at 512, s. 285 placed the "emphasis of accident" not on the driver but on the other person or vehicle whereas the current provision places emphasis not on the driver but on the vehicle driven by the accused.

¶ 67 The difference in wording between these two sections seems curious at first blush. It might be argued that the former does not appear to contemplate indirect involvement in accidents as falling within the ambit of the Code provision given its failure to expressly refer to same, unlike the case of its provincial counterpart. See, for example, R. v. Vellow (1990), 27 M.V.R. (2d) 59 (Ont. Prov. Div.) at 62-63.

¶ 68 On the other hand, one might posit that the use of the phrase "involved in an accident", without any modifying words, evidences an intent on the part of the drafters of the legislation to give this section a broad application, particularly having regard to the laudable social purpose to which s. 252 is directed, namely, requiring those who are involved in motor vehicle accidents to remain on scene and render assistance to any injured persons in addition to providing the particulars of one's name and address. In essence, this offence proscribes the "hit and run driver" from exhibiting "a grave failure to comport with the standards of humanity and decency": R. v. Gummer (1983), 38 C.R. (3d) 46 (Ont. C.A.) at 50.

¶ 69 The ordinary dictionary meaning of the word "involve". in my respectful opinion, supports this latter view. The Concise Oxford Dictionary, 7th ed., defines "involve" as meaning "... entangle; implicate; include (in); imply, entail; concerned (in) ..."

¶ 70 The balance of authorities also support this broader interpretation of the word "involve" in s. 252 of the Code. The following remarks of Martin J.A., for the court, in R. v. Gummer, pp. 49-50, a sentencing case involving the offences of dangerous driving and failing to remain, are particularly instructive:

> The offences of dangerous driving and "failing to remain" protect different social interests. The offence of dangerous driving is to protect the public from driving of the proscribed kind. The offence of failing to remain under s. 233(2) of the Code imposes a duty on the person having the care of a motor vehicle which has been involved in an accident whether or not fault is attributable to him in respect of the accident, to remain and discharge the duties imposed him in such circumstances. [emphasis added]

¶ 71 It seems to me that if one who is involved in an accident is to remain on the scene, whether or not there has been driving on his or her part, the same must apply with greater force to one whose conduct comprises faulty driving which does result in an accident, whether or not his or her motor vehicle is physically involved in the accident itself. This view of the fail to remain provision is supported by authorities such as R. v. Hansen (1988), 46 C.C.C. (3d) 504 (B.C.C.A.) where it was held that the section contemplates any accident in which a person operates a motor vehicle so as to cause injury to another person or vehicle. See further in this regard R. v. Kletke (1995), 9 M.V.R. (3d) 182 (Man. C.A.).

¶ 72 To put it shortly, I cannot accept the view that there is the necessity for there to be contact between the accused's vehicle and another vehicle for there to be an accident within the meaning of s. 252(2). I agree with the opinion of O'Leary J. expressly to this effect in R. v. Hannam (1986), 1 M.V.R. (2d) 361 (Alta Q.B.) at 364. The word "accident" in this context is not to interpreted as meaning "collision": R. v. Mihalick (1991), 28

M.V.R. (2d) 114 (B.C.C.A.); leave to appeal to S.C.C. refused, 30 M.V.R. (2d) 41; R. v. Atwood (1996), 22 M.V.R. (3d) 137 (P.E.I.S.C.).

¶ 73 Hence, just as one may be said to have caused an accident without actually colliding with another vehicle, as in case of R. v. Rotundo, supra, one may likewise be involved in an accident without such physical contacts so as to trigger the statutory duties enumerated in the failing to remain provision. For an example of this relationship between the offence of failing to remain and the issue of causation, see R. v. DeBock, 3 June 1993, Doc. C12582 (Ont. C.A.). There the victim had been struck in the rear and bumped off the road. The finding that the accused's criminally negligent driving caused the accident which led to the victim's death was dispositive of the issue of his failing to remain at the accident scene.

¶ 74 Applying these principles to the case at bar, and recognizing that at this stage of the proceedings it is not open to the court to consider the quality of the evidence, including the likelihood or lack thereof of conviction (R. v. McIlwain, supra, p. 399), I am of the respectful opinion that a reasonable jury properly instructed could return a verdict of guilty on the count of failing to remain. In coming to this conclusion I am mindful of the fact that it is only the evidence of the witness Smith which implicates the black car as being involved in the accident with the (Smith) white car and there is no physical evidence to this effect at the accident scene. Moreover, while the accused Hubbard indicated knowledge of the accident in his statement to the police, there is no evidence that his motor vehicle actually came into contact with the Smith car or anything else.

¶ 75 The issue of Hubbard's contemporaneous knowledge of the accident, if any, must remain a matter for another forum. At this juncture, I am of the view that the Crown is entitled to a committal on this final count in the information.

Disposition

¶ 76 In summary, the accused are each discharged on the count of criminal negligence causing death contrary to s. 220 of the Criminal Code. The accused are each ordered to stand trial on the count of dangerous driving causing death contrary to s. 249(4) of the Criminal Code. Mr. Hubbard is additionally ordered to stand trial on the charge of failing to remain at the scene of an accident under s. 252 of the Code.

¶ 77 These Reasons for Judgment are being released to all parties 11 February 1999. As requested, I propose to not formally complete the preliminary inquiry, and endorse the information to effect, until 19 February 1999 so as to allow all parties to consider the provisions of s. 561(1).

¶ 78 Finally, I wish to record my appreciation to all counsel for the very high quality of their submissions and materials and, indeed, of their exemplary conduct, throughout the course of these very tragic proceedings.

LIBMAN PROV. J.

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