Citation: *R. v. Grant*, 2014 YKTC 34

Date: 20140626
Docket: 11-00858A
Registry: Whitehorse

TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

KENNETH RUSSELL GRANT

Appearances:
Ludovic Gouaillier — Counsel for the Crown
André Roothman — Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS T.C.J. (Oral): Kenneth Grant has been charged with having committed the offence of dangerous driving causing bodily harm, contrary to s. 249(3) of the *Criminal Code*.

[2] I find that Mr. Grant, while operating his truck, drove over Diane Johns' leg, causing her to suffer injuries to her leg and foot that clearly surpass the threshold required to constitute bodily harm. These injuries were testified to by Ms. Johns and are evident in the photographs that were filed.

[3] The circumstances in which Mr. Grant drove over Ms. Johns are in dispute. I will briefly review some of the evidence connected with the circumstances immediately

surrounding the time when Mr. Grant drove over Ms. Johns' foot and leg. For the purposes of my decision, I do not consider it necessary to review in any detail the circumstances outside of this period of time.

[4] Crown counsel called Ms. Johns and a Mr. Christie, as well as Cst. Greer who was involved in the investigation. Mr. Grant testified in his own defence.

[5] Ms. Johns testified that, without herself having done anything to prompt it, Mr. Grant pushed her out of his vehicle while it was travelling at a speed of 30-50 km/hr. She stated that Mr. Grant was angry with the other passenger, Mr. Christie, and made him get out of the vehicle first, after stopping it on Range Road in order to allow him to do so. He pushed Ms. Johns out while he was accelerating away, after Mr. Christie had exited the vehicle. Prior to the incident, all three individuals had been in the front seat of the truck, with Ms. Johns in the middle.

[6] In contrast to Ms. Johns' version of events, Mr. Grant states that he stopped his vehicle on Range Road in order to get Ms. Johns out of it. He states that he was angry because she had pushed her foot onto his on three occasions while they were driving up Two Mile Hill and onto Range Road. This had the effect of depressing the gas pedal, almost causing him to get into an accident. After Mr. Christie exited the vehicle in order to allow for Ms. Johns to leave, she refused to do so. Ultimately, Mr. Grant ended up forcefully pushing her out of the vehicle and she fell to the ground.

[7] Mr. Grant stated that, without seeing where Ms. Johns was and without checking, he drove ahead approximately 10 feet in order to allow Mr. Christie to get back into the

vehicle. When he called out to Mr. Christie to do so, he was advised by Mr. Christie that he had driven over Ms. Johns' foot.

[8] Mr. Grant said that after this happened, Mr. Christie helped Ms. Johns back into the truck. Mr. Grant offered on several occasions to take her to the hospital, but she refused. He then returned to Carcross, from where they had left earlier the evening before, and dropped Ms. Johns and Mr. Christie off at Mr. Christie's residence.

[9] In Ms. Johns' version of what happened after she was helped back into the truck, she was only asked once whether she wanted to go to the hospital and that was by the Carcross corner while the truck was continuing travelling back to Carcross. Mr. Grant did not stop or turn his truck around to head back to the hospital.

[10] Mr. Christie's testimony, to the extent that he had any or an accurate recollection of events, more closely parallels that of Mr. Grant. He testified that Ms. Johns put her foot on the gas or brake pedal several times before Mr. Grant stopped the truck. He got out of the vehicle, as did Ms. Johns. He does not believe she was forced out and cannot recollect whether she was initially standing or on the ground when she got out. He is unclear as to whether he got back into the truck before Ms. Johns. He testified that both he and Mr. Grant asked Ms. Johns if she wanted to go to the hospital, and she stated that she did not want to.

[11] It is not disputed by the parties that both Ms. Johns and Mr. Christie were significantly intoxicated at the time of the events in question. I further find that Mr. Grant was not intoxicated and there is no reliable evidence to contradict his testimony that he had consumed only two mixed drinks while in Whitehorse.

[12] Crown counsel has conceded that, on the whole of the testimony, there is not a sufficient basis to reject the evidence of Mr. Grant and Mr. Christie and accept the evidence of Ms. Johns instead.

[13] I agree. I will say that Ms. Johns testified in a manner that did not, insofar as to how she testified, cause me any concern. She presented as forthright and consistent in her version of events.

[14] Mr. Christie's evidence suffered more from his limited recollection of certain aspects of the events and would not, on its own, be persuasive. To the extent that his testimony touched on points also testified to by Ms. Johns and Mr. Grant, I find that his evidence was more consistent with and supportive of Mr. Grant's version of events.

[15] Mr. Grant's evidence was believable and not contradicted by any evidence that I consider to be reliable, at least not to the point where I could reject his evidence.

[16] To the extent that there is additional evidence to consider, I find that Ms. Johns' testimony that she was pushed out of a vehicle moving between 30-50 km/hr to be highly suspect. She suffered no visible injuries to her hands and face and she testified that she was pushed onto her back and she stayed there without rolling over. This, I believe, would not be the case if she were pushed out of a vehicle moving at, or close to, the speed she estimated. It is much more logical that she was pushed out of a stopped vehicle in the manner Mr. Grant testified to.

[17] I find that the version of events proffered by Mr. Grant is more consistent with the circumstances and the whole of the evidence than the version presented by Ms. Johns.

As I am unable to reject Mr. Grant's evidence and, in fact, find his version of events to be more probable, I must consider whether, on his version of events, his actions constituted the criminal offence of dangerous driving.

[18] Crown counsel does not contend otherwise in terms of the facts I should rely on in reaching a verdict. Counsel submits, however, that, even on Mr. Grant's version of events, the offence of dangerous driving is made out.

[19] In essence, the Crown's submission is that Mr. Grant, knowing that Ms. Johns was significantly intoxicated, pushed her out of his truck, causing her to fall to the ground and, without bothering to ensure she was safely away from the truck, drove it forward running over her leg and foot. This, submits the Crown, constitutes dangerous driving.

[20] Defence counsel concedes that Mr. Grant may well have been negligent or careless, but submits that his actions fall short of being a criminal act for which Mr. Grant should be criminally sanctioned.

[21] Section 249(1) reads as follows:

> Every one commits an offence who operates
>
> (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

[22] In cases where bodily harm results, the offence is punishable by imprisonment of up to 10 years in jail.

[23] In order to be found guilty of the offence of dangerous driving, it must be proven beyond a reasonable doubt that the operator of the motor vehicle drove the vehicle in a dangerous manner which constituted a marked departure from the standard of care that a reasonable person would have observed when considering all the circumstances.

[24] As stated by the Supreme Court of Canada in *R. v. Roy*, 2012 SCC 26 at para. 28, in summarizing and confirming the applicable principles consolidated and clarified in *R. v. Beatty*, 2008 SCC 5:

> ... The *actus reus* of the offence is driving in a manner dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably have been expected to be at that place (s. 249(1)(a) of the *Criminal Code*). The *mens rea* is that the degree of care exercised by the accused's was a *marked* departure from the standard of care that a reasonable person would observe in the accused's circumstances (*Beatty*, at para. 43). The care exhibited by the accused is assessed against the standard of care expected of a reasonably prudent driver in the circumstances. The offence will only be made out if the care exhibited by the accused constitutes a *marked* departure from that norm. While the distinction between a mere departure from the standard of care, which would justify civil liability, and a *marked* departure justifying criminal punishment is a matter of degree, the lack of care must be serious enough to merit punishment (para. 48).

[25] The 'fault' requirement for a finding of guilt is of considerable importance as it "ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction". (*Roy*, at para. 1)

[26] In para. 32 of *Roy*, the Court reproduced the comments from paras. 34 and 35 of *Beatty* as follows:

> ... If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty.
>
> In a civil setting, it does not matter how far the driver fell short of the standard of reasonable care required by law. The extent of the driver's liability depends not on the degree of negligence, but on the amount of damage done. Also, the mental state (or lack thereof) of the tortfeasor is immaterial, except in respect of punitive damages. In a criminal setting, the driver's mental state does matter because the punishment of an innocent person is contrary to fundamental principles of criminal justice. The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment.

[27] With respect to the *actus reus*, Cromwell J. stated the following at para. 34 of *Roy*:

> In considering whether the *actus reus* has been established, the question is whether the driving, viewed objectively, was dangerous to the public in all of the circumstances. The focus of this inquiry must be on the risks created by the accused's manner of driving, not the consequences, such as an accident in which he or she was involved. As Charron J. put it, at para. 46 of *Beatty*, "The court must not leap to its conclusion about the manner of driving based on the consequence. <u>There must be a meaningful inquiry into the manner of driving</u>" (emphasis added). A manner of driving can rightly be qualified as dangerous when it endangers the public. It is the risk of damage or injury created by the manner of driving that is relevant, not the consequences of a subsequent accident. ...

[28] With respect to the *mens rea* requirement, Cromwell J. stated in paras. 36 and 37:

> 36 The focus of the *mens rea* analysis is on whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances (*Beatty*, at para. 48). It is helpful to approach the issue by asking two questions. The first is whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the second question is whether the accused's failure to foresee the risk and take steps to avoid it, if possible, was a *marked departure* from the standard of care expected of a reasonable person in the accused's circumstances.
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> 37 Simple carelessness, to which even the most prudent drivers may occasionally succumb, is generally not criminal. ...

[29] In determining whether the driving at issue constitutes the requisite 'marked departure' from the expected standard of care, the trier of fact will generally be required to draw inferences from all of the circumstances. (*Beatty* at para. 43).

[30] Even where the manner of driving constitutes a marked departure from normal driving, an examination of all the circumstances is necessary "... to determine whether it is appropriate to draw the inference of fault from the manner of driving ..." (*Roy* at para. 40).

[31] As such, driving, which, objectively viewed, could be considered dangerous or 'careless', even if the consequences are tragic, does not necessarily result in the degree of moral blameworthiness required to criminalize behaviour. (*Roy* at para. 42).

[32] The reasoning in *Beatty* and *Roy* was considered by Gropper J. in *R. v. Hecimovic,* 2013 BCSC 1865. The driver in that case was driving at approximately 100 km/hr in an 80 km/hr zone, changed lanes when approaching an intersection, failed to see signs indicating that the lane she entered was a right turn only lane, proceeded, inadvertently and while somewhat distracted, through a red light, swerved to avoid a median which protruded into the right lane, lost control of her vehicle and struck a vehicle in the approaching lane on the other side of the intersection, killing two young passengers in that vehicle.

[33] In acquitting the accused on the charge of dangerous driving causing death, Gropper J. stated the following at paras. 48-49:

> 48 Here, there were a series of acts and each compounded the other, but I have not found that any of the acts separately constituted a marked departure from the norm. When considered together, I find that they do not establish the *mens rea* element of the defence. These three acts were part of a momentary error and even together they do not show a marked departure from the norm or something other than simple carelessness.
>
> 49 The Crown has not met the heavy onus required. ...

[34] In *R. v. Sanford*, 2014 BCSC 310, a 14-year-old boy was struck in a marked crosswalk, sustaining significant injuries. The accused passed a stopped vehicle (with a left turn signal on) on its right side, left the roadway, entered a bike lane, and proceeded without stopping into the crosswalk, striking the youth.

[35] Gropper J., in applying the reasoning in *Roy*, although finding the accused's driving to be wrong, found that the *actus reus* was not proven as the Crown had not

established that the driving was dangerous. In considering the *mens rea* aspect and the two-pronged test, Gropper J. found that a reasonable, prudent person would have foreseen the risks of driving as he did and taken steps to avoid it. However, Gropper J. found that the accused's actions nonetheless failed to constitute a marked departure from the norm, considering it to be a momentary lapse of attention and careless.

[36] In *R. v. Blostein*, 2014 MBCA 39, the accused drove through a construction zone at twice the legal limit, striking and killing a construction worker about one-half a kilometre from the speed sign. In upholding the trial judge's acquittal on a charge of dangerous driving causing death, the appellate court stated in para. 15 that:

> The consequence of driver error, no matter how tragic, does not determine a driver's legal liability (*Roy* at para. 2). This is so because driving is an inherently risky activity with significant social utility. Coupled with these attributes is the recognition that even prudent drivers can occasionally be careless. The criminal law, therefore, requires proof of moral blameworthiness by the driver (*Beatty* at para. 34). It is not enough that a driver was careless or negligent under the civil law. The criminal law requires proof that the manner of driving was objectively dangerous, taking into account the factors mentioned in s. 249(1)(a) of the *Code* and also that the conduct is a marked departure from what is expected of a reasonable person in the circumstances (*Beatty* and *Roy*). ...

[37] In *R. v. De Bortoli*, 2012 BCSC 1957, the accused's vehicle, while travelling at "an unusually high rate of speed", was driven on the wrong side of the road, passing very close to three children, left the road, went through a ditch, crossed another road, went through a chain-link fence and struck an elementary school, imbedding itself two metres into the school. It was a Sunday and no-one other than the accused was

injured. Butler J. noted in paras. 21 and 22 that there are two lessons to take from the Supreme Court of Canada decision in *Roy*:

> ... First, it is an error to infer that a driver's conduct displays a marked departure from the standard of care of a reasonable person in the circumstances from the mere fact that the driver committed a dangerous act. ...
>
> 22 The second lesson to take from *Roy* is that advertent negligence cannot be inferred from a dangerous act. There must be evidence to support a conclusion that the accused driver actually foresaw the risk and decided to take it: see para. 51.

[38] In convicting the accused, Butler J. noted in paras. 69-70 that the manner of driving was such that:

> ... any reasonable person in his circumstances should have appreciated the risk of harm to members of the public. ...
>
> ... It is more than a momentary lapse of judgment. It was not a single manoeuvre that was ill-timed or careless. The entire course of his driving ... was conduct that could be characterized as dangerous. When the totality of that conduct is considered, it amounts to a marked departure from the norm. ...

Application to the present case

[39] I find that Mr. Grant stopped his vehicle in order to have Ms. Johns leave it. He did so due to concerns regarding her actions while he was driving his vehicle. Mr. Christie exited the vehicle so that Ms. Johns could get out. When Ms. Johns refused to do so, Mr. Grant pushed her out of the vehicle. Without checking to see where she was, he drove the vehicle ahead in order to allow Mr. Christie to get back in, running over Ms. Johns' leg and foot in the process.

[40] With respect to the elements of the offence, I do not find that the manner of driving was dangerous. I cannot conclude, based on the fact that an injury occurred, that it occurred as a result of dangerous driving. Had there been no injury, Mr. Grant's manner of driving would likely not have attracted any particular scrutiny.

[41] With respect to the *mens rea*, I am satisfied that a reasonably prudent person would have ensured that the intoxicated Ms. Johns was safely away from the vehicle before driving it forward. In this sense, I find that Mr. Grant failed to appreciate the objectively obvious risk of harm to her and thus acted unreasonably. While Ms. Johns' actions in depressing the gas pedal may have given Mr. Grant reason to stop his vehicle, it in no way justifies his driving away in the manner that he did.

[42] That said, I do not find, from a consideration of all the circumstances, that Mr. Grant's conduct, while perhaps careless and negligent, constituted a marked departure from the standard expected such that he should be criminally sanctioned. While his actions may, at some point, warrant a finding of civil liability, I find that they fall short of the actions and degree of moral blameworthiness required to result in a criminal conviction.

[43] As such, Mr. Grant is acquitted of the charge of dangerous driving causing bodily harm.

[44] I believe s. 271 was dealt with; correct?

[45] MR. GOUAILLIER: Yes.

[46] THE COURT: The Crown entered a stay to the charge.

[47] That concludes the matter.

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COZENS T.C.J.