Citation: *R. v. Sidhu*, 2015 YKTC 46

Date: 20151016
Docket: 15-05209
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

MANDEEP SINGH SIDHU

Appearances:
Kimberly Sova — Counsel for the Territorial Crown
Mandeep Sidhu — Appearing on his own behalf

REASONS FOR JUDGMENT AND SENTENCE

[1] CHISHOLM T.C.J. (Oral): Mr. Mandeep Sidhu is charged with two offences contrary to the *Motor Vehicles Act*, RSY 2002, c. 153, namely, s. 186, careless driving; and s. 188, stunting. These allegations stem from an incident on July 12, 2015, in the City of Whitehorse.

[2] The evidence of the investigating officer and that of Mr. Sidhu is fairly similar, except for the short period of time that encapsulates the allegations.

[3] Cst. M. Hutton testified that he was working as a general duty officer on the evening in question. Just prior to midnight, he made a traffic stop on Two Mile Hill, a major divided thoroughfare with multiple lanes. Cst. Hutton pulled over a vehicle for a

possible traffic infraction. The young driver of the vehicle was leaving the downtown area and travelling in a westerly direction on Two Mile Hill when pulled over. The driver stopped his vehicle about halfway up Two Mile Hill in the left-hand lane closest to the median dividing the major road. Cst. Hutton had turned on the emergency lights on his marked police vehicle when stopping this vehicle. He left the lights activated while he spoke to the driver of the vehicle.

[4] After speaking to the driver of the vehicle, the officer was returning to his police vehicle with some documents when Mr. Sidhu's company truck, with which he was familiar, approached at a high rate of speed. Cst. Hutton estimated the speed to be between 100 and 110 km/h. The posted speed limit is 60 km/h. Cst. Hutton stated that when this occurred he was at the front hood of his vehicle towards the driver's side. The driver of the truck did not adjust his speed. When the truck passed the passenger side of the police vehicle, it was estimated by the officer to be approximately a foot away. The driver of the truck was honking his horn. After having passed the police vehicle, the speed of the truck then increased to what the officer estimated to be 120 km/h.

[5] Mr. Sidhu testified that he noticed the emergency police lights part way up Two Mile Hill, approximately a minute prior to passing the police cruiser and the vehicle in front of it. He stated that he was initially travelling at 60 km/h and he reduced his speed to 50 km/h, after having noted the police emergency lights. He continued to closely monitor his speed as he approached the police vehicle. He assumed the police vehicle was stopped in the far right lane. It was only when he was very close to the police vehicle that he realized it was in the same lane as he was. He had to take evasive

action to avoid a collision, so he quickly changed lanes while increasing his speed. In doing so, he accelerated to 60 km/h. He honked his horn as he passed the police cruiser. Mr. Sidhu recalls there being no other traffic in the westbound lanes when this incident occurred.

[6] As depicted in the video that Mr. Sidhu took of this area in question sometime after the incident, there are street lights all along this road, although Mr. Sidhu indicates that one of the street lights was burned out at the time of this incident.

[7] The officer described the lighting as "dusky" at the time of the incident.

[8] The video presented by Mr. Sidhu, which is marked as Exhibit 2, shows that the artificial lighting is good in that area.

[9] In order to prove the careless driving charge, the Crown must prove that Mr. Sidhu drove without due care and attention or without reasonable consideration for others using the highway. I am mindful of the fact that this is not a credibility contest between Cst. Hutton and Mr. Sidhu. The Crown must prove beyond a reasonable doubt each and every element of the offences. The burden is on the Crown and never shifts to the defence. I have closely considered all of the evidence in this matter.

[10] Mr. Sidhu portrays himself during these events as a very safe and prudent driver who was so vigilant, due to the police presence further up the road, that he reduced his speed to below the speed limit. He continuously monitored his speed, as he was suspicious there might be another police vehicle in the area. At the same time, he testifies to barely avoiding an accident with the police vehicle, having assumed the

police vehicle would be stopped in the far right-hand lane as opposed to the far left-hand lane. It is perhaps understandable that, as he rounded the curve at the bottom of Two Mile Hill, he initially anticipated the police vehicle being stopped in the far right-hand lane. However, for a significant distance, as depicted in Exhibit 2, he had a clear and unobstructed view of the vehicle and its activated emergency lights.

[11] I am unable to reconcile the favourable driving conditions and Mr. Sidhu's stated speed with the actions he states he had to employ at the last second to avoid a collision with the police vehicle. If he were indeed travelling at or below the speed limit, he would have had ample time to determine where the police vehicle was actually located and to take whatever measures were required to safely pass the police cruiser and the vehicle in front of it. Travelling at that speed and in those conditions, he could not have ended up in the position of almost colliding with the police cruiser.

[12] A viewing of Exhibit 2 underscores the ease with which Mr. Sidhu could have changed lanes in order to completely remove himself from the vicinity of the police vehicle and the vehicle stopped in front of it. The video supports a finding that Mr. Sidhu would not have found himself in a near accident situation had he been travelling at the low rate of speed he suggests.

[13] I also have difficulty with his evidence of making a last-second manoeuvre to avoid a collision and yet having the time and presence of mind to honk his horn as he passed the police vehicle. In my view, these two actions are incompatible.

[14] Overall, I do not find Mr. Sidhu's evidence credible. I accept the evidence of Cst. Hutton that Mr. Sidhu was travelling at a high rate of speed and came dangerously

close to hitting the police vehicle as he went by it. Cst. Hutton did not observe the truck moving from one lane to another as it approached the area where he was parked. He had a clear view of the approaching truck as he was facing it.

[15] On the issue of the credibility of Cst. Hutton, Mr. Sidhu suggests that because of previous arrests of him by the officer in 2010 and 2011, which did not lead to convictions, the officer's credibility in this matter should be questioned.

[16] One of these earlier arrests involved a charge of driving a vehicle while operating a cell phone. Cst. Hutton located a device which he believed was a cell phone in the vehicle driven by Mr. Sidhu. As I understand the chronology of events, Mr. Sidhu was subsequently convicted after an *ex parte* trial for driving while using a cell phone. Cst. Hutton testified at that initial hearing. On appeal, however, the Crown conceded that the initial conviction should be overturned, as it had been determined that the device in question was an iPod and not a cell phone.

[17] Based on the evidence I heard, there is no basis to conclude that Cst. Hutton was untruthful with respect to the driving while operating a cell phone charge. The most that can be said is that he was mistaken with respect to the device being operated.

[18] Regarding other charges that were laid against Mr. Sidhu in 2010 and 2011, there is nothing I can make of this fact on its own. I therefore cannot draw any adverse inference with respect to the credibility of Cst. Hutton or with respect to the reliability of his evidence in the matter before me.

[19] Having considered all of the evidence, I find that the Crown has proved beyond a reasonable doubt that on the night of July 12, 2015, Mr. Sidhu did not drive either with due care and attention or with reasonable consideration for others using the road. As such, I find him guilty of the charge of careless driving.

[20] The Crown also seeks a conviction for the charge of stunting. In order to prove this charge, there must be sufficient evidence to prove beyond a reasonable doubt that Mr. Sidhu engaged in an activity that was "likely to distract, startle, or interfere with other users of the highway". The fact that Mr. Sidhu was travelling at a high rate of speed and was dangerously close to the police vehicle when he passed it satisfies me that he drove in a manner which was likely to interfere with other highway users. I find him guilty of that offence.

[21] I must, however, consider whether the rule against multiple convictions applies in this case.

[22] The basis for this rule is that no offender should be punished twice for the same offence. In order for this rule to be engaged, I have to be satisfied that the same act of the accused is the foundation for each charge.

[23] Secondly, if I am satisfied of a factual nexus, I must look further to determine whether there is a sufficient legal nexus between the charges to engage this principle (*R. v. Prince*, [1986] 2 S.C.R. 480). In other words, I must look to the elements of the two offences to determine whether the rule against multiple convictions is applicable.

[24] The British Columbia Court of Appeal in *R. v. Heaney*, 2013 BCCA 177 summarizes the development of this rule and the principles underlying the rule, which is also known as the *Kienapple* principle. The Court stated at para. 15:

> The rule was refined in *Kienapple* where the majority found that there could not be more than one conviction arising out of the same "delict". ...

[25] At para. 23, the Court stated:

> In determining whether the *Kienapple* principle applies, the focus is not on common elements between the offences, but whether there are any additional or distinguishing elements. This point was clarified by Dickson C.J.C. at 49 [of *Prince*]:
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> > There is, however, a corollary to this conclusion. Where the offences are of unequal gravity, *Kienapple* may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence. For example, in *R. v. Loyer*, [1978] 2 S.C.R. 631, *Kienapple* was applied to bar convictions for possession of a weapon for the purpose of committing an offence when convictions were entered for the more serious offence of attempted armed robbery by use of a knife. Although the robbery charges contained the element of theft which distinguished them from the weapons charges, there were no elements in the weapons charges which were additional to or distinct from those in the robbery charges. Accordingly, it was appropriate for the Court to apply *Kienapple* to bar convictions on the lesser weapons charges rather than on the robbery charges.

[26] In *R. v. Andrew* (1990), 46 B.C.C.R. (2a) 325 the British Columbia Court of Appeal enunciated four situations where the *Kienapple* principle will apply. Lambert J.A. summarized these "keys" as follows:

> 1) Where the offences are of unequal gravity, *Kienapple* may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence. (*Prince* p. 499)
>
> 2) Where an element of one offence is a particularization of essentially the same element in the other offence. (*Prince* p. 500)
>
> 3) Where there is more than one method, embodied in more than one offence, to prove a single criminal act. (*Prince*, p. 501. But I have used "criminal act" instead of "delict")
>
> 4) Where Parliament has deemed a particular element to be satisfied on proof of another element. (*Prince* p. 501)

[27] In the matter before me, there is clearly a factual nexus between the two charges. It is the manner of Mr. Sidhu's driving as he passed the police cruiser that led to both the careless driving and stunting charges, and it is this action that is the basis for both charges.

[28] Turning to the legal nexus, I firstly consider whether this is one of those cases where the offences are of unequal gravity and in which a conviction for a lesser offence may be barred. Pursuant to s. 247(1) of the *Motor Vehicles Act*, the maximum penalty for stunting is a fine "of not more than $500, or to imprisonment for a term not exceeding six months without the option of a fine." Pursuant to s. 247(9), a first offence of careless driving is punishable by a "fine of not less than $200 and not more than $1,000, or to

imprisonment for as long as 90 days, or both"; for a second or subsequent offence, the penalty is a minimum fine of "$500 and not more than $2,000, or to imprisonment for as long as six months, or both." The careless driving charge is therefore, in my view, the more serious offence.

[29] The essential elements of the careless driving offence are driving without due care and attention or without reasonable consideration of others. The essential element of the stunting charge, based on the facts of this case, is driving in a manner that was likely to interfere with other users of the road. There are no additional distinct items in the stunting charge from those in the careless driving offence. None of the factors outlined in *Prince* that will defeat a claim that different offences possess the legal nexus to warrant the use of *Kienapple* are present before me.

[SUBMISSIONS RE PENALTY]

[30] With respect to an appropriate sentence for Mr. Sidhu, I have considered submissions of both the Crown and Mr. Sidhu. I have considered as well the driving abstract, which has been presented to me. There is one prior conviction for careless driving, although I do take note of the fact that it occurred in 2006. There are some other unrelated matters under the *Motor Vehicles Act*.

[31] In terms of the circumstances of the offence for which Mr. Sidhu was convicted, I think of note is the fact that this is a situation where he drove dangerously close to a police vehicle at a high rate of speed. As such, considering all of the factors of this case and the personal circumstances of Mr. Sidhu and his prior history in this regard, in my view an appropriate penalty is above the minimum.

[32] I should also point out that this is not a matter in which there was a guilty plea, where he would receive credit for having pleaded guilty. Although he cannot be punished for having brought this matter to trial, it is something that I take into account in terms of the sentencing.

[33] So, there will be a fine of $400 and the surcharge, which is 15 percent, amounts to $60. I will allow Mr. Sidhu two months to pay the total amount.

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CHISHOLM T.C.J.