Citation: *R.* v. *Clement*, 2007 YKTC 30

Date: 20070425
Docket: T.C. 06-00514
Registry: Whitehorse
Heard: Carmacks

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

REGINA

v.

RODERICK CLEMENT

Appearances:
Kevin Komosky — Counsel for Crown
Gordon Coffin — Counsel for Defence

REASONS FOR SENTENCING

[1] FAULKNER C.J.T.C. (Oral): Roderick Clement is charged on an Information containing four counts, all arising out of a motor vehicle accident that occurred on the 8th of November 2006, near Braeburn in the Yukon.

[2] Count 1 charges that Mr. Clement operated a motor vehicle while his ability to do so was impaired by alcohol or a drug and thereby caused the death of Archie James Lenny, contrary to s. 255(3) of the *Code*. Count 2 charges Mr. Clement with refusing to provide breath samples contrary to s. 254(5) of the *Criminal Code*. Count 3 charges Mr. Clemet with operating a motor vehicle on the highway in a manner that was dangerous to the public, thereby causing the death of Archie James Lenny, contrary to

s. 249(4) of the *Code*. Lastly, with operating a motor vehicle while disqualified, contrary to s. 259(4)(b) of the *Code*.

[3] With respect to Count 4, the charge of driving while disqualified, Mr. Clement entered a guilty plea at the outset of trial. The trial proceeded on the remaining three counts.

[4] The facts, briefly, are that on November 7, 2006, Mr. Clement was at the home of some friends in Whitehorse, Yukon, specifically Dennis Menacho and his partner Carrie Dickson. There was a drinking party that went on late into the night. The next morning, and it was late in the morning after everyone got up, another friend, a Mr. Archie Lenny, had appeared at the residence. The decision was made to drive to Carmacks, Yukon in a vehicle owned by Ms. Dickson's father, as I understood it. It was decided that the accused, Mr. Clement, would drive, ostensibly, as
Mr. Menacho testified, because whilst the others resumed drinking in the morning,
Mr. Clement had not.

[5] Consequently, the accused, Mr. Menacho, Ms. Dickson, Mr. Lenny, and Ms. Dickson's infant child got into the car. After various stops for fuel and a trip to the liquor store and so on, the party started off towards Carmacks with Mr. Clement driving the truck. According to Mr. Menacho and Ms. Dickson, they and Mr. Lenny continued to consume alcohol as the truck proceeded towards Carmacks, but
Mr. Clement did not. Mr. Clement's driving was described as normal.

[6] Ultimately, Mr. Clement reached a point which is described as the top of the Braeburn hill south of Braeburn. It is a straight stretch of road, and although it was

winter, it was daylight and the road was dry and it was, as I say, a straight stretch of road. It was also essentially level. There was, perhaps, a one degree grade. Although the main portion of the road was dry, the shoulder of the road was covered with snow. As Mr. Clement drove along, it appears that he took his eyes off the road to retrieve a bottle of pop from down in the floor or console area of the vehicle, and as he did so, the vehicle veered to the right. The right-hand tires entered the snow-covered shoulder of the road. The truck then travelled on for some 46 metres before entering a steep ditch on the side of the road. At this point, the vehicle went down in the ditch and eventually rolled over, skidded for a while upside-down and then headed back towards the highway, at which point, it actually rolled back up onto its tires. So it ended up right side up, although substantially damaged.

[7] Tragically, Mr. Lenny, who was not wearing a seatbelt, was partially ejected from the vehicle during the accident sequence and died as the result of severe head injuries he sustained in the accident. Remarkably, the other passengers, who it does not appear were belted in either, with the exception of the infant, received only very minor cuts and scrapes.

[8] A Yukon Government vehicle happened to come along quite shortly after the accident. That vehicle was equipped with a mobile radio and the police were summonsed. Corporal Pilatzke from the Carmacks detachment of the RCM Police happened to be driving on the Klondike Highway between the accident site and Carmacks. He heard the radio call and responded to the scene. There, he encountered Mr. Clement and the other survivors. He noted with respect to

Mr. Clement that he had an odour of alcohol on his breath but no other particular symptoms of impairment, save and except that Mr. Clement appeared quite subdued.

[9] It is obvious that this may or may not have been the result of alcohol consumption, since, by the time Corporal Pilatzke arrived, Mr. Clement was aware that his friend, Mr. Lenny, had perished in the accident and that obviously, he, Mr. Clement, was responsible for that.

[10] Now, the evidence also featured a reconstruction of the accident sequence by Constable Wessell. He indicated that the vehicle travelled some 46 metres from the time the right front tire entered the snow-covered shoulder of the road until the vehicle started down the ditch. At the speed that the vehicle was going, this would have taken something in the order of one and a half to one and three-quarter seconds. The longer time would be travelling at the legal limit of 90 kilometres per hour. The shorter time would be if the vehicle was travelling, as Mr. Clement later admitted, at 110 kilometres per hour. In either event, it took somewhat less than two seconds for the vehicle to travel that distance.

[11] According to Constable Wessell, it would have taken approximately one and a half seconds for the average driver to comprehend what was happening and react to it. It follows that there was very little time from the time that the vehicle entered the snow-covered portion of the road until the situation became unrecoverable. I should add that the actual period of inattention may have been somewhat longer than one and a half seconds because there could have been a period of time when the vehicle was travelling more in the center of the travelled portion of the roadway and started over

toward the snow-covered section, but it is impossible to know how long that period of time was.

[12] At all events and on all the evidence, clearly the accident occurred within a matter of seconds. As I believe I have already indicated, Constable Wessell's evidence was that once the vehicle entered the ditch, which was quite steep, the accident was inevitable and could not be prevented by any action on behalf of the driver.

[13] With those facts in mind, I turn to consider the counts remaining before the Court. The first count is the charge of impaired driving causing death. As the Crown rightly points out, there is no issue here of causation. Clearly, it was Mr. Clement's error that caused the accident and led directly to the death of Mr. Lenny. I also agree with the Crown that it need not prove a marked degree of impairment by alcohol, but only that there was some degree of impairment.

[14] The evidence, however, is of alcohol consumption the evening before. There is no evidence that Mr. Clement was drinking in the hours prior to the accident, and certainly no evidence of a blood alcohol level. There is also, of course, the evidence of the accident itself, coupled with the fact that he smelled of alcohol. I have already mentioned that when Corporal Pilatzke encountered the accused, he appeared somewhat dazed in appearance. As I have already indicated, while this could have been due to impairment, it is equally likely that it was due to the effects of the accident and Mr. Clement's realization that Mr. Lenny had died.

[15] It seems to me, at the end of the day, that while it is, to some degree, likely that Mr. Clement's ability to drive was impaired by alcohol; it is equally possible that the

accident occurred simply as a result of fatigue and inattention or a combination thereof. In the result, in my view, it has not been proven to the requisite standard that Mr. Clement's ability to drive a motor vehicle was impaired by alcohol. Consequently, Count 1 must stand dismissed.

[16] I should mention that Mr. Komosky also argued that I could draw an adverse inference from the fact that Mr. Clement later refused to provide breath samples back in Carmacks after his arrest. However, for reasons that will follow, I do not think it would be permissible to draw an inference in this particular case.

[17] That turns me to the consideration of Count 2. With respect to that count, Corporal Pilatzke was frank enough to testify that he did not have sufficient grounds to make a breathalyzer demand absent the result of the approved screening device, which the Crown now concedes is inadmissible. It follows, in my view, that since the demand was not lawful, that refusing it is not an offence, and that, as I have already said, an adverse inference cannot be drawn from the fact of the refusal.

[18] The Crown was driven to argue that although Corporal Pilatzke may himself have felt his grounds were less than adequate, that, objectively viewed, those grounds existed. I think the law is clear having regard to *R*. v. *Bernshaw*, [1994] S.C.J. No. 87 that not only must there be objective grounds, but the police officer himself must believe that he has those grounds.

[19] It remains then to consider Count 3. The issue of what constitutes dangerous driving has been a difficult issue for the courts to grapple with over a long period of years. The best that can be said, at this point time, is that there is a continuum running

from civil liability at the one end, through careless driving under provincial or territorial highway traffic laws, through to dangerous driving and criminal negligence under the *Criminal Code*. Enunciating the difference between these concepts, however, is not always easy. In this case, the issue is whether or not the Crown has proved Mr. Clement guilty of dangerous driving causing death.

[20] It is at once apparent that in this case, Mr. Clement's conduct went beyond mere civil liability, and certainly reached at least the level of careless driving. To constitute the offence of dangerous driving, however, I am satisfied that the test in *Hundal*, [1993] S.C.J. No. 29, requires a marked departure from the standard of care that a reasonable, prudent driver would observe in the situation that the accused found himself in. In my view, it must be that there has to be a marked departure; otherwise it would be impossible to distinguish this offence from that of careless driving under Territorial law.

[21] I should add that some of the cases have also spoken of a test formulated along the lines of requiring conduct that is objectively dangerous. However, in my view, describing the offence of dangerous driving this way comes perilously close to saying that dangerous driving is defined as driving that is dangerous. So it is not terribly helpful. So the question remains, in my mind, whether a marked departure has been proved.

[22] The factors that are at play in this case are, firstly, that the accused had consumed alcohol, though the extent to which he was still under the influence of alcohol is unknown. It is certainly reasonable, however, to suppose that he was subject to some of the after-effects of alcohol consumption and a late night of partying.

[23] Secondly, the accused was speeding, travelling, by his own admission, approximately 20 kilometres over the posted speed limit. However, it must be noted that this was a straight, dry stretch of road. The visibility was unlimited, and I think I can take judicial notice of the fact that the Klondike Highway, particularly in November, is not the Highway 401, let us put it that way. So the significance of the speeding is somewhat diminished.

[24] The third factor, of course, is that which immediately led to the accident, and that is the accused decided to retrieve a bottle of soft drink. As he did so, he became distracted and allowed the vehicle to veer off the travelled portion of the roadway. The truck then went down a rather steep ditch and rolled over. There is no evidence that the accused took any action to steer the vehicle back onto the roadway or to brake or take any other action to advert the situation. As I have already said, the road was straight and dry, it was daylight, and there was no reason for the accused to lose control of the vehicle.

[25] However, there is also the evidence that the accident sequence became irretrievable in as little as a second and a half, which is at the limit of what an average driver would take to understand what was going on and react to the situation. Consequently, it can be seen that there was not a long period of inadvertence or a long period of bad driving or any sort of other egregious conduct by the accused. What there was, was a momentary lapse, which led, in the circumstances, to a very serious and tragic accident. The Crown, however, says that even a momentary lapse may result in a conviction for dangerous driving, and points to such cases as *R*. v. *Beatty*, [2006]

B.C.J. No. 1038, *R*. v. *Carlson*, [1993] B.C.J. No. 3066, *R*. v. *Sara,* [1992] B.C.J. No. 1479, and others to demonstrate that the dangerous need not be prolonged.

[26] It is true that when one looks at those cases, all are cases of momentary inattention. However, as Mr. Coffin points out, all of these cases involve significant other factors such as very heavy traffic, following too close or, in one of the other cases, ignoring a line of vehicles that had stopped for a pedestrian. At the end of the day, in my view, the situation here is very similar to that which occurred in the case of *R*. v. *Monkman*, [2005] Y.J. No. 13, which was a careless driving case. The case is, in the end, right on the line between careless driving and dangerous driving. It seems to me that when a case is right on the line, the benefit of the doubt must go to the accused.

[27] As I say, the facts here would have fully supported a conviction for careless driving. They do not, at the end of the day, satisfy me beyond a reasonable doubt that the conduct of the accused had reached the level of dangerous driving as that is understood in the law. Accordingly, Count 3 similarly stands dismissed.

[28] MR. KOMOSKY: Crown is ready to proceed to sentence on the remaining count.

(Submissions on sentencing)

[29] THE COURT: Roderick Clement has entered a plea of guilty to a charge of driving while disqualified. There are some very seriously aggravating factors to this case, not the least of which is that the result of Mr. Clement's taking the wheel on

this particular occasion was that someone was killed. There is the additional factor here that Mr. Clement has an unenviable record in general, and, in particular, an unenviable record with respect to motor vehicle offences, including driving under the influence charges and driving while disqualified charges.

[30] The Crown proceeded by indictment. Consequently, the maximum sentence the Court can impose is one of five years imprisonment. In my view and in all of the circumstances of this case, a substantial sentence certainly in the range of six months or more would have been fully warranted. However, Mr. Clement has already served the equivalent of that or more in pre-trial custody. In the result, he is sentenced to one day in addition to time served, which I calculate at seven months.

[31] In addition, he is prohibited from operating a motor vehicle on any street, highway or other public place in Canada for a period of three years.

[32] I hope, Mr. Clement, that you are sincere in your professed desire to do something about your alcohol problem. Obviously, it has been a blight on your life for a significant number of years. You need to do something about it before anything else happens.

[33] There was the motor vehicle charge?

[34] MR. KOMOSKY: As indicated, I have instructions from the Territorial Crown that upon conviction on s. 259(4) to stay that charge.

[35] THE COURT: The charge is stayed.

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FAULKNER C.J.T.C.