R. v. Haney, 2002 YKSC 34

Date: 20020628
Docket: S.C. No. 01-AP003
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

DOROTHY LYNNE HANEY

APPELLANT

REASONS FOR JUDGMENT OF
MR. JUSTICE HUDSON

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[1] This is an appeal from a decision made by a sitting Justice of the Peace wherein the appellant was found to have committed an offence contrary to s.156(2) of the *Motor Vehicles Act*, R.S.Y. 1986, c.118 which states:

> **Right-of-way at intersections**
>
> 156.(2) A driver intending to turn left across the path of any vehicle approaching from the opposite direction shall not make or attempt to make the left turn unless the turn can be completed in safety.

[2] The evidence was that the appellant entered the left turn lane which would, in completing the turn, take her across two lanes of traffic proceeding south on Second Avenue, and then on Robert Service Way, the road she intended to take. In crossing the outside curb lane of Second Avenue, she was in

collision with a vehicle driven by Ms. Magnuson, herein called the Magnuson vehicle. The time of the accident was early January and there was a build up of snow on the road which was thicker on the less travelled section of the roadway.

[3] There was evidence that Magnuson was speeding at some point along Second Avenue as it travelled toward the accident site but she had come to a “rolling stop” at the red traffic light some short distance prior to the traffic light at the accident scene. The Justice of the Peace found that she had been travelling at 60 km per hour on Second Avenue and she admitted going 40 km per hour at the time of the accident. He also found Magnuson was driving at an unsafe speed for road conditions and the charge against the driver to that offence was diverted. The evidence is that on such a diversion, the offender takes responsibility for the occurrence.

[4] The appellant’s grounds for appeal are that the Justice of the Peace erred in:

(a) failing to apply the test of proof beyond a reasonable doubt to the offence;

(b) finding that the offence occurred beyond a reasonable doubt because an accident resulted, regardless of the circumstances surrounding the accident;

(c) not accepting that, based on the evidence of Crown and defence witnesses, there existed a reasonable doubt that the accused executed the left hand turn when it was unsafe to do so; and

(d) placing an onus on the accused to prove that the turn was safe because an accident resulted therefrom.

[5] There were four witnesses called for the Crown and the appellant testified on her own behalf.

[6] One witness was an off-duty police officer who described the driving of the Magnuson vehicle some distance before the scene of the accident. The effect of his evidence is to indicate that the Magnuson vehicle was proceeding quickly and that he was almost in a collision with it.

[7] Florence Jean Carlick gave evidence which was quite contradictory and which indicated that the appellant took the left turn at an unsafe speed and failed to stop prior to making the left turn. This witness estimated the appellant's speed at 60 miles an hour while taking a ninety-degree left hand turn.

[8] Melanie Amber Magnuson testified with regard to her driving ending up in the collision with the appellant's vehicle. In a model of simplicity, Ms. Magnuson's description of the accident is "and so I kept going and it turned, so I hit it."

[9] She also described in evidence as follows:

> I seen her move, and by then she was just - - we just hit. Like, there wasn't very much time to react. I turned off to the right a bit, and then we hit, and I tried to get out of her way, but - -
>
> …
>
> I did see her, but it was too late. Like, I seen her stopped so I kept going. I seen her turning and I tried to turn off, but it was too late.

[10] Wayne Frederick Smyth testified. He was the police officer who conducted an investigation of the accident and produced a hand-made drawing of the scene which, though not placed in evidence as an exhibit, was provided at the hearing of this appeal.

[11] Significant evidence was that a driver proceeding south on Second Avenue being entitled to proceed as the light was green, hesitated, remained stationary and the appellant at that time chose to commence her left hand turn. The appellant testified with respect to the driver facing her who had the right of way, she said:

> Q So when - - when you decided to make the turn, it was simply because of the four seconds that had elapsed?
>
> A Yes.
>
> Q Did you make any eye contact with the driver of that vehicle?
>
> A No, I didn't. Because, again, the lights made it - - like, I couldn't see anything. There was a glare on her window, so - -
>
> Q Okay, so you couldn't see if she was waving you on or - -
>
> A No, I - -
>
> Q - - anything like that?
>
> A - - couldn't.
>
> Q Could you see the occupants inside the vehicle?
>
> A I could see silhouettes - -
>
> Q Silhouettes.

> A -- and it appeared that they were looking right towards me. And again, I was watching the tires to see if they were moving.

[12] She also indicated that she wanted to see if the driver facing her “knew to continue to stay stopped because I was going to then pull across.” The appellant’s view of the traffic was in her evidence:

> I could see that there was a truck behind her and there was another vehicle behind her, and then across the other intersection were other vehicles, and I could see that they were coming, piling up.

She agreed that she knew the lights at the previous near intersection were green for Second Avenue traffic.

[13] She further stated:

> I was more preoccupied with seeing if this woman was making her move. Because she’s the first one that I have to deal with as far as giving her the right of way.

She described her movement as follows:

> I was making sure that - - well, obviously, I’m pulling in front of traffic, so I don’t want to be hit by someone, so I’m going slow enough where I have enough time to react, and I wanted to make sure that this woman could see that I was in front of her and she acknowledged that she had to - - she knew to continue to stay stopped because I was going to then pull across.

[14] The test to be applied by a trial judge in a strict liability offence is recited in the case of *Regina v. City of Sault Ste. Marie,* [1978] 2 S.C.R. 1299 at 1325:

> While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

[15] The Justice of the Peace had no problems in finding that the commission of the prohibited act was established beyond a reasonable doubt by the evidence. He said at para. 17:

> But, Ms. Haney, your testimony was that from the time that the light turned green until you started your turn was approximately four seconds. That means that if the light turns green now, you are turning now. Everybody's testimony shows that there was a lot of traffic that night; it's a Friday night. Is it prudent to attempt to cross two lanes of traffic when there is a lot of traffic, in your view you can see they are lined up, in that short a period of time? I cannot say that is prudent. That is not driving prudently. Left-turn persons must ensure that they can do so without interfering with any of the rest of the traffic. So even the fact that you were doing it cautiously and going slowly means simply that. You were proceeding cautiously and going slowly. But you should not necessarily have been proceeding at all. You should have been waiting. You were not yet certain as to what was happening with the Ellis vehicle, whether it was stalled. If, in fact, it was stalled, the line-up behind could easily have pulled out to go around her. You did not know whether that was happening. Those are some of the things that you have to question as to whether or not, as a prudent driver, you were exercising due diligence and care.

[16] Those findings, although referenced to diligence and care, are part of the basis for the finding of proof of the commission of the prohibited act beyond a reasonable doubt. The Justice of the Peace said at para. 12:

> She chose to start to make her turn. There was an accident. It is very clear that the safety aspect could not be met.

[17] It is not appropriate to take that remark out of the whole of the decision and state that a wrong standard was applied to the determination of the commission of the prohibited act when it is a strict liability offence.

[18] On the whole of the evidence before the Justice of the Peace, and particularly the testimony of the complainant, I do not find any reversible errors on any standards in the judgment of the Justice of the Peace in the issue of proof beyond a reasonable doubt of the commission of the offence.

[19] The evidence of the complainant made it clear that she was going to be on the lookout as she made her turn to see if any dangerous circumstances developed and she was going sufficiently slow to see that happen. This occurred at a time of somewhat heavy traffic when she could observe the traffic signal lights to see that it was letting more traffic through, she could have known that when the lights turn red she would briefly be safe to complete her turn. Her evidence seems to indicate that she was embarking on a test of wills in taking the left hand turn lane.

[20] The Justice of the Peace found the accused guilty. He went on to find that on the evidence, as I see it on a balance of probabilities, that she did not exercise due diligence or reasonable care. It is true that he goes on to apply an inapt analogy, but nonetheless, in my reading of the evidence and his finding he has clearly found that the appellant failed to establish on a balance of probabilities that she did exercise appropriate due care or due diligence.

[21] Many authorities were cited in the argument of this case, but in the result, the simple conclusion I have reached, based solely on the evidence of the appellant, is that she had no idea of the intentions of the driver facing her who had the right of way, that she fixed her attention upon the wheels of the car stopped at the first lane she was crossing and thereby could not be certain of the activity taking place in the outer lane which she knew she must cross. Her evidence seemed as though she was embarking on an investigation as she proceeded to ensure at that time whether it was safe to proceed, going so slowly that if danger arrived, she could stop in short order. This is simply not in compliance with the duty imposed on her by the statute under any reasonable interpretation.

[22] As the Justice of the Peace said, this is not to determine the fault of the accident nor even the proportion of fault. Findings made by the Justice of the Peace, in which I concur, do not prevent an ultimate finding that the Magnuson vehicle and its driver were 75, 80 or 90% of the fault, notwithstanding the fact that the breach of the statutory provision has been found.

[23] I read the authorities provided and I am inclined to agree with the decision with *Silvey v. Kuiper,* [1995] 5 W.W.R 436. At the extreme, the case of *Whitehead v. Plouffe*, [2001] N.S.J. 490, (S.C.) (Q.L.), a judgment of the Nova Scotia Supreme Court decides that a left-turning vehicle should see or place himself/herself in a position to see a speeding driver as he/she is crossing the lane in which such speeding might take place.

[24] In my view the Yukon statute places a left turn driver in the same position and the Justice of the Peace did not err in his findings on the evidence.

[25] The appeal is dismissed.

[26] I must comment on the failure to mark as exhibits in the trial certain documents which were the subject of testimony. It is the responsibility of all officers of the court to ensure that documents testified to are marked as exhibits so that the record is complete. An appeal based on the record might be lost if the record is significantly incomplete.

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Hudson J.

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