PROVINCIAL COURT OF NOVA SCOTIA
Citation *R v Younus*, 2015 NSPC 79

Date: 2015-11-27
Docket: 2631627, 2631628
Registry: Windsor

Between:

Her Majesty the Queen

v.

Mohammad Younus

DECISION

JUDGE: The Honourable Judge Claudine MacDonald, J.P.C.

HEARD: June 22nd, 23rd, 26th, August 21st and September 14th, 2015

DECISION: November 27, 2015

CHARGE: Section 249(4) and 249(3)of the *Criminal Code*

COUNSEL: William Fergusson, Crown Attorney
Chris Manning, Defence

By the Court:

[1] Mr. Younus was driving a tractor trailer westbound on highway 101when he struck the right rear corner of a caravan which had stopped for construction. This caused the Caravan to move forward in a counter clockwise direction and strike the vehicle in front of it, a Saturn being towed by a motorhome, the motorhome also having stopped for construction work. The caravan rotated before tipping and rolling on its left side. After hitting the Caravan, the tractor trailer veered off to the right, along the gravel shoulder of the highway before driving onto a grassy embankment.

[2] In addition to the driver, there were three children who were passengers in the caravan at the time. Tragically, one of these passengers Evan Servaes, a five year old boy, died as a result of his injuries. Another passenger, Katherine Dawson, suffered bodily harm.

[3] As a consequence of these events, Mr. Younus was charged under Section 249 of the *Criminal Code* with dangerous driving causing death and dangerous driving causing bodily harm. Mr. Younus does not have to prove or disprove anything. The burden of proving these charges is on the Crown; the Crown must

prove these charges beyond a reasonable doubt in order for Mr. Younus to be found guilty.

[4] The *actus reus* and *mens rea* of dangerous driving were set out in *R. v. Beatty* [2008] 1 S.C.R. 49, *R. v. Roy* [2012] 2 S.C.R. 60 and considered most recently in *R. v. Hecimovic* 2015 S.C.C. 54 affirming, [2014] B.C.J. No. 3066.

[5] Mr. Beatty was charged with three counts of dangerous operation of a motor vehicle causing death after his truck crossed double solid line of a highway and collided with an oncoming vehicle, instantly killing its three occupants. Mr. Beatty initially said he had lost consciousness and later stated that he must have fallen asleep. His acquittals were restored by the Supreme Court on the basis that his momentary lapse of attention was insufficient to support a finding of marked departure from the standard of care of prudent driver.

[6] The *mens rea* of dangerous driving is a modified objective test. As Charron J. held in *Beatty*:

> The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in

> similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused. (para. 43)

[7] Again, with respect to the *mens rea*, Justice Charron stated:

> … the difficulty of requiring positive proof of a particular subjective state of mind lends further support to the notion that *mens rea* should be assessed by objectively measuring the driver's conduct against the standard of a reasonably prudent driver… Because driving, in large part, is automatic and reflexive, some departures from the standard expected of a reasonably prudent person will inevitably be the product, as Cory J. states, of "little conscious thought". Even the most able and prudent driver will from time to time suffer from momentary lapses of attention. These lapses may well result in conduct that, when viewed objectively, falls below the standard expected of a reasonably prudent driver. Such automatic and reflexive conduct may even pose a danger to other users of the highway. Indeed, the facts in this case provide a graphic example. The fact that the danger may be the product of little conscious thought becomes of concern because, as McLachlin J. (as she then was) aptly put it in R. v. Creighton, [1993] 3 S.C.R. 3 (S.C.C.), at p. 59: "The law does not lightly brand a person as a criminal." In addition to the largely automatic and reflexive nature of driving, we must also consider the fact that driving, although inherently risky, is a legal activity that has social value. 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. (para.34)

> For that reason, the objective test, as modified to suit the criminal setting, requires proof of a *marked departure* from the standard of care that a reasonable person would observe in all the circumstances. As stated earlier, it is only when there is a marked departure from the norm that objectively dangerous conduct demonstrates sufficient blameworthiness to support a finding of penal liability. With the marked departure, the act of dangerous driving is accompanied with the presence of sufficient *mens rea* and the offence is made out. (para.36)

[8] In a later decision, *R. v. Roy* [2012] 2 S.C.R. 60, the Supreme Court of Canada reiterated the principles set out in *Beatty* with respect to both the *actus reus* and *mens rea* in dangerous driving offences.

[9] For context, the facts in *Roy* were as follows: Mr. Roy, driving in poor visibility on a slippery road, stopped at a stop sign and then pulled out into the path of an oncoming vehicle. His passenger was killed and Mr. Roy's injuries left him with no recollection of the accident. The trial judge held that the accused's driving conduct, driving into the path of an oncoming vehicle, was objectively dangerous to the public. The trial judge also found that, absent some explanation from the accused which was not available because of the accused's memory loss, *mens rea* could be inferred given that the accused's driving constituted a marked departure from an objective standard of prudent driving conduct. Our Supreme Court, in acquitting Mr. Roy, rejected this approach, that is of inferring *mens rea* based on the dangerous driving. As set out by Justice Cromwell on behalf of the Court:

> Dangerous driving consists of two components: prohibited conduct — operating a motor vehicle in a dangerous manner resulting in death — and a required degree of fault — a marked departure from the standard of care that a reasonable person would observe in all the circumstances. The fault component is critical, as it ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. While a mere departure from the standard of care justifies imposing civil liability, only a marked departure justifies the fault requirement for this serious criminal offence. (emphasis added) (para.1)

[10] 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*).

[11] In *Roy*, the Supreme Court, in a unanimous decision, suggested that courts ask two questions when determining whether *mens rea* has been proven.

> 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 of 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. (para.36)

THE EVIDENCE

[12] With these principles in mind, I will now focus on whether the Crown has proven the charges. First, I will outline the evidence as it relates to whether the Crown has established the *actus reus* of dangerous driving, that is whether the driving was "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 at that time is or might reasonably be expected to be at that place."

[13] Cst. Sullivan, a collision reconstructionist, gave viva voce evidence and submitted his report which was introduced as an exhibit. He described the highway, including signage, set out his observations of the collision scene, did measurements, and took photographs of the highway, the vehicles, and signage. A plan diagram (Exhibit 2 App. A) drawn by Cst. Sullivan sets out the relative positions of the vehicles as well as measurements. Further, Cst. Sullivan provided his analysis/opinion with respect to the movement of the vehicles upon impact. Having considered all of the evidence heard during this trial I accept Cst. Sullivan's evidence with respect to this.

[14] This collision occurred on July 9th, 2013 at approximately 11:05 a.m. on highway 101, Falmouth, Nova Scotia. The weather was clear, the roadway dry. A 90 km/h. sign was posted approximately 1.5 kilometers prior to the collison scene. The highway prior to where the collision occurred consists of a straight section of highway, followed by a slight clockwise curve, another straight section with an on/off ramp at exit 7 with an overpass.

[15] The collision took place along a straight section of the highway just west of this overpass. Cst. Sullivan, using the police vehicle odometer, estimated that the Kenworth tractor trailer driver would have had 400 metres of "clear straight line visibility" to the first area of impact with the Caravan.

[16] In addition to the maximum 90 km/h sign, a sign informed drivers that 'Speed Fines Double in Work Areas'. Other posted signs were as follows: Construction 1.5 km, followed by Construction 1 km, and finally Construction. These three signs had black lettering on an orange background, each sign having an arrow pointing in the direction of the construction.

[17] The approximate distances between the 'speed fines double" sign and each of the three construction signs as measured by Cst. Sullivan using the odometer of a police vehicle were as follows: from "speed fines double in work areas" to "Construction 1.5km" the distance was 600 meters; from 'speed fines double…' to "Construction 1 km" was a distance of 1200 meters; from 'speed fines double…' to "Construction" was 1400 meters. The start of skid marks left by the Kenworth vehicle was 1700 meters from the "speed fines double" sign which would be approximately 300 meters beyond the final construction sign which Mr. Younus would have passed prior to the collision.

[18] The first police officer to arrive on the scene was Cst. Tara Davis who arrived there at 11:10 a.m. She testified that she saw a vehicle which was being towed by a motor home, the vehicle having significant damage to the rear end. She also saw the undercarriage of a van that was flipped over on its side. After a few minutes she saw the truck that was in the ditch and later spoke to Mr. Younus. Later that day Cst. Davis took a cautioned statement from Mr. Younus, a summary of which was introduced into evidence with agreement of counsel.

[19] During this interview, Mr. Younus asked Cst. Davis about the people who were hurt and inquired as to how they were doing. After speaking to a lawyer, Mr. Younus stated the following:

- The vehicle in front of him slammed on the brakes
- He slammed on the brakes and knew he was going to be unable to stop
- He struck the first vehicle and then veered to the right
- He put his truck in the hole (ditch) because if he had gone straight many people would have died

Cst. Davis asked Mr. Younus about his trip:

- Mr. Younus left Montreal the day before
- Stopped at exit 222 (Meductuc) in New Brunswick

- Had eight hours sleep
- Got up at 0430 hours and did a vehicle inspection

Cst. Davis asked what a vehicle inspection was:

- He checked the brakes, tires, lights and trailer and found that everything was good
- Drove for a couple of hours and stopped for an hour
- Had something to eat and rested. He did not leave the truck
- Does not know where he stopped
- Turned off the 102 highway onto the 101 highway
- Traffic was really slow for forty or fifty kilometers
- Traffic picked up speed close to Windsor
- Speed unknown but was keeping up with traffic
- Saw the construction signs
- Vehicle in front of him slammed on the brakes
- Mr. Younus slammed on his brakes but hit the vehicle
- Mr. Younus did not know what type of vehicle
- Mr. Younus advised that trucks take longer to stop than cars
- Mr. Younus veered to the right and went into the ditch so more people didn't get hurt
- Mr. Younus was prepared to die by putting his vehicle in the ditch to save hundreds.

- He stated that he was stressed and that was why he looked tired. Mr. Younus advised he got enough rest.

Cst. Davis stated that she believed that Mr. Younus was traveling too fast.

- Mr. Younus denied and stated that the vehicle in front slammed on the brakes and he had no time

[20] With respect to the 101 highway, Cst. Davis testified that the 101 changes from a divided highway to a two way highway at exit 5; further she agreed with defence counsel that there have been collisions, including very serious collisions, between exits 5 and 7.

[21] Ms. Renee Dawson, the Caravan driver, testified that she was travelling west on highway 101 and that there was 'barely any traffic.' She had noticed construction signs on the highway and became aware that traffic was stopped before the Falmouth overpass. Having made the decision not to get off the highway, she slowed down, coming to a complete stop at the end of a long line of traffic. Although the traffic was stopped, she could see up ahead that the traffic was starting to move. She remembered looking in the rear view mirror to check on the children in the back seat when she saw the grill of the truck filling the mirror before the truck drove into the back of her vehicle.

[22] Donald Wyer, the driver of the travel trailer which was towing the Saturn, described traffic from Halifax to Windsor as having been 'busy, fairly heavy'. He was sitting in his stopped vehicle, the car ahead of him getting ready to move. Mr. Wyer saw a van come up beside him, the van on its side. The tractor trailer went by him on the right. I note as well that Mr. Wyer was examined with respect to his experience as a truck driver, having driven one for 12 or 13 years. Specifically, he was asked if he had ever driven an 18 wheeler with the front axle brakes disconnected. I will deal with this issue of a possible brake defect later in the decision.

[23] Roger Marshall testified that he was driving to Kentville that morning and had been travelling behind the tractor trailer for approximately 15 to 20 kilometers - including on divided highway and later, when it became a two way highway. Because of signage, Mr. Marshall was aware that construction taking place. Mr. Marshall observed nothing unusual about the manner in which the tractor trailer was being driven prior to the accident. Mr. Marshall testified that he saw traffic stopped under the underpass and estimated that he observed the construction site/ traffic queue when he was about 200 yards away from it. Seeing this, he took his foot off the gas in order to slow down. Mr. Marshall agreed with the Crown, that just before he eased off on the gas and slowed down that he and the tractor trailer

had been maintaining approximately the same speed, Mr. Marshall estimating his speed as being 90 km/h. Whereas Mr. Marshall slowed down, the 18 wheeler "was still gaining distance away from me and did not appear to be slowing down". A few seconds later, Mr. Marshall saw 'smoke' coming from the back of the tractor trailer which had 'bounced' or 'shook', and he saw the van in front of the 18 wheeler on its side. Mr. Marshall testified that the truck jolted again and drove down into the ditch between the highway and the on ramp.

[24] The evidence, in its totality, establishes that a motor home towing a Saturn vehicle had stopped for construction in a westbound lane. The Caravan had stopped behind the Saturn when the Kenworth tractor trailer struck the right rear corner of the Caravan. This caused the Caravan to move forward and strike the Saturn on the centre rear area. The Caravan then started to rotate as a result of this second impact. The Caravan rolled on to its left side, the front of the vehicle now facing the motor home. After hitting the Caravan, the tractor trailer veered off to the right, along the gravel shoulder of the highway, then proceeded to the right, driving onto a grassy embankment.

[25] The tractor trailer was inspected and was found to have 'no activation of front brakes at the time of inspect' and 'no evidence of air to the front brakes from the treadle valve'. Mr. MacDonald and Mr. Dillman testified at some length with

respect to these mechanical issues, but based on all of the evidence, it is not necessary that this evidence be repeated in detail. To put it succinctly, I am satisfied that at the time of inspection, the two front steer brakes were not working properly on the tractor, that eight out of 10 brakes were working. That being said, the evidence also shows that the driver could be unaware of this defect while driving; further, the malfunction could have been caused by the driver's braking reaction if involved in an emergency stop. To be clear, the evidence does not show that Mr. Younus' vehicle had defective brakes at the time of the collision. However, if the brakes were not in proper working order at the time of driving, the tractor trailer's stopping distance would be affected.

[26] Mr. Bortolin, a senior engineer with HRYCAY Consulting Engineers Inc, was qualified to give opinion evidence in the area of investigation and analysis specializing in the investigation of accidents involving large commercial vehicles as well as involving passenger vehicles.

[27] Mr. Bortolin, performed an in vehicle imaging of the Kenworth's electronic control module – ECM which contains data related to a heavy breaking event. Using this in conjunction with Cst. Sullivan's report, including the plan diagram prepared by the officer, Mr. Bortolin was able to calculate the accelerations and distances travelled every one half second by the vehicle. I am satisfied that the

report completed by Cst. Sullivan and relied upon by Mr. Bortolin was an accurate depiction of the collision scene. To be clear, I am satisfied with respect to the foundation upon which Mr. Bortolin's opinion is based.

[28] Using the information from the ECM and that provided by Cst. Sullivan, Mr. Bortolin created Exhibit 8, a chart setting out the vehicle speed at one half second intervals, the distance travelled both incrementally and cumulatively, the accelerator pedal position and the brake pedal position. This chart covers a time period of just over 20 seconds before the Kenworth drove into the rear of the Caravan, and also provides data for several seconds post-collision. The ECM in the Kenworth was configured so as to be able to record sudden stop events. Although this ECM, like other Caterpillar ECMs, had documented anomalies with respect to the date as well as time intervals (.5 second, not 1 second), these anomalies were accounted for during the analysis of the ECM data.

[29] I accept the evidence of Mr. Bortolin including his evidence that that the Kenworth had a governor which limited its top speed at 65 mph/104.7 km/h. The vehicle's stopping distance from a speed of 105 k.p.h. could be expected to be approximately 79 meters, approximately 88 meters if front brakes were not working properly.

[30] Further I am satisfied that from the time the Kenworth speed began to decrease and reached the point of impact, the vehicle travelled 48.6 meters. The data also shows, as testified to by Mr. Bortolin, that the brake pedal was applied approximately two seconds before impact. I note as well that in cross-examination, Mr. Bortolin testified that had the brakes been applied 3.5 seconds earlier, the collision could have been avoided.

[31] With respect to the *actus reus*, the evidence establishes the following:

1. The speed limit on this section of highway 101 was 90 km/h
2. The signage clearly indicated that construction was taking place
3. Driving conditions were good
4. The collision took place on a straight section of the highway
5. The tractor trailer drove into the back of a stopped van which was the last vehicle in a line of traffic stopped on the highway because of construction
6. Shortly before braking, the tractor trailer was travelling at a speed of 104.7 km/h
7. The tractor trailer brakes were not applied until approximately two seconds before the collision occurred.

[32] Having considered all of the evidence, I am satisfied beyond a reasonable doubt that Mr. Younus' driving conduct was objectively dangerous to the public.

[33] With respect to the *mens rea*, the Court must consider whether a reasonable person would have foreseen the risk and taken steps to avoid it if possible. Having considered the evidence in its totality, I am satisfied that a reasonable person, would be aware that he/she was driving in a 90 km/h maximum speed zone. Further, upon noticing the signs indicating 'Construction 1 km' and 'Construction ahead', a reasonable person would maintain a lookout for the construction. He/she would be preparing in the event that they might have to stop in order to follow directions from a flag person and/or drive at a reduced speed in a line of traffic or come to a stop behind traffic. A reasonable person would have driven at a speed enabling him/her to stop safely. A reasonable person would have foreseen that failure to pay attention to their speed and/or a failure to maintain a proper lookout for the construction ahead would pose a risk to the public.

[34] Was Mr. Younus' failure to foresee the risk and take steps to avoid it, if possible, a *marked departure* from the standard of care expected of a reasonable person in his circumstances? Mr. Younus, driving a tractor trailer, was aware that his stopping distance would be longer. Although he saw the construction signs he did not decelerate as he approached the traffic queue. Indeed the evidence establishes that for approximately 8 seconds before the collision, Mr. Younus' speed increased from 101.4 km/h to 103 km/h and 104.7 km/h during the final

seconds before he drove into the back of the Dawson vehicle. He was driving faster rather than decelerating as he neared the queue. Despite having an unobstructed line of vision for approximately 400 metres before the scene of the collision, Mr. Younus drove into the back of the Caravan, the last vehicle in a queue of traffic. Mr. Younus told Cst. Davis that the driver of the vehicle in front of him slammed on the brakes, causing him to have to do likewise. He is mistaken on this. This simply does not make sense when one considers all the evidence which includes the fact that the Caravan was the last vehicle in a traffic queue. I am satisfied that Ms. Dawson had come to a stop behind the motorhome towing the Saturn.

[35] I accept the evidence of Mr. Marshall that for the 15 to 20 kilometres during which he was behind the Younus vehicle there was nothing unusual about the manner in which the tractor trailer was being operated until shortly before the collision. As made clear by the *Roy* and *Beatty* decisions, momentary inattention or a momentary lapse of attention is insufficient to make a finding of criminal culpability.

[36] Having considered the evidence, I am satisfied that Mr. Younus' driving was more than a momentary lapse of attention. I cannot and am not expected to quantify it in terms of a specific number of minutes, seconds or meters except I

will make it clear Mr. Younus' dangerous driving, although more than momentary, consisted of several seconds of inattention over a distance of several hundred meters.

[37] There was some evidence, that of Cst. Johnson and Cst. Davis, which suggested that Mr. Younus appeared sleepy. Based on the evidence I am unable to make any such finding. Indeed Mr. Younus himself told Cst. Davis that he had gotten enough rest. In conclusion, I am satisfied beyond a reasonable doubt that Mr. Younus' failure to foresee the risk and take steps to avoid it was a marked departure from the standard of care expected of a reasonable person in Mr. Younus' circumstances.

[38] I find Mr. Younus guilty of both counts of dangerous driving.

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Claudine MacDonald, JPC