Date: 1999 04 06
Docket: CR 03664

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ARNOLD LARRY HOPE, of the Village of Fort Simpson
in the Northwest Territories

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Summary conviction appeal from conviction on a charge of careless driving.

Heard at Fort Resolution: February 1, 1999

Reasons Filed: April 6, 1999

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Appellant: Arthur von Kursell

Counsel for the Respondent: Mark Scrivens

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REASONS FOR JUDGMENT

[1] This is a summary conviction appeal from a conviction after trial before a Justice of the Peace on a charge of driving without due care and attention, contrary to section 154(2) of the *Motor Vehicles Act*, R.S.N.W.T. 1988, c. M-16.

Late filing of the Notice of Appeal

[2] The Appellant was convicted and sentenced on April 29, 1998. His Notice of Appeal was not filed in this Court until September 21, 1998, substantially beyond the time prescribed for filing by Rule 110(1)(a) of the Criminal Rules of the Supreme Court of the Northwest Territories, which is 30 days from the date sentence was passed.

[3] Rule 110(2) provides as follows:

> 110(2) The appeal court or a judge of the appeal court may extend the time within which notice of appeal may be given.
>
> (3) An application to extend time shall be made on notice to the respondent.

[4] In his Notice of Appeal, the Appellant asks for an order granting leave to file the Notice of Appeal outside the 30 day time limit. The grounds stated for that request are as follows:

> (a) On May 28, 1998, the Appellant filed a Notice of Appeal identical to this Notice of Appeal but for the additional relief craved with respect to extending the time period and staying the fine;
>
> (b) The original Notice of Appeal was filed by a fax but the original Notice of Appeal did not follow by surface mail;
>
> (c) As a result of the originals not being forwarded to the Court's Clerk within the prescribed time, the Appellant was deemed not to have filed his Notice within the prescribed time;
>
> (d) The Appellant indicated at Trial and on the record that it was his intention to appeal the decision. The Appellant registered this intention at the conclusion of his trial.
>
> (e) Since the conviction was entered, the Appellant and his solicitor have been in contact with the Fort Simpson detachment of the RCMP regarding this Appeal. The basis of the interactions with the RCMP were based on the assumption that a date would be soon set for this Appeal.
>
> (f) The Appellant did not learn about the difficulties with respect to filing until three months after having filed his documents.
>
> (g) There is available a Trial transcript, photographic exhibits and witnesses for the purposes of hearing an appeal should any of such be required by the Appeal Court.

[5] I find ground (f) puzzling. I assume that it means that the Appellant did not learn until three months after May 28, 1998 that the original Notice of Appeal had not been filed. If that is the case, then it fails to explain why, having learned of this problem on or about August 28, 1998, the Appellant did not file the original Notice of Appeal until some three weeks after that, on September 21.

[6] Although I have just referred to the "original" Notice of Appeal not having been filed, it is clear from what is set out in ground (a) above that additional relief was claimed in the document filed in September so that was not, in fact, the original of what is said to have been sent by fax.

[7] The Notice of Appeal filed in September is the only document before me which refers to a request for an extension of time for filing. When this matter came on before me on February 1, 1999, there was no notice of motion requesting an extension and no affidavit as required in Part 3 of the Criminal Rules, pertaining to applications generally.

[8] It was argued on behalf of the Appellant that the Clerk of the Court had extended the time for filing the Notice of Appeal. With respect, this argument is based on a misapprehension of the power to extend and the requirements with respect to filing documents by telecopier or fax.

[9] I will deal first with filing by telecopier. Rule 5 of the Criminal Rules states that where a matter is not provided for in the *Criminal Code* or the Rules, the procedure shall be as specified by the Court or determined by analogy to the rules of the Court relating to civil actions.

[10] Rule 720(4) of the rules of this Court relating to civil actions provides as follows:

> 720(4) Subject to rule 379, a document, other than an originating document or a document that is to be issued by the Clerk, may be filed with the Clerk by
>
> (a) sending it to the Clerk by means of a telecopier; and
>
> (b) delivering or mailing to the Clerk the original document with any fees payable and, if the document is to be returned by mail, a prepaid self-addressed envelope.

[11] In my view, Rule 720(4) contemplates contemporaneous transactions. The document to be filed is telecopied to the Clerk of the Court and the original document is, promptly thereafter, delivered or mailed to the Clerk with the other items referred to in 720(4)(b). There is no need for any delay because the same document that has been telecopied is the one that is mailed or delivered. That is what is meant by the reference to "original" document in 720(4)(b). A document which is telecopied but then changed before mailing so that further relief is added, as apparently happened in this case, is not contemplated by this Rule.

[12] When the procedure in Rule 720(4)(b) is properly followed, it does not amount to an extension of the time for filing the document in question. When both subsections (a) and (b) of Rule 720(4) are complied with, the result is that, by operation of the Rule, the document is filed as at the date the telecopy was received by the Clerk. I acknowledge

that the Rule does not specifically say this, but it is the logical consequence of the Rule. I reiterate that it does not involve an extension of time for filing.

[13] More importantly, however, the Clerk has no power to extend the time for filing a Notice of Appeal. That power is found in s. 815 of the *Criminal Code*, pertaining to summary conviction appeals:

> 815(1) An appellant who proposes to appeal to the appeal court shall give notice of appeal in such manner and within such period as may be directed by rules of court.
>
> (2) The appeal court or a judge thereof may extend the time within which notice of appeal may be given.

[14] It is therefore clear, from both s. 815 and Rule 110 referred to earlier, that only the Supreme Court of the Northwest Territories or a judge thereof has the power to extend the time within which notice of appeal may be given, the Supreme Court of the Northwest Territories being the appeal court as defined in s. 812 of the *Criminal Code* for purposes of certain provisions of the *Code*, including s. 815.

[15] In this case, I find that any filing of the Notice of Appeal by telecopier was not effective because it was not made in compliance with Rule 720(4), the telecopied Notice of Appeal having apparently been changed prior to the "original" being filed. Accordingly, the only filing that took place was on September 21, 1998, well out of time.

[16] The power to extend the time for filing may be exercised when an application for that relief is made to the Court. As I have indicated earlier in these Reasons for Judgment, there was no application in the required form and no affidavit evidence placed before me. What is contained in the Notice of Appeal is not evidence, nor are submissions by counsel. Quite apart from the problem referred to above with respect to the telecopied and mailed versions of the Notice of Appeal being different, there was no evidence presented that the telecopied version was received by the Clerk. The court file was not opened until September 21, 1998. The file contains a letter dated September 16, 1998, from counsel for the Appellant, date-stamped received by the Clerk on September 17, 1998, which refers to the Notice of Appeal being enclosed and requests that the Clerk file same. There is no reference in that letter to any earlier filing by telecopier, nor is there any reference to the fact that the time for appeal has expired.

[17] I would have expected in this case that there would be affidavit evidence from the person who telecopied the Notice of Appeal to the Clerk with details of that transaction

and an explanation why the original document was not forwarded promptly and why the one that was forwarded in September was not the same as the one telecopied. There should also be evidence addressing the factors usually considered on an application to extend the time for filing an appeal. Those factors were clearly set out by Vertes J. in *R. v. Antoine*, [1997] N.W.T.R. 282 (S.C.) as follows:

> The decision to extend time to appeal is a discretionary one: see s. 815(2) of the Code. The factors to take into consideration are (a) whether the applicant had shown, within the appeal period, a bona fide intention to appeal; (b) whether the applicant had accounted for the delay; and (c) whether the appeal has a reasonable chance of success; see, for example, *R. v. Mohammed* (1989), 52 C.C.C. (3d) 470 (Man. C.A.), and *R. v. Beaverho* (October 30, 1995), Doc. Yellowknife CR 03009 (N.W.T.S.C.).

[18] The filing of a notice of appeal within the prescribed time is a condition precedent to the court's jurisdiction to entertain the appeal: *R. v. Holmes* (1982), 2 C.C.C. (3d) 471 (Ont. C.A.). The question of extension of the time is not to be treated lightly; nor should it be assumed that a court will as a matter of course grant an extension.

[19] Having referred thus far to what is not before me by way of an application to extend the time for filing the Notice of Appeal, I now turn to what is before me. There is evidence that the Appellant has shown, within the appeal period, a bona fide intention to appeal. The transcript of the trial indicates that after he was convicted, the Appellant stated twice to the Justice of the Peace that he would appeal the decision and asked the Justice of the Peace how to go about doing that.

[20] I am, accordingly, satisfied as to the first requirement of the test referred to in *R. v. Antoine*.

[21] There is no evidence accounting for the delay in filing the Notice of Appeal, but I infer that it was not due to any delay or change of mind on the part of the Appellant himself but arose rather because of inadvertence or misunderstanding on the part of someone in the office of his solicitors.

[22] I take into account that the Respondent Crown did not allege any prejudice to its case as a result of the failure to file the Notice of Appeal in time. Crown counsel did not raise the late filing and was prepared to proceed with the appeal itself.

[23] I allowed counsel to go ahead and argue the merits of the appeal when this matter came before me. In retrospect, it could not be said that the appeal had no merit.

[24] Having considered all of the above, and in the very specific circumstances of this case, I have decided to allow the extension of time to file the Notice of Appeal to September 21, 1998, the date it was actually filed.

The appeal

[25] The charge upon which the Appellant was convicted was that he did, on or about the 3rd day of February, 1998, at or near the Village of Fort Simpson in the Northwest Territories, commit the offence of driving without due care and attention, contrary to s. 154(2) of the *Motor Vehicles Act*.

[26] It should be noted that s. 154(2) is actually the offence of operating a vehicle without reasonable consideration for others using the highway. The section which makes it an offence to operate a vehicle on a highway without due care and attention is 154(1). I will deal with this discrepancy further on. It is clear, however, that at trial and on the appeal, all involved dealt with the matter as though it was a charge under s. 154(1).

[27] The Appellant represented himself at trial. The Crown was represented by a police officer.

[28] The evidence before the Justice of the Peace can be summarized as follows. The Appellant's truck and Ms. Erasmus' van were involved in a collision at the intersection of 99A Avenue and 102nd Street in Fort Simpson. Ms. Erasmus testified that she was driving slowly eastbound along 99A Avenue, approaching the corner to turn right onto 102nd Street southbound, when she was struck by the Appellant's truck, which was in her lane. She said that she had not seen his truck because her view was obstructed by a fence located to the right.

[29] Ms. Erasmus testified that the truck struck her on the passenger side of her van, although the photographs indicate that the damage was on the driver's side of the van. That discrepancy does not appear to have been noted or raised at the trial. It may be that Ms. Erasmus simply misspoke and meant to refer to the driver's side. In any event, the location of the damage is not, in my view, determinative of the issues in the case.

[30] When the collision occurred, the Appellant was proceeding northbound along 102nd Street. He testified that he was proceeding very slowly. He admitted that he was driving in the middle of 102nd Street. There is no centre line marked on that street. He said that Ms. Erasmus came around the corner very fast and hit him.

[31] Various photographs were taken by the police after the accident, the impact of which had moved the vehicles from the point of collision. A lot map and a drawing of the intersection were also used at trial. Although they were not marked as exhibits at trial, counsel agreed that they should be before me on this appeal.

[32] The drawing and map were not marked by the witnesses during their testimony and it is very difficult to determine from the transcript exactly where on those documents they were referring to when they talked about where the collision happened. From the drawing, it appears that there are actually two corners (or perhaps two angles to the corner) that one has to turn around to get from 99A Avenue onto 102nd Street southbound. The drawing shows a fence and snowdrift at one or both of those corners. There were no stop signs, lights or other markers at the intersection.

[33] Two police officers testified that the tracks in the snow showed that the Appellant's truck was left of centre on 102nd Street on its way through the intersection. Both officers testified that in their experience there was room enough on that road for two vehicles to pass if driven carefully. The Appellant admitted this as well.

[34] In his reasons for convicting the Appellant, the Justice of the Peace specified certain parts of the evidence that he was not taking into account, such as behaviour by the Appellant after the collision. No complaint was made on appeal about what he did not take into account.

[35] The Justice of the Peace went on to say the following:

> Facts:
>
> 1. Everybody agreed about the road conditions. Well, I shouldn't say agreed about the road conditions, they said, everybody agreed that there was snow on the road. Okay, which means everybody has to be extra careful when they're driving. The shape of the road varies from hard packed snow, snow on top, snow covered but good, snow covered but bits of grade and, even though you didn't say it in your summation or testimony, you stated during cross-examination it was very slippery in your books.
>
> 2. In fact, you did say you were driving down the middle of the street, which is 102, because it was narrow. You said that, you stated that for the record. In the cross-examination and in your statement.

3. The Crown witnesses, Constable Quevillon, Constable Lang, Ms. Erasmus and yourself said that there was enough room to pass if you drove carefully. If you went through there, one person could go one way and another person could go the other way. You all agreed to that. That was according to my notes and my recollection of everything that was said. If you want slow enough, people could pass safely. It would be a tight squeeze, but it would be a safe trip going through.

4. The Crown's witnesses Constable Quevillon and Lang and evidence shows that the accident occurred a little bit on the left side of the road going towards the hospital. Okay. I don't know if that's north, east, west or south. All I know is the direction is going to the hospital. It was on, if you go there it's on the left hand side of the road. And that is if you're going that way, you're on the other traffic coming this way.

   Ah. Okay. As for the impact, again, like I've said, I'm not an expert in it. I don't know what happens when a vehicle gets hit, where it goes or what happens. As for the speed, I cannot say who was going to (*sic*) fast. In your opinion, she was going too fast. In her opinion, you were going a little fast. I do not know. There was no skid marks from my understanding, so to me, realistically maybe you guys were going the speed you've said, 25-30. But 25-30 going one way and 25-30 going another way, that's a lot of speed when it hits together. That, I know. However, I've been saying all this, an accident occurred and from the evidence presented to me and all the testimony, pictures, you're (*sic*) cross-examination, the Crown's cross-examination, with the evidence presented to me I have to find you guilty as charged. As for the fine.

[36] In my view, it is clear from the reasons he gave that the Justice of the Peace found that the Appellant, in driving in the middle of the road while approaching, and while in, the intersection, drove without due care and attention. The accident is simply one of the facts referred to by the Justice of the Peace. There is no indication that he found the Appellant guilty simply because there was an accident. It is clear from his careful review of the facts that the Justice of the Peace had regard to the Appellant's manner of driving.

[37] The Appellant argued that the Justice of the Peace failed to consider that the Appellant had the right of way. Although that argument was not made by the Appellant in his submissions to the Justice of the Peace, the Appellant had questioned one of the police witnesses about the right of way and it was touched on by the prosecutor in his submissions. In addition, the Appellant testified in his evidence in chief that he felt that Ms. Erasmus was going at an excessive speed and that she failed to yield.

[38] I turn first to s. 204 of the *Motor Vehicles Act*, which provides as follows:

> 204.(1) In this section, "intersection" means an intersection that
>
> (a) is not controlled by a traffic control device;
> (b) is controlled by a traffic control device, but the device is not in operation; or
> (c) is controlled at every corner by a stop sign or red flashing light.
>
> (2) A driver approaching an intersection shall yield the right of way to traffic within the intersection.
>
> (3) A driver reaching an intersection before another driver has the right of way over the other driver.
>
> (4) Where two drivers arrive at an intersection on different roadways at the same time, the driver on the left shall yield the right of way to the driver on the right.

[39] Counsel for the Appellant relied on subsections (3) and (4) of s. 204, arguing that either the Appellant reached the intersection before Ms. Erasmus did or they reached it at the same time, and in either case the Appellant would have had the right of way. He pointed out that although Constable Lang, who was not present until after the collision had occurred, testified the right of way was not applicable, he did so on the basis that Ms. Erasmus was already into the intersection, which does not appear to be what Ms. Erasmus said in her evidence. It is, however, difficult for me sitting on appeal and on this record to know exactly where Ms. Erasmus was when the collision occurred. She testified at different times that she was "approaching the corner, about to turn", that she "started up again and was approaching the corner", that she was "slowing down to turn the corner, but just before [she] got onto the road that turns", that she was "coming to turn the corner to get onto the straight road, just as [she] was turning" when the collision happened. From her evidence, I conclude that she was not yet in the intersection.

[40] All the evidence was that the Appellant was driving straight through on 102nd Street. I cannot determine exactly where he was when the collision occurred but his location would have been clear to the Justice of the Peace as it appears from the record that the Appellant was referring to either the map or the drawing when he testified. The Appellant testified that he saw Ms. Erasmus' van come "barrelling around the corner" and the collision occurred shortly thereafter. The most likely scenario is that the vehicles

were approaching the intersection at the same time and therefore s. 204(4) would give the Appellant the right of way.

[41] However, even if the Appellant had the right of way, that is not determinative of the issue. The question to be determined was not who caused the accident or whether Ms. Erasmus was at fault to any extent. It was whether the Appellant was driving without due care and attention. The right of way was one factor. The fact that the Justice of the Peace did not specifically refer to it does not mean that he failed to appreciate that issue or that he erred in convicting the Appellant. A trial judge is not required to give reasons for his judgment since there is a presumption, in the absence of a clear error of fact or law on the record, that he applied the proper and relevant principles: *R. v. Burns*, [1994] 1 S.C.R. 656. In this case, it is clear from the reasons given that the Justice of the Peace focussed on the manner in which the Appellant was driving, that he was in the middle of the road, not keeping to his side while approaching an intersecting road from which traffic could turn only right, that is, toward the Appellant, or left.

[42] The Appellant also argued that the Justice of the Peace failed to consider that there was no evidence of *mens rea*.

[43] Section 154 (1) of the *Motor Vehicles Act* does not specify the *mens rea* required for a conviction under that section. It makes it an offence for a driver to operate a motor vehicle without due care and attention. It deals with inadvertent negligence, with the absence of care and attention, something that falls short of driving that is dangerous: *O'Grady v. Sparling*, [1960] S.C.R. 804; *Mann v. R.*, [1966] S.C.R. 238. It must also, however, be conduct which can be considered a breach of duty to the public and deserving of punishment: *R. v. Divizio* (1986), 32 C.C.C.(3d 239 (Ont.Div.Ct.).

[44] Veit J. reviewed the *mens rea* requirement for careless driving in *R. v. Grosvenor*, [1993] A.J. No. 744 (Q.B.), relying on *R. v. Creighton* (1993), 83 C.C.C. (3d) 346 (S.C.C.). As Veit J. stated, a court may make a prima facie finding of *mens rea* by inference from the facts.

[45] Here, the facts as found by the Justice of the Peace were that the Appellant was driving in the centre of the road in the path of traffic travelling towards him. There was evidence that it was possible for two drivers to pass each other on that road if they drove carefully. Had the Appellant kept to the right side of the road, another vehicle could have passed by him. The Appellant acknowledged this in his evidence.

[46] Although not referred to by the Justice of the Peace, there was also uncontradicted evidence from Ms. Erasmus that there was a fence obstructing the view at the corner from both 99A Avenue and 102nd Street.

[47] It is implicit from the judgment of the Justice of the Peace that he was satisfied that the Appellant had failed to direct his mind to the risk of driving in the middle of the road and therefore at least partially in the oncoming lane at that intersection where there was not a clear view of approaching traffic. That inference is one that he was entitled to draw from the facts.

[48] I would distinguish *R. v. Divizio* on its facts. In that case, there was no evidence of any wrongful action by the accused prior to the accident and the trial judge simply presumed that the accused was not paying attention.

[49] In *R. v. Creighton*, McLachlin J. held that the normal inference that the driver who commits a dangerous act failed to direct his mind to the risk and the need to take care may be negated by evidence raising a reasonable doubt as to the lack of capacity to appreciate the risk.

[50] Both *R. v. Creighton* and *R. v. Grosvenor* indicate that the capacity of an accused to appreciate the risk may be inferred. It is only where there is evidence that may raise a reasonable doubt about capacity that the court need go on to consider that issue further. In *R. v. Grosvenor*, Veit J., sitting on appeal, held that there was evidence before the trial judge bearing on the capacity of the appellant but that the trial judge failed to consider whether that evidence raised a reasonable doubt as to his capacity to appreciate the risk.

[51] In this case, there was no evidence which might raise a doubt with respect to the Appellant's capacity. The Appellant's own evidence was to the contrary. When asked on cross-examination whether he had been stressed out or worried, he replied that he was in a fair state of mind and that, "My physical ability, my mental ability had no impairment in regards to this accident".

[52] On the evidence in this case, there was no need for the Justice of the Peace to consider the capacity of the Appellant to appreciate the risk of his actions.

[53] Finally, the Appellant submits that the Justice of the Peace made no findings of credibility. However, the evidence for the most part was consistent as between the Appellant and Ms. Erasmus. The only real point of difference had to do with speed and

the Justice of the Peace said that he could not determine whether either party was going too fast. He was entitled to come to that conclusion.

[54] My task on this appeal is not to decide whether I would have come to the same conclusion as the Justice of the Peace. This is not a re-trial of the case. I have to determine whether the Justice of the Peace made an error in law or reached a verdict that is unreasonable or unsupported by the evidence.

[55] For the reasons given, I am not satisfied that there was an error of law or that the verdict was unreasonable or unsupported by the evidence. The appeal is therefore dismissed.

[56] One matter remains and that is the error in the charge. On the basis of the reasoning set out in *Groenewegen v. The Queen* (February 10, 1998), Yellowknife, CR03530 (Northwest Territories Supreme Court) I hereby amend the ticket Information to specify s. 154(1) of the *Motor Vehicles Act* as the offence. That will be the offence for which the Appellant is convicted, rather than s. 154(2). As all concerned have proceeded on the basis that driving without due care and attention was the charge, and as the penalties are the same under both subsections of s. 154, there is no prejudice to the Appellant from this amendment.

[57] To summarize, the ticket information is amended to charge the offence under s. 154(1) of the *Motor Vehicles Act*, driving without due care and attention. The Appellant stands convicted of that offence. The appeal is dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
6th day of April 1999

Counsel for the Appellant: Arthur von Kursell
Counsel for the Respondent: Mark Scrivens

CR 03664

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