Plante v. *HMTQ*, 2010 NWT SC 48.cor1

Date: 2010 06 04
Docket: S-1-CR 2009 000 131

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ALLEN ARCHIE PLANTE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Corrected judgment: A corrigendum was issued on August 17, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

Summary Conviction Appeal

Heard at Yellowknife, April 29, 2010

Reasons filed: June 04, 2010

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

Counsel for the Appellant: Hugh Latimer
Counsel for the Respondent: Andreane Cote

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REASONS FOR JUDGMENT

[1] The Appellant was convicted by a Justice of the Peace of an offence under s. 154(2) of the *Motor Vehicles Act*, R.S.N.W.T. 1988, c. M-16, which provides that "No driver shall operate a vehicle without reasonable consideration for others using the highway". He now appeals that conviction, arguing three grounds: (I) that the conviction was for an offence other than what the Appellant was charged with, (ii) that the Justice of the Peace put the onus on the Appellant to disprove guilt, and (iii) that the Justice of the Peace failed to give reasons why he disbelieved the Appellant and believed the Crown witness.

[2] I will deal with the second ground first. In order to place it in context, some background is necessary. The information on which the Appellant was charged alleged an offence under s. 154(2) of the *Motor Vehicles Act* and incorrectly described that offence as "driving without due care and attention". The Crown called a civilian witness, who testified that he first heard a vehicle outside his home and then observed the Appellant driving by at about 80 kilometres an hour, far in excess of the posted speed limit of 40 kilometres. It was a summer evening and the witness observed people out for walks and children playing on the road. He heard the spray of gravel as the Appellant accelerated to take a turn in the road.

[3] The Appellant testified that there was no traffic on the road when he was driving and that he saw no one. There were two or three children in the area, but they were playing in a park on the side of the road, not on the road. He was driving about 40 kilometres an hour and slowed down to take the turn in the road.

[4] The Justice of the Peace gave the following reasons for convicting the Appellant:

> The basic elements - the place, date, time, identification of the vehicle, identification of the Accused - there's no question. The only question that remains is whether or not the Crown and/or Defence - the Crown prove and/or the Defence disprove - the charge as stated. Subsection two, "No driver shall operate a vehicle without reasonable consideration for others using the highway". This case, what it comes down to is believability. Just quite that simple. The Crown witness unequivocally stated and heard excessive speed or noise that would indicate driving that was not what it should be. The Crown witness also indicated that there were people in that area - pedestrians. The Defence statement said, he was driving the speed limit and that there were no pedestrians along the road. Now, whose testimony do I accept? In this case, I unequivocally accept the Crown's defence - Crown's testimony and I find you guilty as charged. ...

[5] The Appellant submits that in framing the question as whether the Crown has proved or the defence has disproved the charge, the Justice of the Peace failed to recognize that the burden of proof is on the Crown and instead put an onus on the Appellant to disprove the charge.

[6] The law is clear that even where, as here, credibility is the only issue, there is no burden on an accused to disprove guilt; the burden is always on the Crown to prove the guilt of the accused. The question was not whether the Appellant had disproved the charge, but whether his evidence raised a reasonable doubt as to whether he was guilty: *R. v. W. (D.)*, [1991] 1 S.C.R. 742. If the Justice of the Peace believed the Appellant, or if the Appellant's evidence raised a reasonable doubt, the Justice of the Peace had to acquit.

[7] The Respondent points out that near the end of his reasons, the Justice of the Peace stated that he unequivocally accepts the testimony of the Crown's witness. The Respondent argues that this suggests that the Justice of the Peace rejected the Appellant's testimony because it did not convince him or raise a reasonable doubt in his mind about the Appellant's driving and that it was open to the Justice of the Peace to convict on the remaining evidence that he accepted, that being the testimony of the Crown's witness.

[8] The difficulty with this argument is that it fails to take into account how the Justice of the Peace framed the question. If, as his words suggest, he put an onus on the Appellant to disprove the charge, his rejection of the Appellant's testimony may well have come about because, in his view, the Appellant had not satisfied that onus. There is no indication in

the reasons given by the Justice of the Peace as to why he rejected the Appellant's testimony, so it is not possible to rule out that it was the result of putting that onus on the Appellant.

[9] The Respondent also submits that failure by a trial judge to use the same language used in *R. v. W. (D.)* when dealing with the assessment of credibility is not fatal: *R. v. C.L.Y.*, [2008] S.C.J. No. 2. While that is true, the language used must show that there is no misapprehension as to the correct burden and standard of proof. In this case, the problem is that the Justice of the Peace appears to have erroneously put a burden on the Appellant to disprove the charge. In the context of this case, that amounts to a burden on the Appellant to prove to the Justice of the Peace that his version of the facts was the correct one.

[10] Since Justices of the Peace in this jurisdiction are invariably lay persons, and usually, as in this case, do not have the assistance of counsel, the same level of legal analysis that one would find in the Territorial or Supreme Court cannot be expected. The Respondent says that notwithstanding any deficiency or error in what the Justice of the Peace said, the result is one that he could reasonably have reached. In this regard, the Respondent relies on the following words of Vertes J. of this Court in *R. v. Lehniger*, [1993] N.W.T.J. No. 121 (S.C.):

> I also think that some allowances should be made for the fact that these are Justice of the Peace proceedings. Normally such proceedings are not conducted by legal professionals. Some of the more subtle philosophic and linguistic nuances of the law may no doubt be foreign to the participants. The ultimate object is to make sure justice is done. In this case I have concluded that it was.

[11] In *Lehniger*, the complaint was that the Justice of the Peace said that he had to decide "who's telling the truth", whether it was the Crown witnesses or the accused. Vertes J. said that if these words had been part of instructions to a jury, they would be in error because they failed to explain that the rule of reasonable doubt applies to credibility issues and that if the trier of fact cannot resolve conflicting evidence that would give rise to a reasonable doubt. However, after reviewing the whole of the Justice's remarks, Vertes J. was satisfied that he had applied the correct test as to the standard of proof.

[12] In this case, the Justice of the Peace gave no reasons why he rejected the Appellant's testimony or disbelieved him and it is not possible to say that he applied the correct test because of his reference to "the Crown prove and/or the Defence disprove". Those words are a direct and erroneous reference to the burden of proof and in the absence of any other statement to why the Appellant's testimony was rejected, it is not possible to be satisfied that the Justice of the Peace applied the correct burden of proof in assessing the Appellant's testimony and dealing with credibility.

[13] Accordingly, I find that the Justice of the Peace erred and did not apply the correct test with regard to the burden of proof and the appeal must be allowed on that ground.

[14] I have already noted that the Justice of the Peace did not describe his reasons for rejecting the testimony of the Appellant. Since the appeal is allowed on the ground described above, I need not deal with this issue (which is also raised by the Appellant's third ground of appeal) in any detail. I will simply note that where credibility is an issue, a trier of fact should give reasons for rejecting the testimony of an accused and accepting the testimony of a Crown witness or witnesses. In this case, the Justice of the Peace merely said that the Crown witness "unequivocally" stated certain things. He said nothing about the testimony of the Appellant except to describe its content very briefly.

[15] There are numerous decisions of the Supreme Court of Canada that refer to the importance of trial judges giving reasons for their decisions, for example, *R. v. Sheppard*, [2002] 1 S.C.R. 869, *R. v. Gagnon*, [2006] S.C.J. No. 17, *R. v. Dinardo*, [2008] S.C.J. No. 24. Perhaps the most succinct statement of the rationale for requiring reasons was stated by Binnie J. in *Sheppard*, at paragraph [24]:

> In my opinion, the requirement of reasons is tied to their purpose and the purpose varies with the context. At the trial level, the reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.

[16] Although they need not be extensive, in a case like this reasons should be detailed enough to allow the accused to know why his evidence has been rejected by the trier of fact, why he has not been believed.

[17] Finally, the Appellant's first ground of appeal deals with the discrepancy between the section under which the Appellant was charged and the description of the offence. Again, since I have decided that there must be a new trial because of the error regarding the burden of proof, I will address this ground only briefly.

[18] The Appellant was charged under section 154 of the *Motor Vehicles Act*, which reads as follows:

> 154 (1) No driver shall operate a motor vehicle on a highway without due care and attention.
>
> (2) No driver shall operate a motor vehicle without reasonable consideration for others using the highway.

[19] The information charging the Appellant referred to s. 154(2) but described the offence as "driving without due care and attention", which is the substance of the offence under s. 154(1). When the charge was read out by the clerk in Justice of the Peace court, it was referred to as s. 154(2) but described as driving without undue (*sic*) care and attention. The Justice of the Peace found the Appellant guilty "as charged" but described the offence as operating a vehicle without reasonable consideration for others using the highway. Other parts of the transcript seem to indicate that the lay person who appeared with and represented the Appellant thought either charge might be at issue. On the whole, the transcript indicates considerable confusion as to which charge - driving without due care and attention or driving without reasonable consideration for others - was the subject of the proceedings. It may well be, as argued by the Respondent, that some actions can be the basis for either charge. However, discrepancies between the section number of a statute under which an accused is charged and the description of the charge should be dealt with at the commencement of trial so that all those involved in a court proceeding know the precise charge the court is dealing with.

[20] In this case, I will leave it to the Respondent to apply to amend the information should it proceed to a new trial.

[21] In the result, the appeal is allowed on the ground of error by the Justice of the Peace as to the burden of proof, the conviction is quashed and a new trial is ordered.

"V.A. Schuler"
V.A. Schuler J.S.C.

Dated at Yellowknife, NT, this
04 Day of June 2010

Counsel for Appellant: Hugh Latimer
Counsel for the Respondent: Andreane Cote

Corrigendum of the Reasons for Judgment

of

The Honourable Justice V. A. Schuler

On the second page of the Reasons for Judgment, paragraph 1, second line was missing an “N” in R.S.**N**.W.T. The corrected page will read:

154(2) of the *Motor Vehicles Act*, R.S.N.W.T ...

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