Date: 2012 03 27
Docket: S 1 CR 2011 000157

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GARTH LAWRENCE WALLBRIDGE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Reasons for judgment on a summary conviction appeal

Heard at Yellowknife, NT, on March 23, 2012

Reasons filed: March 27, 2012

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Appellant: Alexander Pringle, Q.C.

Counsel for the Respondent: Marc Lecorre

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REASONS FOR JUDGMENT

[1] The appellant was found guilty of the summary conviction offence of dangerous driving contrary to s. 249 of the *Criminal Code*, and appeals that conviction in this Court, alleging error by the trial judge.

[2] Notwithstanding the capable arguments of counsel on the hearing of this appeal as to what factual findings could or should have been made by the trial judge on the evidence, I find, on a review of the trial record and the decision of the trial judge that the factual circumstances are quite straightforward, i.e., the facts are not really in issue on this appeal.

[3] In the vernacular, the factual scenario is a case of "road rage"; a case of "road rage" which came into criminal court.

[4] A vehicle driven by one Gratton was parked illegally in the right-hand lane of two south-bound traffic lanes during the brief "rush hour" on the main street in Yellowknife. Notwithstanding a traffic sign in front of the Royal Bank on Franklin Avenue indicating that parking is prohibited between 4:30 p.m. and 6:00 p.m., Gratton parked there while awaiting one of his passengers who was doing business in the bank.

[5] Shortly after 5:00 p.m. the appellant was driving his vehicle south in the right-hand lane and was prevented from continuing by the presence of the parked Gratton vehicle and by the flow of traffic in the left-hand (south-bound) lane. He was required to stop his vehicle behind the Gratton vehicle. He saw that there was a driver in the Gratton vehicle, and honked his horn repeatedly, to no avail. He also used his cell-phone to call the city's by-law office. Eventually, Gratton's passenger emerged from the bank and got in the Gratton vehicle. Gratton then proceeded to drive south on Franklin Avenue, and the appellant followed closely behind.

[6] Four or five blocks further along Franklin Avenue, Gratton turned left on 57th Street, en route to his residence. The appellant also turned left, and followed closely behind the Gratton vehicle. Gratton was concerned that the appellant was continuing to follow closely behind him, and so pulled over and parked his vehicle on 57th Street. The appellant also pulled over, parking a car length or two behind the Gratton vehicle.

[7] Gratton got out of his vehicle and approached the appellant's vehicle. The appellant remained in the driver's seat, and rolled down the driver-side window. The appellant was on his cell-phone, apparently again contacting the by-law office. Gratton used some profanity towards the appellant, and there was a verbal confrontation. Gratton grabbed the cell-phone out of the appellant's hands. At some point Gratton returned the cell-phone to the appellant.

[8] After the verbal confrontation between the two, Gratton began to walk back to his vehicle. The appellant then drove his vehicle slowly forward and nudged or bumped Gratton at least twice with his vehicle, and pulled close alongside the driver's side of the Gratton vehicle, apparently in an effort to prevent Gratton from getting back into his vehicle. Gratton was not injured when he was bumped or nudged by the appellant's vehicle, nor did he fall down.

[9] It is this brief operation of his vehicle by the appellant on 57th Street, over a distance of perhaps twenty or thirty feet, which constitutes the alleged *actus reus* of the offence of dangerous driving, i.e., in moving his vehicle slowly forward, nudging or bumping into the person of Gratton, as Gratton was attempting to get into his vehicle.

[10] Although there were some discrepancies or conflicts in the evidence of the trial witnesses, the trial judge made the findings of fact as summarized in the preceding paragraphs. The trial judge determined that the appellant intentionally nudged or bumped his vehicle into the person of Gratton, and that he did so to intimidate or scare Gratton.

[11] A determination by a trial judge on the credibility of witnesses, and on findings of fact, are entitled to deference in an appeal court, and an appeal court is not to interfere with those findings except in the case of palpable error (*R. v. Lee*, 2010 ABCA 1). I see no reason to interfere with the findings of the trial judge in making the determinations set forth in the preceding paragraphs.

[12] However, that does not resolve the main issue on this appeal - can the conduct of the appellant, as found by the trial judge, constitute the offence of dangerous operation of a motor vehicle contrary to s. 249 of the *Criminal Code*?

[13] The sole ground of the appeal advanced by the appellant is stated thus: "the conviction was unreasonable and cannot be supported by the evidence."

[14] Counsel are agreed that the standard of review in determining whether a verdict is unreasonable is whether the verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered (*R. v. Biniaris* 2000 SCC 15).

[15] This appellant was charged with an offence contrary to s.249(1)(a) of the *Criminal Code*, which reads:

> Everyone commits an offence who operates a motor vehicle in a manner that is 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 that at the time is or might reasonably be expected to be at that place (emphasis added)

[16] At one point in the trial decision the trial judge acknowledged that the inquiry was to determine whether "the manner of driving was dangerous to the public within the meaning of s.249." However, with respect, the trial judge did not make that inquiry. Rather, the trial judge concluded that any manner of driving a vehicle to intimidate or scare, or to intentionally nudge or bump a person, is dangerous operation of a motor vehicle, i.e., dangerous to the public. The trial judge stated at paragraph 10:

> I find that using a vehicle in a manner to intimidate, to scare, to move a person, to intentionally hit a person, is operating a vehicle in a manner that is dangerous to the public. There cannot be a safe way to bump or hit a person with a vehicle, with an SUV.

[17] The evidence, as determined by the trial judge, was to the effect that the appellant, in conducting himself as he did when he struck Gratton with his vehicle, was driving slowly and had his vehicle under control. The evidence was that there was little traffic on 57th Street. These are important circumstances which the trier of fact must have regard to in making a determination of dangerousness, or not, under s. 249. Yet these were not circumstances included in the trial judge's consideration, or determination, of dangerousness - the implication being that no matter how slow, no matter how controlled, all operation of a motor vehicle in nudging or bumping a person is dangerous operation under s. 249, or, put another way, intentionally operating a motor vehicle so that the vehicle has contact with a person is *per se* dangerous driving under s. 249. With respect, in my view this is erroneous. The trial judge failed "to have regard to all the circumstances" as required by s. 249.

[18] In the criminal law, the objective test for criminal fault requires that an accused's conduct amount to a "marked departure" from the standard of care that a reasonable person would observe in the circumstances. In the present case the trial judge made reference to the "marked departure" analysis but in doing so the focus was on the intentional hitting of Gratton rather than on the manner of driving.

[19] At paragraph 7 the trial judge stated:

> Even if Mr. Wallbridge was trying to prevent Mr. Gratton from leaving the scene with Mr. Wallbridge's phone, I find that hitting someone with a vehicle in order to prevent them from leaving is not what a reasonable prudent person in the position of Mr. Wallbridge would have done.

[20] And further at paragraph 7:

> I ask myself: Is hitting or bumping a person with a vehicle a marked departure from the standard of care expected of a reasonable person in the circumstances of the accused, Mr. Wallbridge?

[21] And further:

> I find that the intentional hitting of an individual with a vehicle is a marked departure from the standard of care expected of a reasonable person, even in the circumstances that Mr. Wallbridge found himself in

[22] I agree with the trial judge that a reasonable person does not intentionally assault another driver out of frustration with that other driver's illegal parking. However, in this case, the "marked departure" analysis must relate to the appellant's manner of driving, not his decision to assault Gratton.

[23] On the facts as found by the trial judge, the appellant was not without criminal fault. He intentionally assaulted Gratton. However, the charge was not assault but rather dangerous driving.

[24] In my respectful view the trial judge failed to consider "all of the circumstances" as required by s. 249 and this failure led to an unreasonable verdict. A verdict of dangerous driving could not reasonably have been rendered had all the circumstances been taken into consideration as required by s. 249.

[25] The trial judge erred in convicting the appellant of dangerous driving on the facts as found by the trial judge.

[26] The appeal is allowed. The conviction under s. 249 is set aside, and a verdict of acquittal should be entered.

J.E. RICHARD
J.S.C.

Dated this 27th day of March 2012

Counsel for the Appellant: Alexander Pringle, Q.C.
Counsel for the Respondent: Marc Lecorre

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