

CANADA / JUDGMENT

R. v. Gray

2023 BCSC 1419

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 1419 R. v. Gray

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gray,

2023 BCSC 1419

Date: 20230602

Docket: 56605

Registry: Vernon

Between:

Rex

Respondent

And:

William Craig Gray

Appellant

Before: The Honourable Mr. Justice Riley

Oral Reasons for Judgment

Counsel for the Appellant:

S. Dugas

Counsel for the Respondent:

B. Bellrichard

Place and Date of Hearing:

Vernon, B.C.

May 19, 2023

Place and Date of Judgment:

Vernon, B.C.

June 2, 2023

Introduction

[1] The appellant Mr. Gray appeals his conviction for driving without reasonable care and consideration for others contrary to s. 144(1)(b) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318. The conviction arose out of an incident in which Mr. Gray swung wide and drove along the centre lane of the highway, outside of the two dedicated lanes for traffic moving in his direction, while passing other vehicles. Mr. Gray argues that the Judicial Justice erred by (i) applying an incorrect burden of proof, (ii) misapprehending the evidence, and (iii) rendering a verdict that was unsupported by the evidence, and (iv) unreasonable. At the hearing of the appeal, the focus of the argument was the appellant's contention that the Judicial Justice erred in failing to address the evidence on the key issue of whether Mr. Gray took all reasonable care when he drove his vehicle to the left of the two dedicated lanes on his side of the highway.

Facts

- [2] The events in issue took place on the highway near Round Lake, on 25 June 2021. Mr. Gray was driving his vehicle northbound on the highway. He had one passenger, Ms. Kirby. Cst. Volz was on duty, driving her police vehicle in the opposite direction on the highway.
- [3] At trial, the sole witness for the Crown was Cst. Volz, and the two defence witnesses were Mr. Gray and Ms. Kirby.
- [4] Cst. Volz testified that as she was proceeding southbound on the highway, she focussed her attention on a cluster of three oncoming cars, which were basically three abreast. Mr. Gray's vehicle was the furthest to the left, and was driving in what Cst. Volz described as the meridian between the northbound and southbound lanes. Mr. Gray's vehicle left behind it a plum of dust and rocks as it proceeded northbound along a portion of the roadway not normally used for driving.
- [5] In his trial testimony, Mr. Gray essentially admitted what the officer saw, namely that he had driven his vehicle left of the two dedicated northbound lanes. The more contentious questions at trial had to do with the circumstances leading up to Mr. Gray operating his vehicle in this manner, and Mr. Gray's explanation for his manner of driving.

- [6] To continue with the narrative, Cst. Volz, upon seeing Mr. Gray's vehicle driving in the centre lane, activated her police lights and stopped Mr. Gray's vehicle. The officer then approached Mr. Gray's vehicle, and explained why she had stopped him. Mr. Gray's reaction at the time was to tell the officer that the vehicle to his immediate right was driving slowly in the outside lane, so he passed it.
- [7] Cst. Volz returned to her vehicle and wrote out a violation ticket citing Mr. Gray for three offences under the MVA, namely: (i) driving without reasonable care and consideration for others contrary to s. 144(1)(b) of the MVA, (ii) passing on the left in an unsafe manner contrary to s. 158, and (iii) crossing a solid or broken line contrary to s. 155(1)(b)(ii).
- [8] When Cst. Volz returned to Mr. Gray's vehicle to give him the ticket, Mr. Gray offered a second account of what happened. He said one of the two vehicles ahead of him suddenly pulled in front of him, forcing him to move further left into the centre lane.
- [9] As I say, the two witnesses called on behalf of Mr. Gray at trial - Mr. Gray himself, and his passenger Ms. Kirby - both confirmed that Mr. Gray's vehicle was the furthest to the left of three northbound vehicles, and that he was driving in the centre of the highway to the left of the two dedicated northbound lanes.
- [10] Mr. Gray's testimony was that in the time period immediately prior to his going into the centre lane, his vehicle was amongst a cluster of perhaps 50 or 60 vehicles travelling northbound on the highway. There was a lot of slow moving traffic in the right lane. Mr. Gray was in the left lane, or passing lane. A vehicle ahead of him swerved to the left, right in front of him. Mr. Gray testified that his "options" were to go further left into the "highway divider", which is what Cst. Volz referred to as the meridian. He said if he had not moved over, the vehicle that swerved in front of him would have hit him. Mr. Gray added that he was travelling approximately 60 km per hour in a 90 km zone, and he did not drive into the southbound lanes.
- [11] Ms. Kirby testified that traffic on the highway was very busy. There were two northbound lanes. There were many vehicles ahead of Mr. Gray's vehicle in the right lane, and Mr. Gray was driving in the left lane. All of a sudden, a car in the right lane moved into the left lane, right in front of Mr. Gray's vehicle. Mr. Gray moved further to the left, into the meridian lane between the northbound and southbound lanes. Ms. Kirby referred to it as the turning lane, explaining that this is how Mr. Gray had referred to it in their discussions prior to her testimony. Ms. Kirby also offered the view that it would not have been safe for Mr. Gray to simply apply his breaks, because he would have been hit by "cars behind".

The Judicial Justice's Decision

- [12] The Judicial Justice found Mr. Gray guilty of driving without due care for others contrary to s. 144(1)(b) of the MVA. I would summarize the Judicial Justice's reasoning process as follows.

- [13] The Judicial Justice was clearly satisfied that Mr. Gray was (i) driving on the highway, (ii) driving in what the Judicial Justice referred to as the meridian, which was not a dedicated northbound lane, and (iii) passing other vehicles on the left.
- [14] In reviewing the law with respect to proof of driving offences, the Judicial Justice quoted at length from his own reasons in an unreported case called *R. v. Wheeler*. In the *Wheeler* decision, the Judicial Justice referenced three prior decisions dealing with the offence of careless driving under s. 144(1)(b) of the MVA.
- [15] The first was *R. v. Malcolm*, 2015 BCSC 306, wherein at para. 21 Mr. Justice Rogers described the "true test of driving without reasonable care and consideration" as being whether the driving was "done without consideration of the conditions and use of the roadway by others, in such circumstances where a reasonably prudent driver ought to have been made aware of the potential dangers posed or created".
- [16] The second decision was *R. v. Buchholz*, 2008 BCPC 246, in which Judicial Justice Gordon reasoned that the duty contemplated in s. 144(1)(b) of the MVA is to drive "in such a manner as to not endanger any other persons, whether they are other drivers, or pedestrians, or in this case, road maintenance workers".
- [17] The third case was *R. v. Goldade*, 2009 BCPC 62, at para. 18-19. In *Goldade*, the Honourable Judge de Walle explained at para. 19 that, "[i]f the Crown establishes that the manner of driving departs from the accustomed sober behaviour of a reasonable man, it is then open to the accused to avoid liability by proving he took all reasonable care".
- [18] The Judicial Justice also referred to his prior decision in *Wheeler* for a discussion of the defence of necessity as set out on *R. v. Klem*, 2016 BCSC 2178 at para. 16-17.
- [19] The Judicial Justice then moved on to consider Mr. Gray's contention that he "went into the meridian out of necessity", reasoning as follows:
- [32] I struggle somewhat with Mr. Gray's explanation about it being necessary for him to go into the meridian. There would have been options to Mr. Gray other going into the meridian. There was no evidence that he sounded his horn when the slower moving vehicle moved into his lane. There was no evidence as to why the slowing vehicle moved into his lane.
- [33] At roadside, Mr. Gray provided two different explanations to Cst. Volz. The first explanation was that the vehicle in the left lane was not going fast enough to pass the vehicle in the right lane so Mr. Gray decided to pass the vehicle in the left lane. The second explanation, once the officer came back with the ticket, was that that the vehicle in the right lane had pulled in front of him suddenly and that he could have slowed, put on his brakes, or passed the vehicle. So he provided two choices that he had to the officer, but he chose to pass as opposed to applying his brakes.

- [34] Ms. Kirby said that he could not have applied his brakes because there was vehicles [sic] behind him. I do not know why Ms. Kirby would have known that. She gave no evidence that she turned around to see the vehicles behind Mr. Gray.
- [38] If I accept Mr. Gray's evidence that the vehicle in the right lane moved in front of him, necessitating him taking some evasive action, there were other options available to Mr. Gray such as sounding the horn and applying his brakes.
- [39] Under Mr. Gray's scenario, instead of doing that, he went into the meridian. By going into the meridian, he caused dust and debris to be thrown up into the air, which would have affected vehicles behind him and oncoming vehicles and vehicles in the northbound lanes.
- [40] I find Mr. Gray's driving into the meridian was not that of a reasonable and prudent person in the circumstances. Mr. Gray had other options available to him, including sounding his horn and applying his brakes. By driving into the meridian, Mr. Gray drove into an area of the roadway that is not for travel, but a divider between the two directions of traffic.
- [41] I find that Mr. Gray has not made out a defence of necessity in this case.
- [20] The Judicial Justice found Mr. Gray guilty of driving without due care and attention for others contrary to s. 144(1)(b). The Justice went on to find that the other two counts, passing on the left without due care, and crossing a double line without due care, were "incorporated into" the first, and solely on that basis entered acquittals on those counts.

Arguments on Appeal

- [21] Before dealing with Mr. Gray's arguments, I should say that I had some difficulty with the Judicial Justice's consideration of the defence of necessity. Necessity is a well-known defence in the criminal law, but it is difficult to understand why it would have been of any assistance in analyzing the issues in this case, given that driving without due care for others contrary to s. 144(1)(b) is a strict liability offence, which by its very nature allows for a defence of due diligence: Goldade at para. 19; R. v. Gill, 2009 BCSC 1523 at para. 5.
- [22] In both Wheeler and in the case at bar, the Judicial Justice rested his discussion of the defence of necessity on R. v. Klem, 2016 BCSC 2168. Klem was a case involving prosecution for offences under the Wildlife Act arising out of the accused's intentional shooting of a bear. The trial judge considered whether the accused's actions were excused under the defence of necessity. In an earlier decision in relation to the same matter, the Court of Appeal had ruled that the defence of due diligence was not available because the charges arose out of an allegedly intentional act: R. v. Klem, 2014 BCCA 272 at 29-30. Speaking for the Court, Lowry J.A. explained at para. 29 that due diligence "appears to be raised most typically in answer to prosecutions founded on negligent conduct that gives rise to an offence". The Court ordered a new trial, leaving open the possibility that the accused could raise the defence of necessity.

- [23] The charges in the case at bar involved allegations of a negligence-based offence, that is, careless driving or driving without due care for others. Both the Provincial Court in Goldade and this Court in Gill have recognized that the defence of due diligence is available to the accused in response to a charge under s. 144(1)(b). In this context, rather than analyzing the accused's manner of driving under the rubric of necessity, it seems to me it would have been more straightforward to analyze Mr. Gray's position under the doctrine of due diligence, that is, whether Mr. Gray took all reasonable care that could be expected of a reasonably prudent driver to avoid the manner of driving that is the subject of the charge.
- [24] However, despite the Judicial Justice's consideration of the issue through the lens of necessity, in my view the Justice ended up in the right place, by focussing the analysis on whether there were other options reasonably available to Mr. Gray in the circumstances. This is in substance the very same question that would be posed in considering the issue of due diligence, namely, whether Mr. Gray took all reasonable precautions that a reasonable and prudent driver would have taken to avoid the driving conduct that is the subject of the charge. The burden was on Mr. Gray to establish this, on a balance of probabilities. The test is an objective one, applied in the particular circumstances in which Mr. Gray found himself at the time of the events in question.
- [25] I should add that on appeal Mr. Gray's counsel did not raise any issue about the Judicial Justice's discussion of the issue of necessity. Rather, counsel focused his submission on whether the Judicial Justice committed some reviewable error in determining the ultimate issue as I have just framed it, that is, in concluding that there were other reasonable options available to Mr. Gray in the circumstances. More specifically, counsel for Mr. Gray submitted that in reaching this conclusion, the Judicial Justice erred by (i) applying an incorrect burden of proof, (ii) misapprehending the evidence, and (iii) rendering a verdict that was unsupported by the evidence, and (iv) unreasonable.
- [26] I will deal firstly with Mr. Gray's argument on the burden of proof. In his written submission, counsel for Mr. Gray points out that the burden was on the Crown to prove beyond a reasonable doubt that Mr. Gray's driving was such as to constitute an offence under s. 144(1)(b). Counsel cites, among other things, what is in my view the key passage from Goldade addressing the burden of proof for an offence under s. 144(1)(b) as follows:
- If the Crown establishes that the manner of driving departs from the accustomed sober behaviour of a reasonable man, it is then open to the accused to avoid liability by proving he took all reasonable care. Again, this is viewed objectively by what a reasonable man would have done in the circumstances. If the accused reasonably believed in mistaken facts, which, if true, would have made the act innocent, or if he took all reasonable steps to avoid the event, he will not be convicted: *R. v. Funk*, [2005] B.C.J. No. 3034.
- [27] In his written submission at para. 8, counsel for Mr. Gray submits that the Judicial Justice held Mr. Gray to the wrong standard of proof. I do not agree. Indeed, at para. 4-5 of his written submission, counsel acknowledges that the Judicial Justice made a finding that Mr.

Gray's vehicle "was being operated in a manner that departed from the objective standard", and that after that it was "open to the accused to establish that he acted in a lawful manner". As I read the Judicial Justice's reasons, he was clearly satisfied that the Crown had met its burden of proving beyond a reasonable doubt what was in effect the actus reus of the offence, that the manner of driving departed from the standard of care and attention expected under s. 144(1)(b). The Judicial Justice then went on to consider whether the accused could show that there were other reasonable options available to him, in effect conducting the due diligence analysis, at which stage the burden shifted to the accused. I do not see any improper application of the burden of proof in this regard.

- [28] On the actus reus stage of the analysis, counsel for Mr. Gray seems to imply at para. 4 of his written argument that the Crown's evidence was dubious because the investigating officer made her observations from approximately one kilometer away, as she approached Mr. Gray's vehicle and the other two vehicles from the opposite direction. With respect, I do not agree that the evidence as to manner of driving was questionable or weak. There was overwhelming evidence to support the Judicial Justice's conclusion that the accused's manner of driving departed from the accustomed sober behaviour of a reasonable person without due regard for the safety of others. Mr. Gray was driving a vehicle that was to the left of two other vehicles proceeding down a two lane stretch of highway. Mr. Gray was travelling in what the Judicial Justice referred to as the meridian lane. Even if one were to call it the turning lane, it was not a designated lane for northbound travel, and Mr. Gray was travelling at a rate of speed somewhere between 60 km and 90 km per hour, passing two other vehicles. Further, Mr. Gray's car was kicking up dust and rocks, because it was travelling on a portion of the road that is not normally driven upon in this manner. In fact, at trial Mr. Gray did not really dispute any of this. His evidence was directed toward what is in effect the second stage of the analysis, that is, whether, despite the manner of driving, he exercised due diligence.
- [29] On the due diligence stage of the analysis, counsel argued at paras. 8 and 10 of his written submission and at the hearing of the appeal that in considering whether there were no other reasonable driving alternatives available in all the circumstances, the Judicial Justice subjected Mr. Gray's evidence to a standard of proof beyond a reasonable doubt. I do not agree. There is nothing in the Judicial Justice's reasons to support the view that Mr. Gray was required to disprove his guilt beyond a reasonable doubt, or to prove the defences of "necessity" or due diligence beyond a reasonable doubt. To the contrary, the Judicial Justice quoted at length from the case law which explains the nature of the burden on both the Crown (to prove the actus reus beyond a reasonable doubt) and the defence (to prove due diligence on a balance of probabilities, where the Crown meets its burden of proving the actus reus) in respect of a charge under s. 144(1)(b) of the MVA. There is nothing in the Judicial Justice's reasons to show that he misapprehended the nature of the burden of proof that rests on the accused at the due diligence stage of the analysis.

- [30] Counsel also argued, at para. 14 of his appeal submission, that Mr. Gray "met his burden of proving the reasonableness of his conduct [on] a balance of probabilities". Earlier in his written argument, at paras. 11-12 of the appeal submission, counsel argued that the only evidence before the Judicial Justice as to Mr. Gray's explanation for the manner of driving was the "uncontradicted evidence" of Mr. Gray himself, supported by the testimony of the defence witness Ms. Kirby. Counsel submitted, in effect, that the Judicial Justice erred in failing to find that Mr. Gray had met his burden on the basis of this uncontradicted evidence. It seems to me that this is more in the nature of an unreasonable verdict argument than it is an argument about an error as to the burden of proof. In any event, whether it is conceived of as an argument regarding burden of proof, or an argument as to alleged unreasonableness of the verdict, in my view the submission fails for two reasons.
- [31] First, the mere fact that the evidence was "uncontradicted" does not mean that the Judicial Justice was bound to accept it. The Judicial Justice had the discretion, as the trier of fact, to accept some, all, or none of the testimony of any of the witnesses who gave evidence at the trial. Of course, there are special rules for credibility assessment in relation to the testimony of the accused, in light of the Crown's burden to prove its case beyond a reasonable doubt, but in the context of a strict liability offence with a due diligence defence, those principles only apply insofar as the accused's testimony addresses the actus reus, on which the Crown bears the burden of proof. In this case, the accused did not really dispute the actus reus, i.e. the manner of driving. His evidence went mostly to the issue of due diligence, on which he bore the burden of proof. The Judicial Justice clearly had some difficulty with Mr. Gray's account of his behaviour, as reflected in the Justice's review of the two different explanations Mr. Gray gave to the investigating officer.
- [32] What can be said is that the Judicial Justice appears to have accepted Mr. Gray's testimony that the car ahead of him swung out into the left lane, in front of Mr. Gray. This is apparent from para. 38 of the reasons, where the Judicial Justice stated, "If I accept Mr. Gray's evidence that the vehicle in the right lane moved in front of him". The Justice proceeded to analyze that situation by assessing whether Mr. Gray took all reasonable precautions or care as would be expected of a reasonable driver faced with this situation.
- [33] This leads me to the second point in response to this particular argument as to the reasonableness of the verdict. The Judicial Justice was not bound to accept as conclusive or objectively reasonable Mr. Gray's assertion that he had no other option open to him but to veer out into the centre lane. The Justice had the authority and responsibility to scrutinize Mr. Gray's explanation, to assess whether there were other reasonable options, other than veering into a non-travelling lane at passing speed, which options might have been taken by an objectively reasonable driver in these circumstances. As discussed above, this is an objective standard, focusing on the reasonable driver, in the particular circumstances that were presented to Mr. Gray at the time of the driving in question. On this issue, the Judicial Justice concluded that there was another option that would have been open to a reasonable driver in these circumstances, namely for Mr. Gray to apply his brakes or to slow down,

rather than veering left into a non-travelling lane at passing speed. I do not think one could say the Judicial Justice erred in reaching that conclusion. It was a conclusion that was open to the Justice on the evidence before him.

[34] Finally, Mr. Gray's counsel argued, both in his written and oral submissions, that the Judicial Justice "failed to address the actual evidence" on the issue of due diligence. Recall the Judicial Justice's conclusion that there was a reasonable alternative available to Mr. Gray, namely to sound his horn and apply his brakes, rather than veering left into the centre lane. Mr. Gray says this conclusion overlooked the evidence of Mr. Gray and Ms. Kirby, to the effect that it would not have been safe or reasonably prudent for him to apply his brakes because it created a risk that he would cause a collision with the car behind him.

[35] I have carefully considered this argument but in the end I do not agree that the Judicial Justice overlooked or failed to come to grips with the evidence on this point. The Judicial Justice referred to the evidence of Ms. Kirby that Mr. Gray "could not have applied his brakes because there [were] vehicles behind him". Thus, the Justice was clearly aware of this evidence, but did not find it convincing. With respect to Mr. Gray himself, he alluded to this issue in his trial testimony, but his evidence was not particularly explicit. On appeal, both counsel pointed to p. 14 of the transcript, where Mr. Gray testified as follows:

As soon as we reached the passing lane, I signalled and pulled into the left lane and accelerated up to 90 kilometers an hour and passed the slower vehicles on - in the right lane. Others - another behind me did exactly the same. So I had cars behind me very close, a vehicle to my right, when a car in the right lane with no signals, not even at me, turned around and swerved into my lane.

The accident training that I had taken with a company gave me one - only one option. I could have slammed on - well, many options with - but avoiding an accident - one option, to pull onto the highway divider to my left - highway divider lane is over 16 feet wide - and pass this car, which would have worked except this car accelerated, and the vehicle that was behind me filled the void behind it.

Then skipping down six lines:

If I had taken - if I had taken any other action, there could have been a major motor vehicle accident. If I had swerved - if I hadn't made room for that car on the - on the right, I would have hit him about mid - or he would have hit me about mid-vehicle, and I had a truck and he had a car. With the possibility of multiple vehicles being damaged. Never, at any time, did I go into oncoming lanes.

[36] In this passage, Mr. Gray made reference to other vehicles, including at least one vehicle behind him. Later in the same passage, Mr. Gray started but did not complete his explanation of what he expected what would happen if he put on his brakes. Mr. Gray said, "I could have slammed on ", and then stopped himself mid-sentence and went on to say he had no options but to swerve left.

- [37] As I read this evidence - and I stress, I am reading it from a transcript after the fact as I was not present for the testimony as the Judicial Justice was - it would appear as though Mr. Gray did not complete his thought. He did not fully explain himself as to why he believed it was not a prudent course for him apply his brakes rather than swinging into the centre lane. He simply asserted his conclusion.
- [38] One is left to speculate about what Mr. Gray might have said as to his ability to safely apply his brakes. One can guess what he might have said, but maybe he did not say more because he did not want to open up a can of worms or subject his full explanation to greater scrutiny.
- [39] In the end, it seems to me that the Judicial Justice should not have had to guess at what Mr. Gray's explanation would have been. The burden was on Mr. Gray to lay out his due diligence defence. He had to satisfy the Judicial Justice, on a balance of probabilities, that he acted with all due diligence by addressing any objectively reasonable ways to avoid the pattern of driving that constituted the actus reus of the offence. Mr. Gray failed to convince the Justice. I cannot say that the Justice committed any reviewable error in this regard, or that the verdict was unreasonable or unsupported by the evidence.
- [40] The appeal is dismissed. I should add that counsel for Mr. Gray said everything that might reasonably be said on behalf of his client, but despite counsel's able submissions, I see no basis on which to allow the appeal.

"Riley J."

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