

CANADA / JUDGMENT

R. v. Heth-Klems

2023 BCCA 246

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 246 R. v. Heth-Klems

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Heth-Klems,

2023 BCCA 246

Date: 20230612

Docket: CA48266

Between:

Rex

Respondent

And

Harrison Heth-Klems

Appellant

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated

December 13, 2021 (conviction) (R. v. Heth-Klems, 2021 BCSC 2536,

Chilliwack Docket 69056-2).

Counsel for the Appellant:

E. Purtzki

M. Smith

Counsel for the Respondent:

M. Richards

Place and Date of Hearing:

Vancouver, British Columbia

May 23, 2023

Place and Date of Judgment:

Vancouver, British Columbia

June 12, 2023

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice Bennet

The Honourable Mr. Justice Grauer

Summary:

Appeal from conviction for dangerous driving causing death. The appellant collided with a slower moving vehicle while travelling on a straight, flat stretch of road in daylight hours. The judge found that the collision occurred while the appellant was travelling substantially above the speed limit and "gazing" at an accident on a parallel highway. The appellant argued that the judge failed to identify how and in what way his driving conduct went beyond mere negligence and amounted to a marked departure from what a reasonable person would have done in the circumstances. Further, the appellant argued that on the factual findings made by the judge, she could not have convicted him of the offence charged.

Held: Appeal dismissed. The judge made no error in her articulation or application of the governing legal principles. The reasons explain the basis for her finding that the requisite fault requirement was established. The judge found that the appellant's driving conduct demonstrated a "marked" departure from the standard of care a reasonable person would have observed. The marked departure was in looking away from the road for an inordinate and unsafe period of time while travelling at a high rate of speed and with knowledge that a slower moving vehicle was ahead. The judge was not, as a matter of law, required to acquit on her factual findings.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] The appellant was convicted by a Supreme Court judge of dangerous driving causing death. He appeals from conviction arguing that the judge failed to conduct a "meaningful inquiry" into whether the fault requirement for the offence had been established beyond a reasonable doubt.
- [2] The appellant does not dispute that the trial judge correctly stated the governing legal principles set out in *R. v. Beatty*, 2008 SCC 5, *R. v. Roy*, 2012 SCC 26 and *R. v. Chung*, 2020 SCC 8. He submits, however, that she erred in applying those principles to the circumstances of this case. Without challenging the sufficiency of the reasons, the appellant argues that the judge erred in law by failing to identify how and in what way his driving constituted a marked departure from the standard of care a reasonable person would have observed in the circumstances. In addition, the appellant argues that on the facts found by the trial judge, she could not have convicted him of dangerous driving causing death. He submits that failing to give legal effect to factual findings also constitutes an error in law.
- [3] As a result of the alleged errors, the appellant seeks an acquittal or, in the alternative, a new trial.
- [4] The Crown submits that the judge explained why the appellant's driving conduct was found to constitute a marked departure from the applicable standard of care. The Crown characterizes the appellant's second ground of appeal as an assertion that the verdict is unreasonable. On the evidence adduced at trial, the Crown submits that the verdict is reasonable and amply supported by the evidence.
- [5] In further defence of the verdict, the Crown submits that the judge erred in her consideration of the mens rea of the offence by failing to have regard to the fact that the appellant was not licensed to operate a motorcycle and was prohibited from driving any motor vehicle at the time of the collision.
- [6] For the reasons that follow, I am not persuaded that the appellant's grounds of appeal have merit. I would dismiss the appeal. I consider it unnecessary to address the additional arguments advanced by the Crown in support of the verdict.

II. Background and Factual Findings of the Trial Judge

- [7] On July 13, 2018, at approximately 7:35 p.m., the appellant, who was operating a Kawasaki Ninja motorcycle, ran into the back of a slower moving Lincoln Navigator (the "collision"). Tragically, the appellant's passenger, Megan Kinnie, was killed in the collision.

- [8] The collision occurred on South Parallel Road, a two-lane road that runs parallel with and along the south side of Highway 1 in Abbotsford. If traffic on Highway 1 is backed up, eastbound drivers can use South Parallel Road to make their way across the city. South Parallel Road can be accessed at the Whatcom Road exit. The next exit east of Whatcom Road is Cole Road. Eastbound traffic on South Parallel Road is controlled by a stop sign at Cole Road.
- [9] On the evening of the offence, the appellant was travelling east on Highway 1 in Abbotsford. A serious accident had occurred in the eastbound lanes (the "accident"). Traffic was moving very slowly. The appellant passed slower moving vehicles on the right by travelling on the paved south shoulder of the highway for about 500 metres before exiting at Whatcom Road. One witness, Byron McDonald, who is also a motorcyclist, characterized the manoeuvre as "a bit aggressive" and something that was discouraged in the motorcycle training he took. The Crown relied on the appellant's decision to pass other vehicles on the right shoulder as forming part of a pattern of dangerous driving leading up to the collision. The judge did not accept the Crown's position on this point, noting that "[t]his action in and of itself does not demonstrate anything more than Mr. Heth-Klems was not content to be slowed down by the flow of traffic on Highway 1".
- [10] After exiting Highway 1, the appellant proceeded on South Parallel Road eastbound towards Cole Road. The collision occurred about 2.7 kilometres from the intersection of Whatcom Road and South Parallel Road, and 181 metres west of the Cole Road stop sign.
- [11] The evening was clear. The roads were dry. Visibility was excellent and there were no visual impairments that would affect a driver's ability to see a vehicle travelling ahead of them. The sun was setting in the west. It played no role in the collision, which occurred on a straight, flat stretch of road.
- [12] The motorcycle was in good condition. There was no evidence of a sudden mechanical failure that may have contributed to the collision.
- [13] The posted speed limit on South Parallel Road is 80 km/h, but it is not unusual for drivers to travel 100 km/h on this stretch of road.
- [14] The motorcycle and the Navigator were captured on video surveillance travelling along South Parallel Road 1,379 metres away from the site of the collision. The Navigator passed first. The motorcycle passed by 22 seconds later. From the video surveillance evidence, an estimate could be made of the speed at which the motorcycle was then travelling. A collision analyst testified that the motorcycle was travelling between 120-131 km/h when it was captured on video.

- [15] The appellant did not have a licence to operate a motor vehicle and was, at the time of the collision, prohibited from driving. The Crown argued that this evidence was relevant to proof of the mens rea of the offence. The judge declined to take it into account because, in her view, "there was nothing to tether the relevance of those factors to the elements of the offence that the Crown must prove beyond a reasonable doubt."
- [16] The appellant did not give evidence.
- [17] There were a number of witnesses to the collision and its aftermath, including the driver of and passengers in the Navigator, and others who made observations as to how the collision unfolded from their vehicles on Highway 1.
- [18] Mehtab Shoker was driving the Navigator eastbound on South Parallel Road. He testified that when his passengers alerted him to the accident on the highway to his left, he slowed down. He estimated that he was travelling between 60 and 70 km/h but admitted that he could not recall the exact speed he was travelling. When he was about 200 to 300 metres away from the Cole Road stop sign, he saw a motorcycle behind him in his mirror. He estimated that it was approximately one kilometre away, and going over 100 km/h. He said the appellant and his passenger were looking to their left and that both of them had their hands out pointing in the direction of the accident on Highway 1. He said he was still moving forward when the collision occurred. In cross-examination, he denied slowing down quickly when he saw the accident. He also denied slowing down almost to a standstill before the collision occurred.
- [19] Mr. Shoker's evidence was largely confirmed by Raydan Kumar, a passenger in the Navigator. Mr. Kumar testified that he watched the motorcycle approach quickly from behind as Mr. Shoker reduced his speed on approach to the Cole Road stop sign. Mr. Kumar estimated that the operator of the motorcycle and his passenger had their heads turned looking at the accident for 10 to 12 seconds before impact. His "wild guess" was that the motorcycle was travelling 170-180 km/h.
- [20] There was conflicting evidence respecting the speeds at which the motorcycle and Navigator were travelling at the point of impact. Witnesses who were on Highway 1 at the time of the collision variously testified that the motorcycle was travelling "between 80 and 100 kms/h", "quite fast" and "faster than highway speed" as it proceeded along South Parallel Road. There was no evidence confirming Mr. Kumar's estimate of the speed of the motorcycle as it approached the back of the Navigator. One witness who made his observations from Highway 1 testified that the Navigator was travelling "very slowly maybe 10 or 20 kilometers an hour" when the collision occurred. Another witness testified that the Navigator was parked or going "very, very slow" at the point of impact.
- [21] It was evident from physical evidence left at the scene that the appellant attempted, much too late, to brake and take evasive action prior to impact.

[22] It was the theory of the defence that the appellant was travelling at, or marginally above, the posted speed limit at the time of the collision. He became momentarily distracted by the accident on Highway 1 and ran into the back of the Navigator which had slowed to a near standstill in the middle of the road.

[23] The judge rejected that theory. In reasons for judgment indexed as 2021 BCSC 2536, she made these critical findings of fact (at paras. 98-109, 121, 132):

- the appellant was aware that the Navigator was travelling ahead of him on South Parallel Road;
- the motorcycle was travelling at approximately 120 km/h when it passed the surveillance camera;
- as the motorcycle approached the scene of the collision, its speed was closer to, but not less than, 100 km/h;
- Mr. Shoker reduced the speed of the Navigator when he became aware of the accident on Highway 1 and as he approached the stop sign at Cole Road. He did not stop suddenly or slow abruptly;
- the appellant rapidly approached the slower moving Navigator;
- although the appellant was aware he was gaining on the Navigator, he turned his head to the left to look at the accident on Highway 1. The appellant and his passenger were pointing over to the left, likely communicating about what they were seeing, as they approached the point of impact;
- the appellant did not slow the motorcycle's speed of travel despite having averted his eyes from the road;
- while Mr. Kumar's evidence that the appellant looked in the direction of the accident on Highway 1 for a good 10-12 seconds "is likely on the high side", the appellant was inattentive "for a significant amount of time in relation to the speed he was travelling". He "did not glance" at Highway 1 and immediately return his attention to the road in front of him. Had he done so, he would have seen that the Navigator had begun to slow down. Rather, he "turn[ed] his head away to gaze - not glance - at what was happening on Highway 1";
- that the appellant did not react sooner by braking or taking evasive action until 24.28 metres from the point of impact served to confirm that "he had taken his eyes off the road, while travelling at least 100 kilometers an hour and rapidly gaining on the slower moving Navigator, for more than was safe or prudent in the circumstances"; and
- the Navigator was "there to be seen and impossible to miss". It did not appear in front of the appellant as "an unexpected hazard that suddenly emerged onto the roadway and took [him] by surprise".

III. The Elements of the Offence of Dangerous Driving

- [24] The actus reus of dangerous driving is captured by the language of what is now s. 320.13(1) of the Criminal Code, R.S.C. 1985, c. C-46. The manner of driving must be dangerous to the public, having regard to all the circumstances.
- [25] The offence of dangerous driving is not proved by showing only that the accused drove in a manner that was dangerous to the public. There is a fault element. The Crown must prove that the accused's objectively dangerous conduct was accompanied by the required mens rea. Specifically, the Crown must prove that the manner of driving amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances: Beatty at para. 43. The requirement of a marked departure from the standard of care expected of a reasonable person is intended to avoid casting the net of penal liability too widely: Beatty at para. 34.
- [26] The point was emphasized in Roy:
- [30] A fundamental point in Beatty is that dangerous driving is a serious criminal offence. It is, therefore, critically important to ensure that the fault requirement for dangerous driving has been established. Failing to do so unduly extends the reach of the criminal law and wrongly brands as criminals those who are not morally blameworthy. The distinction between a mere departure, which may support civil liability, and the marked departure required for criminal fault is a matter of degree. The trier of fact must identify how and in what way the departure from the standard goes markedly beyond mere carelessness.
- [36] 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 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.
- [37] Simple carelessness, to which even the most prudent drivers may occasionally succumb, is generally not criminal. As noted earlier, Charron J., for the majority in Beatty, put it this way: "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" (para. 34). The Chief Justice expressed a similar view: "Even good drivers are occasionally subject to momentary lapses of attention. These may, depending on the circumstances, give rise to civil liability, or to a conviction for careless driving. But they generally will not rise to the level of a marked departure required for a conviction for dangerous driving" (para. 71).

[38] The marked departure from the standard expected of a reasonable person in the same circumstances - a modified objective standard - is the minimum fault requirement... .

[*Italic emphasis in original; underline emphasis added.*]

[27] The requisite mens rea may be inferred from driving found to be objectively dangerous. As noted in Roy at paras. 40-41, the trier of fact must examine all the circumstances to determine whether it is appropriate to infer the requisite degree of fault from the manner of driving.

[28] The relevant point to be taken from Beatty and Roy is this: a finding that an accused operated a motor vehicle in a manner dangerous to the public does not necessarily prove that the manner of driving amounted to a marked departure from the standard of care a reasonable person in the accused's circumstances would have observed. This only makes sense. Driving is an inherently dangerous activity. It might be said that a driver who fails to signal or check their blind spot before changing lanes on a busy highway operates the vehicle in a manner dangerous to the public. But an entirely different question arises as to whether that driver's conduct--perhaps negligent or careless on its face--constitutes a marked departure from the norm and is, as a result, sufficiently morally blameworthy to attract criminal liability.

IV. The Judge's Analysis

[29] With respect to proof of the actus reus, the judge set out the governing law and positions of counsel. She found that the speed at which the appellant was travelling, combined with his prolonged inattention to the road in front of him, was objectively dangerous. The appellant takes no issue with the judge's approach to proof of the actus reus of the offence, or with her conclusion on this issue.

[30] The judge recognized her obligation to address separately proof of the actus reus and mens rea of the offence. Although advanced as a ground of appeal in his factum, the appellant abandoned in oral argument a submission that the judge erred by conflating proof of the actus reus with proof of the mens rea of the offence.

[31] The judge turned to consider whether the Crown had proved that the manner of driving amounted to a marked departure from the standard of care that a reasonable person would have observed in the circumstances. In accordance with Beatty, she instructed herself that it was important not to conflate the civil standard of negligence with the test for penal negligence. She quoted extensively from Beatty, including these seminal passages from the majority reasons of Justice Charron:

[6] Unquestionably, conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, it is important not to conflate the civil standard of negligence with the test for penal negligence. Unlike civil negligence, which is concerned with the apportionment of loss, penal

negligence is aimed at punishing blameworthy conduct. Fundamental principles of criminal justice require that the law on penal negligence concern itself not only with conduct that deviates from the norm, which establishes the *actus reus* of the offence, but with the offender's mental state. The onus lies on the Crown to prove both the *actus reus* and the *mens rea*. Moreover, where liability for penal negligence includes potential imprisonment, as is the case under s. 249 of the Criminal Code, the distinction between civil and penal negligence acquires a constitutional dimension.

- [7] The modified objective test established by this Court's jurisprudence remains the appropriate test to determine the requisite *mens rea* for negligence-based criminal offences. As the label suggests, this test for penal negligence "modifies" the purely objective norm for determining civil negligence. It does so in two important respects. First, there must be a "marked departure" from the civil norm in the circumstances of the case. A mere departure from the standard expected of a reasonably prudent person will meet the threshold for civil negligence, but will not suffice to ground liability for penal negligence. The distinction between a mere departure and a marked departure from the norm is a question of degree. It is only when the conduct meets the higher threshold that the court may find, on the basis of that conduct alone, a blameworthy state of mind.

[*Italic emphasis in original; underline emphasis added.*]

- [32] In addition, the judge quoted extensively from Roy, including paras. 36-38, which are germane to the appellant's first ground of appeal.
- [33] Having done so, the judge proceeded to analyse whether the appellant's dangerous driving amounted to a marked departure from the standard of care expected of a reasonable person in the same circumstances. She said this:
- [131] Reasonable drivers speed and reasonable drivers take their eyes off the road. But I find that a reasonable driver travelling at least 100 kilometers an hour in an 80 kilometer zone, catching up to a slower moving vehicle, would not divert his or her attention from the road ahead to look at an accident on a parallel roadway for more than a fleeting glance without slowing down markedly, in recognition of the traffic ahead.
- [132] Mr. Heth-Klems failed to maintain a proper lookout by turning his head away to gaze - not glance - at what was happening on Highway 1. This was risky conduct in the circumstances. The Navigator was not an unexpected hazard that suddenly emerged onto the roadway and took the accused by surprise. It was there to be seen and a reasonable driver keeping a proper lookout would have noted changes in its speed and reacted appropriately by slowing down.
- [133] Mr. Heth-Klems, would you please stand up.

[134] I am satisfied beyond a reasonable doubt that your driving constituted a marked departure from the standard of care expected of a reasonable person in the same circumstances and accordingly I find you guilty of dangerous driving causing the death of Ms. Kinnee.

[Emphasis added.]

V. The Grounds of Appeal

1. Did the judge fail to identify how and in what way the appellant's driving conduct amounted to a marked departure from the standard of care a reasonable person would have observed in the circumstances?

[34] The appellant takes no issue with the judge's articulation of the mens rea requirement of the offence of dangerous driving. He submits, however, that the judge erred in her application of the governing principles.

[35] Specifically, he says the judge erroneously concluded that because the appellant did not do what a reasonable driver would have done (maintain a proper lookout and slow down while glancing at a distraction), his conduct therefore amounted to a marked departure from the applicable standard of care. He says the judge leapt from a finding that the appellant's driving conduct displayed civil negligence to a finding that the conduct was a marked departure from the standard of care sufficient to ground liability for penal negligence. He argues that the judge failed to identify how and in what way his departure from the reasonable person standard went markedly beyond mere carelessness. I am not persuaded that the judge erred in her analysis of the mens rea of the offence.

[36] The judge was satisfied that the manner of operation constituted a marked departure from the expected standard of care. Taking a functional approach to the reasons with the judge's factual findings in mind, it is not difficult to discern why the judge came to this conclusion. The appellant, while travelling substantially above the speed limit and with knowledge that he was gaining on a slower moving vehicle ahead, took his eyes off the road for an inordinate amount of time and drove directly into the back of the vehicle ahead of him.

[37] In essence, the judge concluded that a reasonable person operating a motorcycle at highway speed would have foreseen the risk of "gazing" at a distraction while following a slower moving vehicle, and that the appellant's failure to foresee the risk was a marked departure from the expected standard of care: Roy at para. 36.

[38] There is nothing objectionable about the fact that the judge looked to the manner of operation to determine whether the Crown had proved the mens rea of the offence. Inferences respecting proof of the fault requirement of the offence may be drawn from the manner of operation: Roy at paras. 39-41; R. v. Lien, 2019 BCCA 362 at para. 10; R. v. Durani, 2022 ONCA 17 at para. 12.

[39] As noted, the judge warned herself against conflating the civil standard of negligence with the test for penal negligence. The appellant's submission on this issue boils down to a suggestion that the judge did exactly what she warned herself not to do. Where, as here, the judge sets out in clear terms her intention to apply governing legal principles "it should be assumed, in the absence of a very clear indication to the contrary, that [she] in fact followed that very course": *R. v. MacGillivray*, [1995] 1 S.C.R. 890 at para. 15, 1995 CanLII 139.

[40] While the judge's reasons respecting the mens rea of the offence are relatively brief, I find no support for the appellant's submission that the judge did not apply the law properly by engaging in the task she set for herself. To the contrary, she explained why the appellant's driving conduct constituted a marked departure from the standard of care expected of a reasonable person in the same circumstances. Accordingly, I would not give effect to this ground of appeal.

2. Did the judge err by failing to give legal effect to her factual findings?

[41] I do not propose to engage with the Crown's submission that this ground of appeal is tantamount to an assertion that the verdict is unreasonable within the meaning of s. 686(1)(a)(i) of the Code. Regardless of whether the ground is framed as an unreasonable verdict argument or as an alleged error in law arising from the failure of the judge to give legal effect to the facts she found, I see no merit in this argument.

[42] On the factual findings of the judge, which are entitled to deference, she made no reversible error in concluding that proof of the offence had been made out. Further, the verdict cannot be said to be unreasonable or unsupported by the evidence.

3. The Crown's additional arguments made in support of the verdict

[43] I find it unnecessary to address the Crown's additional arguments, advanced in support of the verdict, that the judge erred by failing to consider in her mens rea analysis that the appellant was an unlicensed and prohibited driver on the date of the offence. These issues are best left to another day where the Court has the benefit of full argument, and the issues are material to the resolution of the appeal.

VI. Conclusion

[44] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Fitch"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Grauer"

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