
CANADA / JUDGMENT

R. v. Michell

2002 BCSC 278

COURT

Supreme Court of British Columbia

DECIDED

29 January 2002

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Rulings on

application for directed verdict on Count 1

and on cross-examination of Mr. Michell

The Honourable Mr. Justice Fraser

January 29, 2002

HER MAJESTY THE QUEEN

AGAINST

NELSON TOMMY MICHELL

Counsel for the Crown:

Declan Brennan

Counsel for the Accused:

Timothy Klaassen

- [1] THE COURT: There are two applications before me, made in mid-trial by the defence. The submissions concluded only at four o'clock yesterday afternoon. The necessities of the situation led me to consider the submissions and make conclusions on them in the evening of yesterday. This means that the reasons I hand down this morning may not be as polished as I would like and I do reserve the right to add to the reasons or change them once they are transcribed. However, my practice when I do that is to indicate any significant change by the use of square brackets, so that counsel and the parties know exactly what it was that was spoken in Court and what it was that was added afterwards. There will be nothing added afterwards, of course, which would shift a basic reasoning in my rulings. I will also be adding citations for the cases that I mention.
- [2] The first application by the defence is that there be a directed verdict on Count 1, impaired driving causing death. The application is focused on the "causing death" component of Count 1. The defence concedes that there is evidence suitable for the decision of a jury on the issue of whether Mr. Michell's, the accused's, ability to drive was impaired by alcohol. Thus, the result of this application, if successful, would be to reduce Count 1 to impaired driving simpliciter, without any reference to the death of Glen Dunn, who was killed in the collision which is the subject matter of this criminal trial.
- [3] Mr. Dunn, with a high level of alcohol in his blood, was "driving" his three-wheeled electric scooter along Coalmine Road in the village of Telkwa at about midnight on a September night in 1999 when he was struck and killed by the small pick-up truck being driven by Mr. Michell.
- [4] I use the word "driving" in quotation marks because it is far from clear from the provisions of the Motor Vehicle Act whether, in conducting his scooter up Coalmine Road, Mr. Dunn, in law, was a "pedestrian" or, alternatively, was driving a "motorcycle".
- [5] The evidence discloses that it was a pitch-black night, and that Mr. Dunn's scooter had no lights and no reflective tape which would have been visible to Mr. Michell. The evidence also discloses that Mr. Dunn's scooter was more or less in the middle of the road, travelling across the road from right to left, from the vantage of Mr. Michell. When I say "more or less in the middle of the road," I am referring to the evidence of Royal Canadian Mounted Police Sergeant Frayne who, without objection to his qualifications as an accident reconstruction expert, testified that the rear wheels of the scooter were near the centre line when the scooter was struck.

- [6] More importantly, Sergeant Frayne testified that Mr. Michell's truck was substantially over the centre line when it struck Mr. Dunn. He testified, more controversially in my view, that the absence of visible skid marks from the truck before the collision meant that Mr. Michell had neither swerved nor braked.
- [7] I have, from my experience, a considerable scepticism about accident reconstruction evidence. Some of the assertions made by Sergeant Frayne seem dubious to me. But his testimony is there, and I am not the trier of fact.
- [8] What it boils down to is whether the fact of Mr. Michell's truck being over the centre line is sufficiently connected with his impairment ³/₄ or his alleged impairment ³/₄ to leave the issue to the jury.
- [9] This raises the testimony of the Crown expert, Mr. Brian Image, a toxicologist qualified to comment on the effect of impairment on the ability to drive. Among other things, Mr. Image said that impairment can cause difficulty for a motorist in staying in his or her own lane on a highway.
- [10] There is a dismaying lack of consistency among the decided cases. An example at one end is *R v. Fisher*[1], a decision of the Court of Appeal, in which the Court held that a motorist who drove through a crosswalk while the level of alcohol in her blood was at the .15 to .17 range had not been shown to be guilty of the crime of impaired driving causing the death of the pedestrian in the crosswalk whom she struck and killed.
- [11] What it boils down to, in my view, is whether the jury is entitled to infer from the mere fact of Mr. Michell's truck being over the centre line that the collision was a product of impairment. As the evidence now stands, there is no other explanation for the fact that Mr. Michell's truck was not entirely on its own side of the road. While it may be tenuous or unpersuasive, it is the jury which should decide whether there is a connection between the evidence of impairment and the accident.
- [12] *R v. Reed*[2], a decision of the Court of Appeal, holds that crossing the centre line, in the absence of an explanation by the accused, amounts to dangerous driving. This decision was affirmed by the Supreme Court of Canada[3]. This reinforces my conclusion that Mr. Michell must have his fate determined by the jury. This is about as thin a case as I have seen, nonetheless, "thin" is not for me.
- [13] My ruling is that the jury will determine guilt or innocence on Count 1. I decline to direct a verdict.
- [14] The second matter on which I have been asked to rule is as to the cross-examination of Mr. Michell, should Mr. Michell choose to testify at this trial.
- [15] Mr. Michell was convicted in 1996 of the crime of theft. He was also convicted in 1996 of the crime of impaired driving.

- [16] Section 12 of the Evidence Act provides that a witness may be cross-examined as to a criminal conviction. In the leading case on s. 12, *R. v. Corbett*[4], the Court held that the trial judge has a discretion whether to permit the Crown to cross-examine the accused as to a particular previous conviction. The exercise of the discretion is based on the determination whether the probative value of an admission of a previous conviction outweighs the potential prejudice to the accused. The court held that the discretion can be exercised against cross-examination when a merely mechanical application of s. 12 would be contrary to the interests of justice or would work an injustice on the accused.
- [17] Mr. Justice LaForest was a dissenting judge in *Corbett* but, as I read the case as a whole, the Court adopted his analysis of s. 12, including the proposition that the more closely the crime for which the accused was previously convicted resembles the charge which the jury has to deal with, the more prejudice there is to the accused.
- [18] I have looked at the decision of the British Columbia Court of Appeal in the *Perera*[5] case. In my view, the true interpretation of that decision is that Mr. Justice Lambert confirms the proposition that I have just articulated, that is, that the more closely the previous conviction resembles the charge before the jury, the more prejudice there is to the accused. Then Mr. Justice Lambert went on to hold that the trial judge in that case exercised his discretion properly.
- [19] On my reading of the reasons, however, these two propositions are not linked. The holding that the trial judge exercised his or her discretion properly in allowing cross-examination as to the conviction did not amount to a holding that when the previous conviction resembles the charge, then the discretion should be exercised so to allow such cross-examination. In other words, *Perera* does not, in my view, stand for a proposition opposite to that articulated by Mr. Justice LaForest.
- [20] As the Crown says, the *Corbett* case itself is one in which a person charged with murder was held to be vulnerable to cross-examination which included reference to a previous conviction for murder. I hold that the Crown is correct in saying that close resemblance is not a necessary barrier to cross-examination.
- [21] [Of course, the original purpose of the legislation which is now s. 12 of the Evidence Act had nothing to do with the testimony of an accused. It was introduced by the Common Law Procedure Act of 1854, in the United Kingdom, to facilitate the cross-examination of witnesses in civil trials. It was extended to criminal trials there in 1865. But in 1865, an accused was not permitted to testify at his trial[6].]
- [22] [Canadian Courts have articulated since then a rationale for cross-examination of a witness, including an accused, as to previous convictions. It is well expressed in the following passage from *R. v. Charland*:

However, particularly in the context of a lengthy criminal record, such prior convictions have probative value that is greater than trifling because a jury could reasonably conclude that the convictions reflect a disregard for the laws and rules of society, making it more likely that the person who harbours such attitudes would lie.[7]]

[23] In this case, I am influenced by Reasons for Judgment of our Court of Appeal, delivered by Madam Justice Ryan, in which it was observed that drinking-driving causing death or bodily harm offences are "so easily committed by ordinary citizens." [8] In other words, the overwhelming majority of people who are convicted of impaired driving are ordinary people who do not regard themselves as criminals.

[24] I agree with the proposition that the Court of Appeal articulated in that case. [It means that the rationale of Charland does not apply.] It is my view that there is an almost non-existent connection between a single conviction of impaired driving and credibility. I am satisfied that the prejudice in permitting the cross-examination of Mr. Michell on his previous conviction for impaired driving, apart from the fact that the conviction is five years old, would significantly outweigh any probative value that admission of that conviction would have.

[25] I therefore rule that there shall be no reference by the Crown to the previous conviction of impaired driving in any cross-examination of Mr. Michell. The defence concedes that it is appropriate to allow cross-examination on the previous conviction for theft.

[26] Those are my rulings. We will stand down until the jury arrives.

"G.P. Fraser, J."

The Honourable Mr. Justice G.P. Fraser

[1] (1992) 7 B.C.A.C. 264

[2] (1997) 100 B.C.A.C. 161

[3] [1997] S.C.C.A. No. 87

[4] [1988] 1 S.C.R. 670; (1988) 41 C.C.C. (3d) 385 (S.C.C.)

[5] (1991) 5 B.C.A.C. 302

[6] For all these references, see M.L. Friedland, Note, "Criminal Law - Evidence - Cross-examination on Previous Convictions in Canada - Section 12 of the Canada Evidence Act", 47 Can. Bar Rev. 656 (1969).

[7] (1996) 110 C.C.C. (3d) 300, at 313; (Alta. C.A.) approved by the Supreme Court of Canada, [1997] 3 S.C.R. 1006

[8] R. v. Johnson (1996) 112 C.C.C. (3d) 225, at 237 (B.C.C.A.)

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