
CANADA / JUDGMENT

R. v. Sanford

2014 BCSC 310

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sanford,

2014 BCSC 310

Date: 20140109

Docket: 59779-2

Registry: Chilliwack

Regina

v.

Robert Larry Sanford

Before: The Honourable Madam Justice Gropper

Oral Reasons for Judgment

Counsel for the Crown:

G. Lindsey

Counsel for Accused:

J. Reveley

Place and Dates of Trial:

Chilliwack, B.C.

January 6 - 8, 2014

Place and Date of Judgment:

Chilliwack, B.C.

January 9, 2014

Introduction

- [1] THE COURT: On November 4, 2011, between 7:30 and 8:00 p.m., Gavin May, who was 14 years old at the time, was heading down Charles Street in Chilliwack going south as a pedestrian to meet his friend at a church located on the southeast corner of the intersection of First Avenue and Charles Street. He was travelling by skateboard. He was dressed in a dark brown or black jacket, blue jeans, and black shoes. He was wearing an olive green tuque. It was dark.
- [2] First Avenue is a through street and it can be busy with cars, pedestrians, bicyclists, and skateboarders. The evidence is not clear about whether it was busy on November 4, 2011 between 7:30 and 8:00 p.m.
- [3] First Avenue has one lane in each direction. On the western side of the intersection at Charles Street, there is a marked crosswalk. On the eastbound side adjacent to the roadway there is a marked bicycle lane, and there is also a pedestrian crossing sign at the southern end of the crosswalk facing the eastbound traffic.
- [4] When Gavin May got to the intersection of Charles and First Avenue, he stopped at the northwest corner of the intersection, picked up his skateboard and looked around. His intention was to cross First Avenue to the other side of Charles at the marked crosswalk. He says that before he started across he saw a car stopped across the street in the westbound lane and a truck stopped in the eastbound lane that had its blinker on, signalling a left turn.
- As the east and westbound cars were stopped, Mr. May says "I assumed that I was good to go. I put my skateboard down and got on it and pushed twice and went across the crosswalk."
- [5] Mr. May did not make it across the crosswalk. He got across the westbound lane and in front of the truck he saw in the eastbound lane with its blinker. At that moment, Mr. Sanford had pulled to the right of the truck with its blinker on and drove through the intersection. Mr. Sanford's vehicle collided with Mr. May. Mr. May became airborne and landed in the middle of the intersection.
- [6] As a result of the collision, Mr. May was in and out of consciousness at the scene. He suffered several injuries including a right elbow fracture, a right fibula fracture, a right tibia fracture, abrasions on his head, back, chest and left hand, and a concussion.
- [7] Mr. Sanford is charged with dangerous driving causing bodily harm, contrary to s. 249(3) of the Criminal Code, R.S.C. 1985, c. C-46:

249(1) Every one commits an offence who operates

- (a) 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....

...

- (3) Every one who commits an offence under subsection (1) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

The Evidence

- [8] In reviewing the evidence I have included quotes from the witnesses. The quotes are from my notes of the evidence, which is not a transcript.

- [9] Mr. and Mrs. Davis were eastbound in the vehicle directly behind Mr. Sanford's which they described as a white van. The Davis' followed the white van for some time. Neither Mr. nor Mrs. Davis noticed anything remarkable about how the white van was being driven.

- [10] Mrs. Davis says,

As we neared Charles I was conversing with my husband. The vehicle in front of us was slowing; the vehicle in front of the van was stopped before the crosswalk. The van pulled around to the right. On the right there was not another lane. There was no sidewalk. There may be a bike lane but I can't say for sure.

- [11] Later in her evidence she says,

After the van pulled to the right my husband was slowing down and then I saw a blur of a person coming. The stopped vehicle in front of us at the driver's side is where I first saw that person. I could not make anything out. It was a person coming fast across the crosswalk. It was faster than a walk. The speed of the person and the speed of the van; the van was going to hit the person. The person and the van connected and the kid went flying.

- [12] Mr. Davis' recollection is similar. Neither Mr. nor Mrs. Davis could say whether there was a vehicle stopped across the intersection in the westbound lane.

- [13] Greg Young was stopped in the eastbound lane on First Avenue. He intended to turn left onto Charles Street, that is, north. He says he pulled up to the crosswalk and he signalled to turn left. He stopped to let "the kid", who we know is Gavin May, cross. He says there was someone stopped on the opposite side of First Avenue in the westbound lane. As Mr. Young was waiting for Mr. May to cross, Mr. Young says, "the vehicle went around my right side. I didn't notice the vehicle before the kid got hit. I can't remember if I heard a braking, it happened so fast." Mr. Young is referring to Mr. Sanford's vehicle.

- [14] At the same time, Branden Vanden Eykel was heading to his friend's house and was travelling in his vehicle westbound on First Avenue towards Charles Street, at the speed limit or slightly faster. He says he did not think that there was a car ahead of him driving in the same direction.
- [15] As he headed west, Mr. Vanden Eykel says he saw a car stopped with its blinker on across Charles on the opposite side of First Avenue. When he was about 200 feet from the intersection, Mr. Vanden Eykel said he noticed a shadow crossing in front of the stopped car's headlights. He slowed down and about two seconds later, when Mr. Vanden Eykel was about 100 feet from the crosswalk, he said he heard a thump. He did not know what it was at first. He saw a white van that passed the stopped vehicle to its right which then drove through the intersection and pulled over. He realized that the thump was the sound of the collision between the white van and Mr. May.
- [16] Mr. Vanden Eykel says if there was no one crossing First Avenue in the crosswalk on the western side of the intersection a left turning vehicle would have had time to pass in front of him.

Position of the Parties

The Crown

- [17] The Crown argues that Mr. Sanford engaged in dangerous driving when he passed on the right of Mr. Young's vehicle that was stopped at the crosswalk and proceeded through the intersection without stopping. In doing so, the Crown says, Mr. Sanford breached several sections of the Motor Vehicle Act, R.S.B.C. 1996, c. 18: he passed on the right by driving off a roadway (s. 158); he left the designated roadway and entered a marked vehicle lane (s. 159); and he passed a vehicle that was stopped to permit a pedestrian to cross (s. 179).
- [18] Although Mr. Vanden Eykel says he was not stopped in the westbound lane on the eastern side of the intersection, the Crown says I should prefer the evidence of Gavin May that he was "good to go" having observed vehicles in the eastbound and westbound lanes stopped on First Avenue at Charles Street and the evidence of Greg Young which was that a car was stopped opposite to him in the westbound lane.
- [19] The Crown asserts that Mr. Vanden Eykel may simply be wrong about where he was when he first observed a shadow in the headlights of the eastbound vehicle, that is, Mr. Young's vehicle.
- [20] The Crown says that the presence of those vehicles stopped would have alerted Mr. Sanford that there was a reason to stop at the intersection and not to pass Mr. Young's vehicle and proceed through the intersection without stopping. This the Crown says is a marked departure from the standard of care expected of a reasonable person in Mr. Sanford's circumstances.

- [21] The Crown says that even if I do not find that there was a vehicle stopped in the westbound lane, that is, if I accept Mr. Vanden Eykel's evidence, a reasonable driver in Mr. Sanford's position still observing Mr. Young's vehicle stopped would have been alerted to there being something in the intersection which caused Mr. Young's vehicle to stop. If the westbound vehicle was as far away as Mr. Vanden Eykel said he was, Mr. Young would have been able to make his left hand turn. This should have signalled to Mr. Sanford that Mr. Young was stopped for a reason, likely a pedestrian.
- [22] With or without the presence of the westbound vehicle stopped on First Avenue at Charles Street, the Crown says Mr. Sanford's decision not to stop and check and proceed through the intersection by passing Mr. Young on the right satisfies the mens rea of the offence. A reasonable person would have foreseen the risk and taken steps to avoid it if possible. Mr. Sanford's failure to do so was a marked departure from the standard of care expected of a reasonable person in Mr. Sanford's circumstances.

The Defence

- [23] Mr. Sanford asserts that a breach of a section or sections of the Motor Vehicle Act is not determinative of dangerous driving. He says that Gavin May was wearing dark clothes on a dark night and crossed on his skateboard faster than walking speed. Neither one of the Davis witnesses saw Mr. May before the collision, and he was only a shadow to Mr. Vanden Eykel. He was not obviously visible.
- [24] The accused argues that the only rational conclusion is that Mr. Sanford saw the lights of the oncoming vehicle, that is, Mr. Vanden Eykel's vehicle, and Mr. Young's vehicle with its left turn signal on and thought that Mr. Young was waiting for the westbound vehicle to pass before he made his left turn onto Charles.
- [25] In those circumstances Mr. Sanford argues he slowed down and then pulled to the right with the intent of passing the Young vehicle turning left and proceeding east on First Avenue. The defence argues that this is not failing to see a risk nor was it a marked departure from the standard of care expected of a reasonable person in the accused's circumstances.

Legal Framework

- [26] The nature of the offence of dangerous driving causing bodily harm has been described by the Supreme Court of Canada in the decision of *R. v. Roy*, 2012 SCC 26. The Court begins at paras. 1 and 2:
- [1] Dangerous driving causing death is a serious criminal offence punishable by up to 14 years in prison. [And I will say that dangerous driving causing bodily harm is also a serious criminal offence punishable up to ten years in prison]. Like all criminal offences, it consists of two components: prohibited conduct -- operating a motor vehicle in a dangerous manner resulting in death -- and a required degree of fault -- a marked departure from the standard of care that a reasonable person would observe in all the circumstances. The fault

component is critical, as it ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. While a mere departure from the standard of care justifies imposing civil liability, only a marked departure justifies the fault requirement for this serious criminal offence.

[2] Defining and applying this fault element is important, but also challenging, given the inherently dangerous nature of driving. Even simple carelessness may result in tragic consequences which may tempt judges and juries to unduly extend the reach of the criminal law to those responsible. Yet, as the Court put in *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, at para. 34, "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." Giving careful attention to the fault element of the offence is essential if we are to avoid making criminals out of the merely careless.

[27] In this case, there are two issues:

1. Has the Crown proven beyond a reasonable doubt that at the relevant time Mr. Sanford was operating his motor vehicle as set out in the Criminal Code: in a manner dangerous to the public having regard to all the circumstances including the nature, condition and use of the place at which the vehicle was being operated and the amount of traffic at the time or might reasonably be expected to be at that place?
2. If dangerous driving is proven, has the Crown proven beyond a reasonable doubt that the bodily harm to Mr. May was caused by Mr. Sanford's dangerous driving?

[28] The legal principles that apply in respect to dangerous driving are set out in the two cases to which I have referred: *Beatty* and *Roy*. The principles are:

- a. The offence of dangerous driving is focussed on the manner of driving, not the condition of the driver; and
- b. The analytical process to determine whether dangerous driving has been proven is defined as follows:
 1. The actus reus is defined in para. 34 of *Roy*:

[34] In considering whether the actus reus has been established, the question is whether the driving, viewed objectively, was dangerous to the public in all of the circumstances. The focus of this inquiry must be on the risks created by the accused's manner of driving, not the consequences, such as an accident in which he or she was involved. As Charron J. put it, at para. 46 of *Beatty*, "The court must not leap to its conclusion about the manner of driving based on the consequence. There must be a meaningful inquiry into the manner of driving". A manner of driving can rightly be qualified as dangerous when it endangers the public. It is the risk of damage or injury created by the manner of driving that is relevant, not the consequences of a subsequent accident. In conducting this inquiry into the manner of driving, it must be borne in mind that driving is an inherently dangerous activity, but one

that is both legal and of social value (Beatty, at paras. 31 and 34). Accidents caused by these inherent risks materializing should generally not result in criminal convictions.

[emphasis in original].

2. The mens rea is also described in Roy, at para. 36:

- [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 of 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.
- c. While the actual consequences that follow upon the driving are not the focus on the enquiry, they are not entirely irrelevant. They may be considered as part of the risk;
- d. The court must be cautious in finding negligence as constituting a criminal offence. There is a fine line; driving is an inherently dangerous activity. The fault component must be carefully examined. It is important for the court to ensure that the line between civil and criminal liability is respected. As Cromwell J. made clear in Roy, a mere departure from the standard of care justifies civil liability. For criminal liability to be found, nothing less than a marked departure will suffice.

Analysis

- [29] I must consider whether I can properly conclude that the necessary elements have been proven by the Crown beyond a reasonable doubt. The first issue is whether or not the necessary actus reus has been proven. That entails an examination of the manner of driving viewed objectively and the risks created by it.
- [30] The driving in this case resulted in a terrible collision and serious injuries to Mr. May. However, the authorities make it clear that it is not determinative that the driving was dangerous so as to constitute proof of the actus reus. It is the manner of the driving which must be examined, not the outcome.
- [31] Mr. Sanford, in passing Mr. Young's vehicle on the right, leaving the roadway, and driving in a marked vehicle lane to do so and then proceeding through the intersection when Mr. Young was stopped as he did, failed to observe Mr. May in the crosswalk. Mr. Sanford failed to stop and take the opportunity to observe whether there was a pedestrian in the crosswalk.
- [32] As the Crown noted, each of these actions: passing on the right, leaving the roadway to do so, and driving in a marked bicycle lane, and failing to stop to permit a pedestrian to cross are breaches of the Motor Vehicle Act.

- [33] However, this is not a trial concerning whether those provisions were breached. This is a trial concerning dangerous driving and whether at the relevant time Mr. Sanford was operating his motor vehicle in a manner dangerous to the public as set out in the Criminal Code provision, that is, having regard to all the circumstances including the nature, condition, use of the place at which the vehicle was being operated and the amount of traffic at the time was or might reasonably be expected.
- [34] In considering this, I must decide whether the evidence supports a conclusion that there was a vehicle stopped on both the eastern and western side of the intersection.
- [35] It is beyond doubt that Mr. Young was stopped on the western side and had his left turn signal on. I cannot find that there was a vehicle stopped on the eastern side of the intersection. Mr. Vanden Eykel was very clear in his evidence that he was not at the intersection and he was not stopped there when he saw a shadow cross in front of Mr. Young's vehicle headlights and when he heard the thump. He does not recall a vehicle ahead of him in the westbound lane stopped at the intersection. If there was, Mr. Vanden Eykel would not have observed the shadow crossing: the vehicle ahead of him would have obscured that.
- [36] Mr. May and Mr. Young describe a vehicle stopped in the westbound lane. I must make a determination on the evidence presented and in this case I find that there was not a vehicle stopped in the westbound lane opposite to Mr. Young's vehicle. In other words, I accept Mr. Vanden Eykel's evidence.
- [37] With that finding of fact, I must now consider whether the Crown has proven the elements of the offence beyond a reasonable doubt.
- [38] I disagree with the Crown's assertion that the presence or not of a westbound vehicle at a full stop on the eastern side of the intersection is an irrelevant consideration. Without the presence of such a vehicle, Mr. Sanford would only have observed Mr. Young's vehicle stopped with its left turn signal illuminated.
- [39] In light of that, has the Crown proven that at the relevant time Mr. Sanford was operating his motor vehicle in a manner dangerous to the public, having regard to all the circumstances including the nature, condition, and use of the place at which the vehicle was being operated and the amount of traffic at the time was or might reasonably be expected at that place?
- [40] Section 158(1) of the Motor Vehicle Act allows a driver to pass on the right where the driver ahead is signalling a left turn. I am not saying that Mr. Sanford was right in doing so, quite the contrary, he left the travelled roadway, entered into a marked bicycle lane and did not slow down or stop at the crosswalk to permit Mr. May to cross. But applying the test that I must, I cannot find that having regard to all the circumstances that Mr. Sanford's driving was dangerous to the public. Neither can I find that the Crown has established the mens rea of the offence in accordance with the two part test:

- (a) In light of all the relevant evidence, would a reasonable person have foreseen the risk and taken steps to avoid it if possible; and
- (b) If so, was the accused's failure to foresee the risk and take steps to avoid it if possible a marked departure from the standard of care expected of a reasonable person in the accused's circumstances?

[41] I will deal first with whether a reasonable person would have foreseen the risk of this manner of driving and taken steps to avoid it.

[42] A reasonable person in Mr. Sanford's position must have recognized the risks of driving in the fashion that he did in those circumstances, and assuming that a person acts reasonably, would have taken steps to avoid it. There was a marked crosswalk, a sign indicating pedestrian crossing and a vehicle that was stopped at the intersection.

[43] As for the second question, whether Mr. Sanford failed to foresee the risk and take steps to avoid it if possible constitutes a marked departure from the standard of care expected of a reasonable person in Mr. Sanford's circumstances, I find that Mr. Sanford's conduct falls within the type of conduct described by Madam Justice Charron as Beatty, supra, as a momentary lapse of attention. It was not a marked departure from the norm.

[44] Mr. Sanford did not stop to allow Mr. May to cross First Avenue in the marked crosswalk. The collision caused Mr. May to suffer serious injuries. I must be mindful of what the Court said in Roy, to which I have already referred:

"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." Giving careful attention to the fault element of the offence is essential if we are to avoid making criminals out of the merely careless.

[45] I find that Mr. Sanford was careless, but is not guilty of the charge of dangerous driving causing bodily harm.

"Gropper J."

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