

CANADA / JUDGMENT

Sharma v. Kandola

2020 BCCA 161

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 161 Sharma v. Kandola

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Sharma v. Kandola,

2020 BCCA 161

Date: 20200609

Docket: CA46008

Between:

Simone Sharma

Respondent

(Plaintiff)

And

Kulwinder Singh Kandola

Appellant

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Harris

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

March 14, 2019 (Sharma v. Kandola, 2019 BCSC 349,
Vancouver Docket M150735).

Counsel for the Appellant:

R.C. Brun, Q.C.

E. Haupt

Counsel for the Respondent:

W.D. MacLeod

Place and Date of Hearing:

Vancouver, British Columbia

May 26, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 9, 2020

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Tysoe

Summary:

The appellant appeals from a trial judgment finding him solely at fault for causing a motor vehicle accident. At the time of the collision, the respondent, who was travelling in the eastbound lane, was executing a U-turn or "reverse turn" in order to park on the north side of the street. The judge found at the moment of the collision the appellant, who was driving east behind the respondent before the turn, was illegally attempting to pass the respondent, driving too fast and too close to the respondent, and not paying adequate attention to the respondent's brake and turn signals. The judge found that the respondent was driving safely at all times prior to the collision. Held: Appeal allowed, only to the extent that the respondent is liable for the accident at an apportionment of 25%. The judge erred in law by failing to consider the impact on liability of the respondent's failure to see the appellant's vehicle, when the vehicle was clearly there to be seen, despite attempting to properly execute a shoulder and mirror check.

Reasons for Judgment of the Honourable Mr. Justice Harris:

- [1] This appeal is from a trial judgment finding the appellant, Mr. Kandola, solely liable for causing a motor vehicle accident in the mid-afternoon of October 15, 2014 (Sharma v. Kandola, 2019 BCSC 349). The collision occurred when Mr. Kandola's vehicle struck the respondent Ms. Sharma's vehicle on a residential street, in a school zone, in Richmond, BC. At the time of the accident, Ms. Sharma had been travelling in an easterly direction and was in the process of making a U-turn from the south to the north side of the street. Mr. Kandola had been driving behind Ms. Sharma in the same direction as her before Ms. Sharma began to execute her turn.
- [2] The judge found Mr. Kandola was travelling too close to Ms. Sharma's car and driving too fast, he failed to keep a proper look out, and he was attempting to pass Ms. Sharma's vehicle in the westbound lane, an activity prohibited in a school zone. The judge concluded that Ms. Sharma was driving in a safe manner immediately prior to the collision. As a result he found, at para. 52:
- [52] Because of Mr. Kandola's manner of driving, he was unable to respond when the plaintiff's vehicle moved to its left across King Road. I find Mr. Kandola was, in these circumstances, negligent and wholly responsible for the collision.
- [3] On appeal, Mr. Kandola alleges three errors. First, he says that the judge erred by failing to analyse and apply s. 168 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, the provision that regulates making a U-turn, or as it is referred to in the statute, a "reverse turn." Second, Mr. Kandola contends that the judge made palpable and overriding errors of fact in his findings about Ms. Sharma's driving and the location of her vehicle before she began to make the U-turn. Third, Mr. Kandola argues that the judge drew improper inferences from circumstantial evidence that were not based on proven facts. In the result, Mr. Kandola seeks an order allowing the appeal and dismissing the action or, in the alternative, an order for a new trial.
- [4] Although the appellant's counsel did not formally abandon the second ground of appeal in oral argument, the emphasis shifted from focusing on whether Ms. Sharma's vehicle had pulled completely off the road before making her turn to other evidentiary matters. The location of Ms. Sharma's vehicle before she started her turn had been a central live issue at trial. Mr. Kandola had argued that Ms. Sharma pulled completely off the road to the right before starting her turn and cutting off Mr. Kandola in the eastbound lane. The judge rejected this contention. He found, at para. 45, that Ms. Sharma's vehicle at all times occupied a substantial portion of the eastbound driving lane prior to moving to the left across King Road.
- [5] I do not think it can fairly be said that the judge made a reversible error in this finding of fact. Mr. Kandola argues that Ms. Sharma admitted in cross-examination that she had pulled completely off the road. The portion of the transcript Mr. Kandola relies on is at best equivocal. The proposition that Ms. Sharma pulled completely off the road was not put to her directly; instead, it was an assumption embedded in a question that began by attempting

to clarify where along the road she started to move to the right. In my view, the question was objectionable, and it cannot be taken that the witness was agreeing that she pulled completely off the road rather than agreeing about the point at which she began to pull over to the right before embarking on the reverse turn. In any event, the evidence from other witnesses supports the judge's findings of fact. I would not accede to this ground of appeal, to the extent it was seriously pursued.

- [6] It follows then that the judge's findings about the location of Ms. Sharma's car when she began her turn must be accepted for the purpose of appellate review. While Ms. Sharma had moved to the right before beginning her turn, her vehicle remained substantially in the eastbound driving lane.
- [7] At this point it is helpful to provide further context for the remaining issues on appeal.
- [8] The accident happened on a quiet and relatively narrow residential street, King Road that runs west to east in Richmond. The road has one lane in each direction. Ms. Sharma, then a 17-year-old relatively new driver, was driving to a friend's home. The friend was in the car. It was just after the end of the high school day. The plan was to stop off at the house briefly before going on to another event. Ms. Sharma knew the area well, having lived in the same house for a number of years when she was younger.
- [9] The judge described the area of the accident at paras. 4 and 5:
- [4] The collision took place on a residential street named King Road in Richmond, BC, near an elementary school. The location of the collision was in a school zone where school zone signs were posted. The signs stated the speed limit in the school zone was 30 kilometres per hour. From Seacote Road to No. 5 Road in Richmond, King Road runs west to east. The roadway is straight and flat, without any visual blockages. On the date in question, the sky was cloudy and the road was dry.
- [5] The collision occurred between 3:00 pm and 3:30 pm on a weekday. As a result, school zone speed and passing prohibitions were in effect, pursuant to the provisions of the Motor Vehicle Act, R.S.B.C. 1996, c. 318.
- [10] In evidence the judge accepted, Ms. Sharma explained that as she approached her friend's home, located on the right side of the street, she braked and turned on her right signal. She then stopped, before deciding to park on the opposite side of the street. She made a shoulder check and seeing no vehicles began to move slowly to the left to make a U-turn. Her passenger testified that the respondent signalled her intention to begin to turn left. The judge found as a fact that Ms. Sharma's brake lights were operational, that she did brake and that her left turn signal was activated. At all material times before starting to turn, Ms. Sharma's vehicle substantially occupied the right, eastbound lane, the same lane occupied by Mr. Kandola behind Ms. Sharma.

- [11] Although Ms. Sharma gave evidence that she stopped for some seconds before beginning to turn left, the judge found it unnecessary to decide whether she stopped completely or not. More importantly, in my view, the judge accepted that Ms. Sharma had not seen the appellant's van when checking what was behind her, but did not analyse any implications for liability that might arise from that fact. I will return to this matter after I describe the remainder of the judge's factual findings.
- [12] The judge reached several critical conclusions about Mr. Kandola's driving. First, he found Mr. Kandola's evidence, and that of his passenger, unreliable. He concluded that Mr. Kandola collided with Ms. Sharma as he was attempting to pass her on the left. At that time, being in a school zone, the appellant was not entitled to pass. His obligation was to wait behind the respondent's vehicle until the eastbound lane was clear for him to use.
- [13] The judge found that Mr. Kandola was not paying proper attention and failed to see Ms. Sharma's brake lights or the turn signals. Further, Mr. Kandola's van was too close to Ms. Sharma's car when she began to turn. As a result, he could not avoid the collision. Based in part on the evident force involved in the collision, the judge concluded that Mr. Kandola was also driving too fast.
- [14] Mr. Kandola challenges some of these conclusions, arguing that the judge drew inferences unsupported by any proven facts. He contends that the judge in effect became his own accident reconstruction expert, reaching conclusions that are unsupported by the evidence and which, in any event, require expert evidence.
- [15] I would not accede to this argument. In my view, there was sufficient evidence for the judge to reach his principal conclusions using common-sense inferences. For example, the judge's conclusion that the collision occurred in the left, westbound lane is supported by testimony about Ms. Sharma's turn, the starting position of Ms. Sharma's vehicle substantially occupying the right, eastbound lane, and the location of the damage on the vehicles. Ms. Sharma's vehicle was hit in the area to the front of the driver's door and the driver's-side front wheel. This suggests Ms. Sharma's car was well into the turn from the eastbound lane and was in the westbound lane at the moment of impact. Mr. Kandola's van was damaged on the front right passenger side, suggesting it too was well over to the left at the point of collision.
- [16] The location of the collision in the westbound lane supports the judge's finding that Mr. Kandola was attempting to pass as Ms. Sharma began to turn. Mr. Kandola's failure to avoid the collision supports findings that he was not keeping a proper look out, was driving too close to Ms. Sharma, or was driving too fast for the conditions. The finding that Mr. Kandola was driving too fast is supported by the evidence of the damage to the vehicles. In my view, the extent of the damage is consistent with significant force, and the conclusion that Mr. Kandola was driving too fast is not more than a common-sense inference from the evidence. The evidence supports at least one of the findings I have described, or some combination of all three. On the evidence, it was not possible to parse the precise contribution any of these

factors might have played. The judge did the best he could with the evidence and his findings are owed deference.

- [17] I turn now to what became, in my mind, the most significant issue on the appeal: the judge's failure to address the evidence that Ms. Sharma, although checking for vehicles behind her before starting her turn, did not see the van. Indeed, she did not see the van until immediately before the collision.
- [18] It is necessary to proceed on the basis that Ms. Sharma did check to see if any vehicles were behind her, and did not see any. The van was, however, there to be seen. It is a large white van. It could not have been far from her. The street is long and straight. As the judge noted, it is straight and flat, without any visual blockages. In my view, Ms. Sharma failed to see what was plainly there to be seen. Put shortly, she ought to have seen the van, as any driver adequately keeping a proper lookout would have. On the judge's findings, the van was travelling close to her, it was moving quickly, and was attempting to pass her in the westbound lane. With respect, it is an inescapable conclusion that Ms. Sharma's negligent failure to see the van, and to wait until she could ascertain whether it was safe to start her turn, was a legal cause of the accident.
- [19] The judge fell into reversible legal error by failing to analyse the implications of Ms. Sharma's failure to see the van as she ought to have. This is not a case where a finding that a party was not negligent raises a question of mixed fact and law, reviewable on a standard of palpable and overriding error: see *Tabori v. Renaud*, 2017 BCCA 189 at para. 2. Here, the error lies in failing to assess the relevance for liability of uncontested and obviously material evidence. This is a legal error.
- [20] The judge's findings are sufficient to lay a foundation to determine both that Ms. Sharma's negligence was a cause of the collision, and also to determine relative fault for the purposes of the Negligence Act, R.S.B.C. 1996, c. 333. In my view, it is not necessary to send this matter back to trial. The judge's findings of fact are sufficient to apportion liability.
- [21] As is well-known, apportioning fault is a matter of assessing blameworthiness, not causation: *Cempel v. Harrison Hot Springs Hotel Ltd.*, [1998] 6 W.W.R. 233 (B.C.C.A.) at para. 19. Here, Mr. Kandola was driving too fast and/or too close to Ms. Sharma. He failed to see her brake or signal. He did not maintain a proper lookout. He attempted to pass her in the westbound lane when he was not entitled to do so. His obligation was to remain in the eastbound lane until the respondent had cleared the lane for him. Had he been directly behind the respondent, she would have been entitled to assume that he would wait for her to complete her turn. Had he been in the eastbound lane, the respondent's turn would have cleared the eastbound lane for him to continue. On the basis of the judge's findings, the appellant was at fault in a variety of different and cumulative ways.
- [22] By contrast, the negligence of the respondent derives from failing to see what she should have seen, even though she attempted to do what she ought to have done. In attempting a reverse turn, the respondent was statutorily obliged not to interfere with other traffic. To

ensure that she did not do so, she needed to be aware of her total surroundings. As she was in a school zone, she was under a heightened duty to ensure that she was attempting her turn in a safe manner. She attempted to fulfil her obligations by checking for vehicles behind her, but she failed to do so adequately. She did, however, brake and slow down or stop before starting to turn, and she used her signals to indicate her intention to begin her turn.

- [23] In conclusion, in my opinion, Ms. Sharma's blameworthiness is substantially lower than Mr. Kandola's. I would apportion fault at 75% to Mr. Kandola and 25% to Ms. Sharma.
- [24] Given the view I have taken of the respective liability of the parties, I do not find it necessary to further address the alleged error that the judge failed to analyse the obligations of a driver engaged in a reverse turn under the Motor Vehicle Act. Those obligations have been considered, to the extent that statutory breaches may be evidence of negligence, in my analysis.
- [25] Mr. Kandola's main position in the court below was that the respondent was wholly liable for the accident. Indeed, he brought a no evidence motion at the completion of the plaintiff's case. As I see it, the possibility of apportionment was treated as a remote possibility. In this Court, Mr. Kandola maintained in his factum that the appeal should be allowed, an order entered that the respondent was wholly liable for the collision, and the action dismissed. The request for a new trial was put as an alternative, although it was the order sought at the conclusion of the oral hearing.
- [26] In these circumstances, even though I would allow the appeal, I regard success to have been mixed, and would order each party to bear their own costs. I would remit the disposition of trial costs to the trial judge.
- [27] In the result, I would allow the appeal, set aside the order on liability entered below and substitute an order that Mr. Kandola be declared 75% at fault for the accident and Ms. Sharma be declared 25% at fault.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Tysoe"

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