

Citation: *R. v. Okoh*, 2022 YKTC 34

Date: 20220901
Docket: 21-05526
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

JANINA MARIE OKOH

Appearances:
Kelly McGill
Janina Okoh

Counsel for the Territorial Crown
Appearing on her own behalf and
represented by Daniel Okoh

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): Janina Okoh is charged with failing to stop at a red light contrary to s. 176 of the *Motor Vehicles Act*, RSY 2002, c. 153 (the “Act”). Ms. Okoh entered a not guilty plea and the matter proceeded to a trial, in which Ms. Okoh was represented by her husband, Daniel Okoh. It was clear that Mr. Okoh put considerable time and effort into preparing for every aspect of this trial and he proved himself to be a strong and effective advocate on behalf of his spouse, notwithstanding his lack of legal training.

[2] The charge before the Court relates to a motor vehicle accident, involving Ms. Okoh and Derek Johnstone, at the intersection of Mountain View Drive and Range

Road in Whitehorse, Yukon, just after 8:00 a.m. on November 30, 2021. Crown relies on the evidence of three witnesses: Cst. Cole Williams, Derek Johnstone, and Amanda Young. In defence of Ms. Okoh, Mr. Okoh called two witnesses: Paschal Onyekonwu and Ms. Okoh, who testified on her own behalf.

[3] Much of the evidence is not in dispute. The following facts are clear:

- Mr. Johnstone was driving up Mountain View Drive towards Porter Creek in a City of Whitehorse pickup truck (which I will refer to simply as the truck for the purposes of this decision). Immediately before the accident, Mr. Johnstone's truck was stopped in the intersection of Mountain View Drive and Range Road, waiting to make a left turn onto Range Road to travel in the direction of Yukon University.
- Ms. Okoh was coming from the opposite direction, driving down Mountain View Drive in a Nissan Maxima (which I will refer to as the car). She entered the intersection intending to drive straight through to continue travelling towards downtown Whitehorse.
- Ms. Young was operating a school bus on her morning route on Range Road coming from the Northland Trailer Court. At the relevant time, she was the first vehicle stopped at the red light on Range Road at the intersection with Mountain View Drive, waiting for the light to turn green so that she could proceed through the intersection towards Yukon University to complete her route, which ends at Takhini Elementary School.

- Mr. Onyekonwu was also on Range Road but was coming from the opposite direction of the school bus, driving towards the intersection, intending to turn left onto Mountain View Drive to travel towards Porter Creek on his way home from a night shift. At the relevant time, he had just reached the point on Range Road where the road curves to the right leading up to the intersection with Mountain View Drive.
- There is no doubt that at some point Mr. Johnstone commenced his turn towards Range Road. During the turn, the front end of the car driven by Ms. Okoh collided with the passenger side doors of the truck.

Issue

[4] Based on the evidence of all of the witnesses, including Ms. Okoh herself, there is absolutely no doubt that the traffic light governing Mountain View Drive had at least turned yellow before Ms. Okoh entered the intersection. However, Ms. Okoh is not charged with an offence contrary to s. 175 of the *Act*, which prohibits entering an intersection on a yellow light unless a stop cannot “be made in safety”. It should be noted that Crown conceded, and I would agree, that failure to stop at a yellow light, contrary to s. 175 of the *Act*, is not an included offence in this case. Accordingly, being factually satisfied that Ms. Okoh entered the intersection on a yellow light is not sufficient to support a conviction. Ms. Okoh is charged with failing to stop at a red light; therefore, at issue is whether I am satisfied that the traffic light was red at the time Ms. Okoh’s car entered the intersection, an offence contrary to s. 176(1) of the *Act* which requires that:

- (1) When a red light alone is shown at an intersection by a traffic control signal, the driver of a vehicle approaching the intersection and facing the red light
- (a) shall stop immediately before entering the marked crosswalk on the near side of the intersection or, if there is no such marked crosswalk, then immediately before entering the intersection; and
 - (b) shall not proceed until a traffic control signal instructs them that they are permitted to do so,

which would logically be when the light turned to green.

[5] As this is a strict liability offence, the onus is on the Crown to satisfy me that the *actus reus* or act, namely entering the intersection on a red light, has been proven. The standard of proof is beyond a reasonable doubt. Once the prohibited act is proven, the burden in a strict liability offence shifts to the defendant to establish that they were duly diligent in taking all reasonable steps to avoid the commission of the prohibited act. In this case, Ms. Okoh denies having committed the prohibited act, insisting that she entered the intersection on the yellow light, and she has not advanced a defence of due diligence.

[6] Accordingly, the only issue before me is whether or not the Crown has proven beyond a reasonable doubt that Ms. Okoh's car entered the intersection when the light was red. This factual determination, in turn, depends on an assessment of the credibility of the four witnesses who were present at the time of the accident, Mr. Johnstone and Ms. Young who say the light was red, and Mr. Onyekonwu and Ms. Okoh who say the light was yellow. This excludes Cst. Williams, the investigating officer, as he did not arrive until after the accident, and, therefore, his evidence, other than photographs

taken at the scene, offers little to assist me in reconciling the conflicting evidence on the colour of the traffic signal at the crucial moment.

The Law

[7] The assessment of witness credibility occurs within a well-established legal framework. Firstly, I am bound by the test set out by the Supreme Court of Canada in the decision of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, which states that if I believe the accused, I must acquit. Even if I do not believe the accused, I must ask myself whether the evidence presented by the defence nonetheless raises a reasonable doubt, and, if so, I must acquit. Even if the accused's evidence is not believed and does not raise a reasonable doubt, I must ask myself whether, based on the evidence I do accept, I am satisfied beyond a reasonable doubt of the guilt of the accused.

[8] The British Columbia Court of Appeal, in *R. v. Ay* (1994), 59 B.C.A.C. 161, added an additional refinement to the *W.(D.)* test, noting that if I do not know whether I believe the evidence of the accused or the complainant or if I am unable to reject the evidence of the accused, I must acquit.

[9] In assessing the credibility and reliability of the evidence, none of the evidence should be scrutinized in a vacuum, but should be considered within the context of the evidence as a whole. In so considering, it is open to the court to accept some, all, or none of the evidence of any particular witness.

[10] Several cases, including *R. v. J.J.R.D.*, (2006), 2180 O.A.C. 37, at para. 53, have concluded that an accused's evidence can be rejected "based on a considered and

reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence”.

[11] It is crucial, when assessing credibility, particularly where the credibility of the accused’s evidence is assessed in relation to the credibility of the complainant’s evidence as in *J.J.R.D.*, that the court not approach the assessment as a question of preferring one version over the other; in other words, by deciding which version is more likely to be true. The focus must remain, at all times, on the question of whether or not the Crown has met its burden of proving the offence beyond a reasonable doubt.

[12] A final important point on the law in relation to credibility assessments, it is important to note that credibility requires consideration not just of believability, but also of reliability. In *R. v. Sweet*, 2013 YKSC 42, at para. 7, a decision of the Yukon Supreme Court, Gower J. explained the difference as follows:

...Credibility has to do with the witness’s veracity, whereas reliability has to do with the accuracy of their testimony and engages a consideration of their ability to accurately observe, recall and recount the events at issue. ...

[13] The distinction is an important one. A witness can firmly believe in a particular version of events, and testify exhibiting no indications of deceitfulness and yet, can be entirely mistaken. In such circumstances, the witness is not deliberately lying or misleading the court, but their evidence is nonetheless too unreliable to be accepted by the court.

Analysis

[14] Turning first to the evidence of the defence, as indicated, Ms. Okoh testified and she said that she was approximately one car length away from the intersection when the light turned yellow. She believed that it was unsafe to stop given the winter driving conditions, so she proceeded through the intersection noting that she had the right of way. This was supported by the evidence of Mr. Onyekonwu who testified that Ms. Okoh's car was just coming into the intersection when the light turned yellow or that she was already in the intersection when the light turned yellow.

[15] I must note that I found Mr. Onyekonwu certainly to be well meaning with no indicators that he was being deliberately untruthful; however, at the same time, I found his evidence to be extremely confusing, despite Mr. Okoh's best efforts to get a clear picture of what Mr. Onyekonwu actually observed. Indeed, I asked a number of questions myself to try to assist in achieving clarity. Unfortunately, ultimately, Mr. Onyekonwu's testimony lacked both precision and orienting information to assist me in understanding exactly what he observed, and specifically what happened when, and exactly where the various parties were at crucial moments. I would also note that Mr. Onyekonwu was actively driving and coming around a curve when he made his observations. As a result, a time when his attention would have been focussed on operating his own vehicle. This would affect both his opportunity to view what occurred and would split his attention. The combined effect of these concerns undermines the overall reliability of Mr. Onyekonwu's evidence to the point where I simply do not believe it can be safely relied upon in these proceedings.

[16] Turning to Ms. Okoh's evidence, there were similarly no indicators that she was being deliberately untruthful, but there are factors which do cause me significant concern about the reliability of her recollection of events, events that I have no doubt were very traumatic for her given that her young child was in the car at the time of the accident.

[17] Firstly, I had difficulty with Ms. Okoh's assertion that she was approximately one car length back from the intersection when the light turned yellow. Essentially, at her stated speed of 50 to 60 km/hr, if she were that close to the intersection, she would have essentially entered the intersection within a split second of the light turning yellow. In my view, this version of events is inconsistent with the evidence as a whole for a couple of reasons. Firstly, evidence from both Mr. Johnstone and, more particularly Ms. Young, was clear that other vehicles, at least one if not two, travelling in front of Ms. Okoh had entered and crossed the intersection while the light was yellow. This would not have been possible on Ms. Okoh's version of when the light turned yellow.

[18] Secondly, if Ms. Okoh had been as close to the intersection as she suggests when the light turned yellow, the collision itself would have occurred while the light was still yellow, as yellow lights are timed to give drivers enough time to clear the intersection before the light turns red. While it is a live issue before me whether the light was red or yellow when Ms. Okoh actually entered the intersection, the evidence is very clear, in my view, that the collision itself occurred when the light was red.

[19] My other major concern with Ms. Okoh's version of events is that she testified she did not see the truck in the intersection until it was right in front of her. She testified

her view was blocked by an SUV that was travelling from the same direction as she was, heading down Mountain View Drive, but it was waiting to make a left turn onto Range Road. However, no one else who was present, including Mr. Onyekonwu, seems to have seen this SUV. Indeed, Mr. Onyekonwu suggests the intersection was clear but for the truck and car involved in the collision. Though again, his evidence was very confusing, and that may not have been the impression he meant to leave me with.

[20] In response to Crown submissions on this point, Ms. Okoh noted that she had not testified that this SUV blocking her view of the truck was actually in the intersection, only that it was in the left turn lane. However, if I were to accept this submission as a valid explanation as to why no one else saw the SUV, I would, nonetheless, be left with a significant concern affecting the credibility of Ms. Okoh's evidence on this point. Specifically, if the SUV was simply in the left turn lane and had not advanced into the intersection, I fail to see how it could possibly have blocked Ms. Okoh's view of Mr. Johnstone's truck in the intersection. Firstly, the intersection in question is a comparatively wide one, with considerable distance between the two crosswalks across Mountain View Drive located at either end of the intersection and Mr. Johnstone's truck was located at the midway point of the intersection, as marked on the satellite photo by various witnesses. Secondly, the approach to the intersection on Mountain View Drive, as seen in the satellite photo, is straight on, rather than coming around a curve to the left where one might reasonably expect that a vehicle ahead, but in the left turn lane, may block, or at least obscure, the view of the intersection. In the circumstances, this SUV, if there was one, simply could not have blocked her view of the truck until

Ms. Okoh was already in the intersection, unless the SUV itself was also some considerable distance into the intersection. Again, if it was in the intersection, it would have been sufficiently proximate to the accident site that it makes absolutely no sense that no one else would have seen it there.

[21] In the result, I am not satisfied that Ms. Okoh's stated recollection is accurate or reliable. Accordingly, applying the *W.D.* test, I find that I do not, for the reasons stated, believe the evidence of Ms. Okoh, nor does the evidence of the defence raise a reasonable doubt. This then leaves the question of whether the remaining evidence is sufficient to satisfy me that the *actus reus*, or prohibited act, has been established to the requisite standard of beyond a reasonable doubt.

[22] Turning first to the evidence of Mr. Johnstone, while again there were no indicators he was being deliberately untruthful, his evidence did suffer from a major inconsistency. Specifically, he testified on direct that the light turned yellow and he waited for one car to exit the intersection. Another went through the yellow light, and once that car exited there was a break in traffic. The light turned red and he initiated his turn.

[23] On cross-examination, it was put to Mr. Johnstone that in the written statement he provided to police, he indicated that once the light turned yellow, he waited for the last vehicle in the intersection to clear so he could make his turn. He further indicated that when he commenced his turn the light was still yellow, but that it turned red during the last portion of his turn and was red at the time the collision occurred.

[24] As the very issue before me is when the traffic light turned from yellow to red, this inconsistency, which results in conflicting versions about when the light changed in relation to when Mr. Johnstone began his turn, is extremely concerning in assessing whether his evidence can be relied upon on this crucial point, if at all. Indeed, the inconsistency is significant enough that were the Crown's case to be based solely on Mr. Johnstone's evidence, I would have to conclude that it would be unsafe to convict on the basis of his evidence alone.

[25] This then leaves what, in my view, is the crux of this case, whether the evidence of Ms. Young is sufficiently credible and reliable to satisfy me that the prohibited act has been proven beyond a reasonable doubt.

[26] Ms. Young testified that the light turned yellow, traffic slowed, the intersection cleared, and the truck started to make the left-hand turn. She testified that there was a decent gap between the vehicle that had already gone through the intersection and the vehicle that was oncoming, which would have given the truck enough time to make the turn considering the light was turning red. She further testified that the light had turned to red when Ms. Okoh's vehicle entered the intersection. Indeed, Ms. Young is the only witness that clearly stated that Ms. Okoh entered the intersection when the light was red as alleged.

[27] Mr. Okoh very forcefully argued that I ought not to accept Ms. Young's evidence for three reasons: firstly, because Ms. Young knows Mr. Johnstone; secondly, because of inconsistencies in Ms. Young's evidence, and thirdly, because it is impossible or implausible that Ms. Young could have observed both the light turning red and the time

Ms. Okoh entered the intersection from her vantage point. This latter point is interrelated with Mr. Okoh's argument that Ms. Okoh could not have entered the intersection on the red light if Mr. Johnstone started his turn while the light was still yellow as testified by Ms. Young, based on the impact site on the truck.

[28] Dealing with the first of these arguments, Ms. Young testified that following the accident, she recognized Mr. Johnstone when he got out of the truck as she was driving through the intersection. She indicated that she knew him as they were both involved in hockey and both are in the transportation industry. She noted that, as there are a relatively small number of people in transportation in the Whitehorse area, people tend to be acquainted with each other. However, there was nothing to suggest that the relationship was a particularly close one or that it influenced Ms. Young's evidence in any way. I would note that it was clear that Mr. Onyekonwu was similarly acquainted with the Okohs, as he testified that he recognized the car as belonging to the Okohs and he contacted Mr. Okoh to let him know about the accident. While Mr. Onyekonwu's evidence was confusing, it was not undermined in any way as a result of the nature of the pre-existing relationship between Mr. Onyekonwu and the Okohs. The mere fact people are known to each other does not, without more, undermine their credibility.

[29] Turning to the question of inconsistencies, Mr. Okoh points to two that must be addressed. Firstly, Mr. Okoh argues that Ms. Young's testimony contradicted her written statement. Specifically, at trial, she testified that she was stopped at the red light when she observed the accident. In her statement, she wrote "I was driving the school bus at the time with children on board. I continued driving but informed the City Manager on duty at my next available stop..."

[30] With respect, and as discussed at length during Mr. Okoh's submissions, I do not find this to be a clear or material inconsistency. It must be remembered that the statement is a very brief overview consisting of only eight lines, rather than a formal statement. In the first six lines, Ms. Young describes the accident she observed. The above quoted passage makes up the final two lines. The statement does not include a clear reference as to exactly where Ms. Young was when she observed the accident. In my view, the failure to include this information, does not amount to an inconsistency. Furthermore, I am satisfied that the reference to driving is intended to be taken in the general sense, namely that on that morning, Ms. Young was driving her normal route, rather than intended to mean she was moving rather than stopped at the exact time she observed the accident.

[31] The second inconsistency is between Ms. Young's evidence at trial and the independent evidence found in the photographs filed as exhibit 2. Ms. Young testified that the front end of the car struck the truck in the box area. As indicated, this is contrary to the photographs which depict the impact site as being primarily the front passenger door of the truck, with some damage also observable on the rear passenger door. This must be acknowledged as inconsistent.

[32] However, in assessing the impact this inconsistency has on the overall credibility and reliability of Ms. Young's evidence, I note that the photographs in exhibit 1 show the impact site on the car to be primarily the headlight area on the passenger side rather than across the front end of the car. From Ms. Young's vantage point, she would have seen the accident looking at the rear end of the truck and the driver's side of the car. As the photographs show that it was the passenger headlight area of the car that impacted

with the passenger doors of the truck, the majority of the hood area of the car, which seemingly did not impact the truck, would have been aligned further down the truck in the general area of the truck box. In the circumstances, it is not unreasonable that from Ms. Young's perspective it would have appeared that the car struck the box area. While not strictly speaking accurate, it is not an inconsistency that undermines Ms. Young's overall credibility, nor, unlike Mr. Johnstone's evidence, does it relate to a crucial issue, and therefore it does not raise the same concerns about the reliability of Ms. Young's evidence on the issue of what colour the light was when Ms. Okoh entered the intersection.

[33] I would pause here to address Mr. Okoh's argument that the impact site on the truck should persuade me that Ms. Okoh could not have entered the intersection on the red light. While the argument was somewhat difficult to follow, what I understood Mr. Okoh to be saying was that as the photographs indicate the impact site to be primarily on the front passenger door of the truck, the truck could not have been too far into its turn when struck by the car. If the light was still yellow when the truck started its turn, then Ms. Okoh, given the much longer distance her car would have to have travelled into the intersection before striking the truck, must have entered the intersection on the yellow light.

[34] In considering this argument, I note again that the impact site on the car, being the headlight area on the passenger side, indicates that the majority of the front end of the car would be aligned further down the truck in the box area. Therefore, the truck would have been further into its turn than Mr. Okoh suggests. As the turn would begin from a full stop, I am not persuaded that the fact Mr. Johnstone began to turn when the

light was still yellow necessarily means Ms. Okoh must have entered the intersection on the yellow light.

[35] Mr. Okoh's final argument with respect to Ms. Young's evidence is that she would have to have looked to the left to see the light change to red such that she could not possibly have also seen Ms. Okoh enter the intersection from the right. He says that for her to have seen both, would have required her to have two heads, as each would have required her to turn her head in opposite directions.

[36] Again, I would disagree with this characterization. Ms. Young was located some distance back from both the light controlling Ms. Okoh's entry into the intersection and the lane Ms. Okoh was travelling in. As a result, a minor shift of the head and eyes would have allowed her to very quickly see both the light on one side of the intersection and the vehicles entering from the other side.

[37] I note that Ms. Young is an experienced, professional driver who makes a point of paying close attention, scanning the traffic around her, when she is driving the school bus as she is transporting children. Furthermore, she had a clear and unobstructed view of the entire intersection with the large windows in the school bus giving her "a picture view". I have little difficulty concluding that Ms. Young was capable of seeing both the change in the light and Ms. Okoh's entry into the intersection from her vantage point.

[38] Overall, I found Ms. Young to be a very compelling witness, unshaken on cross-examination. I found her evidence to be both credible and reliable on all points, with the sole exception of her being mistaken on the actual point of impact on the truck.

Otherwise, I accept her evidence in its entirety, and based on her evidence, I am satisfied beyond a reasonable doubt that Ms. Okoh did, in fact, enter the intersection when the light was red. Thus, I find Ms. Okoh guilty of the offence of failing to stop at a red light contrary to s. 176 of the *Act*.

RUDDY T.C.J.