SUPREME COURT OF YUKON

R. v. Sidhu, 2016 YKSC 32

Date: 20160722
S.C. No.15-AP016
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

MANDEEP SIDHU

Appellant

Before Mr. Justice R.S. Veale

Appearances:
Karen Wenckebach — Counsel for the Respondent
Mandeep Sidhu — Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Sidhu appeals his conviction on a charge of careless driving in connection with an incident that took place on July 12, 2015 in Whitehorse. In addition to his summary conviction appeal, Mr. Sidhu has brought an application to introduce fresh evidence. Both issues were argued at the same time.

[2] The evidence Mr. Sidhu seeks to admit includes a number of reports and notes relating to interactions between Mr. Sidhu and the investigating police officer, Constable Mitchell Hutton, in 2010 and 2011 in Watson Lake. It also includes Cst. Hutton's notes from July 12, 2015, a number of court transcripts, a USB key with a recorded interview

of a witness in an earlier investigation, and a letter from a car dealership about a defect in Mr. Sidhu's vehicle.

BACKGROUND

[3] The trial of this matter was held in Territorial Court on October 6, 2015. The case against Mr. Sidhu was made by Cst. Mitchell Hutton, and Mr. Sidhu testified in his own defence. The tenor of Mr. Sidhu's defence was that Cst. Hutton has an animus towards him, has lied in the past, and that his evidence about Mr. Sidhu's careless driving in this instance was either greatly exaggerated or fabricated.

[4] Cst. Hutton testified that on July 12, 2015, at approximately 11:55 p.m., he was stopped in the left lane of Two Mile Hill conducting a traffic stop. His emergency lights were on. As he was walking from the stopped vehicle back to his own, Mr. Sidhu drove by at a high rate of speed and honking loudly. Cst. Hutton estimated that Mr. Sidhu's vehicle was about a foot away from the police vehicle when it passed him, despite the road having three or four lanes going the same direction at that point. Cst. Hutton recognized both the truck and Mr. Sidhu driving. He pursued the vehicle but was unable to catch it. He estimated that Mr. Sidhu was driving between 100 and 110 km/h when he passed Cst. Hutton and about 120 km/h afterwards.

[5] Cst. Hutton was cross-examined by Mr. Sidhu about their past interactions in 2010 and 2011, which resulted in charges of assaulting and obstructing a peace officer, mischief and uttering threats, all of which were dropped according to Mr. Sidhu. Mr. Sidhu also challenged Cst. Hutton about a charge and *ex parte* conviction (subsequently overturned) for driving while using a cell phone, taking the position that

Cst. Hutton knew the device was an iPod when laying the charges and that he proceeded on a pretense.

[6] In giving his evidence at trial, Mr. Sidhu adopted a video he took of the scene after the fact. He said that he did not anticipate the stopped vehicles being in the left lane, that the emergency lights on the police car were blinding, and after realizing their location only at the last minute, he honked and accelerated past in order to avoid an accident. He expressed concern that he would have skidded if he had tried to brake. He denied going faster than 50 or 60 km per hour and said he would not have done so because he was aware there was a police car on the road. He also testified that the velocity stack of his truck's engine made a loud noise that could have made it sound like he was accelerating faster than he was.

[7] In his reasons for judgment, Chisholm J. found that Mr. Sidhu's assertion that he was driving at or below the speed limit could not be reconciled with his evidence that he only at the last minute realized the police vehicle and other car were stopped in the left lane. If he were travelling at the low speed he said, given the driving conditions, he would not have ended up in the position of nearly colliding with the police car. Chisholm J. was also sceptical about Mr. Sidhu having the presence of mind to honk his horn if indeed he was making a last-second manoeuver to avoid the police vehicle.

[8] Chisholm J. preferred the evidence of Cst. Hutton, despite Mr. Sidhu's challenge of his credibility. With respect to the iPod misidentification, he found that on the evidence before him, there was no basis to conclude that Cst. Hutton was untruthful about his belief of the nature of the device and that "[t]he most that can be said is that he was mistaken with respect to the device being operated" (para. 17). Regarding the

other charges laid against Mr. Sidhu in 2010 and 2011, the fact of those charges, without more, was not sufficient to allow any adverse inference about the overall credibility of Cst. Hutton.

[9] Ultimately, Judge Chisholm found that Mr. Sidhu was driving without either due care or attention or reasonable consideration for others using the road. A stunting charge that had also been laid was stayed pursuant to the *Kienapple* principle.

FRESH EVIDENCE APPLICATION

[10] The four-part test for the admission of fresh evidence is set out in *R. v. Palmer*, [1980] 1 S.C.R. 759 (see also *R. v. G.D.B.*, 2000 SCC 22):

> 1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial. This criteria is relaxed in criminal cases.
>
> 2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> 3) The evidence must be reasonably capable of belief.
>
> 4) The evidence, if believed, could reasonably be expected to have affected the outcome of the trial.

[11] Mr. Sidhu says that his fresh evidence meets this four-part test. Counsel for the Crown disagrees, saying it meets none of the four criteria, and that its failure to meet the first and the fourth are fatal to this application.

[12] The specific pieces of evidence filed in court by Mr. Sidhu were portion of general reports and notes from August 14, 2010 and August 23, 2011 (authored by Cst. Hutton), two pages from the ITO submitted by Cst. Hutton when he was seeking a warrant to search Mr. Sidhu's iPod, Cst. Hutton's Report to a Justice following his seizure of the iPod (dated September 8, presumably 2011), the first page of Cst. Hutton's handwritten

notes about his stop of Mr. Sidhu on August 23, 2011, a vehicle impoundment form issued to Mr. Sidhu and dated August 23, 2011, a two-page court transcript of *Summary Conviction Act* trial held *ex parte* on May 15, 2012, a USB key with Cst. Hutton's August 23, 2011 interview of Dakota Hinton, a letter from Mark Heynen (automotive technician) about Mr. Sidhu's 2001 GMC W5500 vehicle (relevant to the 2010 charges), and a letter from Mic Mac Motors about Mr. Sidhu's 2010 Toyota Tundra (relevant to the conviction being appealed).

[13] While Mr. Sidhu concedes that all of the evidence he has proffered was available at the time of the trial before Judge Chisholm, he says that his failure to present it then was a consequence of his inexperience as a lay litigant and the fact that much of it was contained in 2600 pages he received in response to an Access to Information Request and which required significant time to process. He is of the view, however, that this failure is not determinative, as there is a real risk of a miscarriage of justice. Crown disagrees, saying that, not only did Mr. Sidhu know about the existence of the evidence, but he also cross-examined Cst. Hutton about the contents, even if done without the actual documents. She also disagrees with Mr. Sidhu's assertion that it would have affected the trial outcome or that there was any risk of a miscarriage of justice.

[14] I agree with the Crown that the fourth element of the *Palmer* test is determinative in this application.

[15] I recognize that, especially with a self-represented accused, the first part of the test may be relaxed. I do not feel that I need to consider this element in great depth, however, given my finding about Mr. Sidhu's failure to satisfy me of the fourth part as set out below.

[16] While not all of the documentation about Mr. Sidhu's past interactions with Cst. Hutton is clearly relevant to this charge, some of it nonetheless could arguably be used to challenge Cst. Hutton's credibility and provide evidence of an animus towards Mr. Sidhu. The issue for Mr. Sidhu though is that not only was this evidence available at the time of his trial, but he put the substance of this position to Cst. Hutton and before the court. Specifically, after a brief *voir dire*, Ms. Sova, the Territorial Crown at trial, advised that the Crown had conceded an appeal of Mr. Sidhu's conviction for driving with a cell phone on the basis that the device in question was an iPod and not an iPhone. In cross-examination by Mr. Sidhu, Cst. Hutton agreed that he gave a statement, used at the *ex parte* trial, that Mr. Sidhu was using a cell phone while driving. Mr. Sidhu did not pursue this further, evidently concluding that he had made his point by responding "Excellent. That answers that question for me." Mr. Sidhu also raised the issue of the 2010 charges with Cst. Hutton, but did not pursue it beyond establishing that Cst. Hutton had charged him with obstructing a peace officer and public mischief. The fact that Mr. Sidhu did not have the documents he now seeks to admit at hand does not get him any further ahead in the circumstances, as Cst. Hutton did not disagree with their history as it was put to him and Mr. Sidhu opted not to probe any further.

[17] With respect to the letters from Mr. Heynen and Mic Mac Motors, I do not see how the first is relevant, but in any event, Mr. Sidhu was given some latitude to cross-examine Cst. Hutton about the 2010 arrest and did not pursue that line of questioning. The letter from Mic Mac Toyota I don't think can be seen as likely affecting the trial outcome. According to Mr. Sidhu the defect in the mass air flow sensor means that the truck could not have accelerated as fast as Cst. Hutton alleged. However, as I read

Judge Chisholm's reasons for judgment, the conviction for careless driving was based on Mr. Sidhu's speed as he approached the stopped vehicles. There is nothing in the letter filed by Mr. Sidhu that says his car was incapable of driving at a speed above 50 or 60 km per hour, even if its acceleration was indeed compromised.

[18] I conclude that Mr. Sidhu's fresh evidence application must fail as he has not demonstrated that the evidence he seeks to admit could reasonably be expected to have affected the result of the trial.

APPEAL OF SUMMARY CONVICTION

[19] As set out in *R. v. Biniaris,* 2000 SCC 15, a verdict is reasonable if it is one that a properly instructed jury or a judge could reasonably have rendered. As framed by Deschamps J. in *R. v. R.P.*, 2012 SCC 22:

> [9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; R*. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).

[20] I cannot find that Chisholm J. made such an error in his findings of fact. He reviewed the evidence of both Cst. Hutton and Mr. Sidhu and drew reasonable conclusions supported by that evidence. Accordingly, his decision to convict Mr. Sidhu cannot be said to be unreasonable and I decline to interfere with it.

[21] Mr. Sidhu's appeal is dismissed.

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VEALE J.