COURT OF APPEAL OF YUKON

Citation: *R. v. Kloepfer*,
2019 YKCA 1

Date: 20190103
Docket: 17-YU812

Between:

Regina

Respondent

And

Paul Kloepfer

Appellant

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Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Cooper
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of Yukon, dated October 14, 2016 (*R. v. Kloepfer*, 2016 YKSC 55, Whitehorse Registry 15-01505).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	L. Whyte
Place and Date of Hearing:	Whitehorse, Yukon May 9, 2018
Place and Date of Judgment:	Vancouver, British Columbia January 3, 2019

Written Reasons by:
The Honourable Madam Justice Cooper

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Fitch

Summary:

Mr. Kloepfer appeals from convictions for dangerous driving, dangerous driving causing bodily harm, and two counts of failing to stop at the scene of an accident. Held: Appeal allowed in part. The convictions for failing to stop at the scene of an accident are quashed because the trial judge incorrectly relied on the presumption in s. 252 of the Criminal Code. Acquittals are entered on those counts because, without reliance on the presumption, there is no evidence upon which a properly instructed trier of fact could reasonably conclude that the appellant left the scene with intent to escape civil or criminal liability. A conditional stay is entered on the dangerous driving simpliciter conviction based on R. v. Kienapple. The dangerous driving causing bodily harm conviction remains. A misapprehension of evidence requires more than merely coming to a conclusion that a party disagrees with. Where there is an actual misapprehension of evidence it must go to a material fact that was relied upon in the trial judge's reasoning process.

Reasons for Judgment of the Honourable Madam Justice Cooper:

Introduction

[1] The appellant, Paul Kloepfer, appeals convictions on one charge of dangerous driving contrary to s. 249(2) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*], one charge of dangerous driving causing bodily harm contrary to s. 249(3) of the *Criminal Code*, and two charges of failing to stop at the scene of an accident contrary to s. 252(1.1) of the *Criminal Code*.

[2] For the reasons that follow, I would allow the appeal in relation to the two counts of leaving the scene of an accident, quash the convictions and enter verdicts of acquittal on both counts. I would allow the appeal from the conviction for dangerous driving, quash the conviction and enter a conditional stay of proceedings on that count.

Background

[3] The appellant and his partner live on Mosquito Road, south of Whitehorse. It is a rural area, with large, treed lots and few neighbours. The appellant co-owns his lot with Ernst Bjarsch, who has a cabin on the lot and is there for only part of the year. The other two houses along the road are lived in year round. The lot next to

the appellant is vacant. His nearest neighbours are the married couple Herbert Arnold and Evie Zhender. Next to the Arnold property are R.S. and U.S. and their two sons, T.S. and S.S. (I use initials to identify these individuals due to T.S. being under the age of 18 at the relevant time).

[4] Mosquito Road is a gravel road that is not maintained by the government. Residents living along the road are responsible for its maintenance.

[5] The relationship between the appellant and his neighbours on Mosquito Road is difficult. There are several reasons for the tensions in neighbourly relations. One of the sources of conflict is the neighbours' perception that the appellant does not contribute to the maintenance of the road yet is a heavy user of the road as he operates a large truck that results in a lot of wear-and-tear on the road.

[6] Tensions between the neighbours have led to both the appellant and his neighbours making complaints to the police.

[7] On August 20, 2014, R.S., her sons, T.S. and S.S., and Mr. Arnold were walking along Mosquito Road, back to their residences. They had two dogs with them. The appellant was driving on Mosquito Road, on his way home.

[8] There was no dispute that there was an incident of some kind when the parties encountered each other on Mosquito Road that afternoon. The issue for the trial judge was as to the nature of the incident.

[9] Mr. Arnold, R.S, T.S. and S.S. each testified to being in a part of the road called the "S" curve when the appellant drove up from behind them at a high rate of speed. They testified that the appellant swerved so close to the sides of the road that they were forced off the road. Their evidence was that the appellant hit T.S. in the shoulder or back area and then swerved to the other side of the road and hit Mr. Arnold. The appellant did not stop his vehicle but continued on to his home. There was medical evidence that T.S. suffered soft tissue damage and that Mr. Arnold suffered minor injury.

[10] The appellant testified that prior to coming to the “S” curve he saw some boulders or rocks on the road that concerned him. He thought that his neighbours had placed the rocks on the road, although his neighbours were not in sight. He was concerned that if he drove over the rocks he might damage the undercarriage of his truck so he drove far to the right and drove around them. After driving around the rocks, he encountered his neighbours walking on the road. He testified that he had to slow down and stop while they moved to the side of the road to let him pass. He testified that as he passed, Mr. Arnold hit his truck with a cane, causing a small dent in the side of the vehicle.

[11] The trial judge did not accept the evidence of the appellant nor did he find that it raised a reasonable doubt.

Grounds of Appeal

[12] The issues on appeal are:

a) Did the trial judge err in relying on the statutory presumption in s. 252(2) of the *Criminal Code*;

b) Did the trial judge err in entering convictions for both dangerous driving and dangerous driving causing bodily harm;

c) Did the trial judge misapprehend the evidence; and

d) Did the trial judge apply differing standards of scrutiny to the evidence of the Crown and the evidence of the defence.

Analysis

Failure to Stop at the Scene of an Accident

[13] The application of a legal principle to a set of facts is a question of law and attracts a correctness standard of review (*R. v. Fan*, 2017 BCCA 99 at para. 49).

[14] Section 252 of the *Criminal Code* provides:

> (1) Every person commits an offence who has the care, charge or control of a vehicle…that is involved in an accident with another person…and with intent to escape civil or criminal liability fails to stop the vehicle…give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.
>
> …
>
> (2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle…offer assistance where any person has been injured or appears to require assistance and give his name or address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.

[15] The presumption set out in s. 252(2) provides a shortcut for the Crown for proving the specific intent to escape liability.

[16] The duties that are imposed pursuant to s. 252(2) are cumulative; they must all be discharged. If the duties are not discharged, there may still be "evidence to the contrary" which precludes reliance on the presumption.

[17] If there is any evidence to the contrary, the onus remains on the Crown to prove, beyond a reasonable doubt, the specific intent to escape liability.

[18] Post-accident conduct of a driver who has failed to discharge the duties in s. 252(2) may constitute evidence to the contrary. An example of this is found in *R. v. Gosselin* (1988), 31 O.A.C. 155 (C.A.), where a driver involved in an accident left the scene and drove 2 kilometers to a restaurant where he made two phone calls to the police and awaited their arrival. As the Court stated in *Gosselin*, the fact that the phone calls were made was some evidence to the contrary. Whether what was said during the calls regarding the accident was believed, or disbelieved, did not detract from the fact that the calls were made and, therefore, constituted some evidence to the contrary on the issue of the intent of the accused when he failed to remain at the accident scene.

[19] The Crown refers to the case *R. v. Sanford*, 2014 ONSC 3164. In *Sanford*, the accused was arrested a few minutes after the accident, driving away from the

scene. He was aware that someone else had called the police and he testified he was going to get water. His explanation for leaving was not accepted. In my view, this case is distinguishable in that the evidence to the contrary, that being the evidence of the accused as to his intentions when he was found fleeing the scene, was rejected by the court. The evidence having been rejected, there was no evidence to the contrary.

[20] These cases illustrate that it is important to identify what specific evidence might constitute evidence to the contrary, as it is only if that evidence is rejected that the presumption will apply. In *Gosselin*, the evidence to the contrary was the fact that calls to the police were made, not the substance of the calls. In *Sanford*, the evidence to the contrary was the stated intention of the accused, which was rejected.

[21] There was no dispute that this incident occurred at approximately 4:00 p.m. Nor was there any dispute that both R.S. and the appellant, independently of each other, called the police to lay complaints regarding the incident that had occurred.

[22] A police officer testified that R.S. made a call to the police at 4:06 p.m., advising of her walking companions having been hit by the appellant and the appellant having driven towards his residence.

[23] The police officer also testified that the appellant called 911 at 4:11 p.m. He identified himself and reported his version of the incident. Specifically, the appellant advised that he had been driving on Mosquito Road, his neighbours had blocked the road with big boulders, and that one of his neighbours had hit his truck with a walking stick.

[24] The trial judge's reasons regarding the failure to remain charges were brief. He stated:

> The Crown has proven beyond a reasonable doubt that the accused had an 'accident' involving his truck with each of Mr. Arnold and T.S. He failed to stop his vehicle in each case. There is no evidence to the contrary that his

> intent was other than to escape liability. Accordingly, I find him guilty of both counts as charged.

[25] The trial judge, having rejected the evidence of the appellant as to what occurred on Mosquito Road, concluded that there was no evidence to the contrary. In my view, he erred in doing so.

[26] The evidence to the contrary was the fact that a call was made to the police. There was no dispute that such a call was made. There being evidence to the contrary, the presumption in s. 252(2) did not apply and the court was required to proceed to an analysis of whether the Crown had established beyond a reasonable doubt an intention on the part of the appellant to escape liability. The trial judge failed to undertake such an analysis.

[27] I would allow the appeal and quash the convictions on the two counts of failing to remain at the scene of an accident. Without reliance on the presumption in s. 252, there is no evidence upon which a properly instructed trier of fact could reasonably conclude that the appellant left the scene of the accident with the intent to escape civil or criminal liability. As a result, I would direct that verdicts of acquittal be entered on both counts.

Entry of Multiple Convictions

[28] Application of the principle against multiple convictions is a question of law and attracts a standard of review of correctness *(Housen v. Nikolaisen*, 2002 SCC 33).

[29] The appellant was charged with one count of dangerous driving causing bodily harm to T.S. and one count of dangerous driving causing bodily harm to Herbert Arnold. At the conclusion of the case, the trial judge found that there was insufficient evidence of bodily harm to Mr. Arnold and he entered a conviction for dangerous driving *simpliciter* “with respect to Mr. Arnold” (at paras. 85–86).

[30] The issue on appeal is whether the trial judge ought to have applied the principle against multiple convictions, as set out in *R. v. Kienapple*, [1975] 1 S.C.R. 729, 1 N.R. 322 and *R. v. Prince*, [1986] 2 S.C.R. 480, 33 D.L.R. (4th) 724 [*Prince*], and not have entered a conviction for dangerous driving *simpliciter*.

[31] The principle against multiple convictions precludes the entry of convictions for multiple offences arising from the same matter or delict. The principle does not apply if convictions arise from the same matter but result in personal injury to multiple victims (*Prince*).

[32] In applying the principle against multiple convictions, the court must consider whether there is both a factual nexus and a legal nexus between the charges.

[33] In determining whether there is sufficient factual nexus between the charges, consideration must be given to the remoteness or proximity of the events in time and location, whether there were any relevant intervening events, and whether the actions were related by a common objective (see: *Prince*, para. 20).

[34] It is only if the court finds that there is sufficient factual nexus that it need go on to determine if there is sufficient legal nexus. The fact that the offences share common elements is not, in and of itself, sufficient to establish a legal nexus. The court must determine if there are any distinguishing features as between the offences.

[35] The trial judge found as follows regarding the driving of the appellant:

> …he reacted to the presence of the four individuals by accelerating his truck in a manner which caused him to lose control and nearly collide with RS. It would appear that he reacted further by correcting the trajectory of the truck excessively to the left or southerly side of the road, where he collided with TS. I find he further reacted by veering to the right or northerly side of the road, where he collided with Mr. Arnold. I do not find that either collision was intentional.

[36] It was clear from the evidence that the incident occurred within a very short time span; a matter of seconds. The driving was continuous with no break or

intervening event. There are no distinguishing features as between the two charges and the offence of dangerous driving was essentially subsumed by the dangerous driving causing bodily harm.

[37] Having found that there was no bodily harm to Mr. Arnold and having found the appellant not guilty on the offence of dangerous driving causing bodily harm to Mr. Arnold, there ought not to have been a conviction on dangerous driving *simpliciter*.

[38] I would allow the appeal, set aside the conviction for dangerous driving *simpliciter*, and enter a conditional stay on that count.

Misapprehension of Evidence

[39] The appellant argues that the trial judge erred by misapprehending the evidence as it related to:

a) the return of the appellant's partner;

b) the use by R.S. of her cell phone to take pictures of the scene;

c) the use by T.S. and S.S. of their cell phones; and

d) T.S.'s injuries.

[40] The appellant also argues that the trial judge erred by failing to give effect to evidence that R.S. had been advised that the police would not intervene in incidents between the neighbours unless there were injuries.

[41] A trial judge's findings of fact are entitled to considerable deference and must be respected absent any palpable and overriding error.

[42] *R. v. Lohrer*, 2004 SCC 80, sets out the test to be applied when it is argued that a misapprehension of evidence resulted in a miscarriage of justice: the test is stringent. The misapprehension must go to substance rather than detail, it must be

material to the trial judge's reasoning process, and it must play an essential role, not just in the narrative of the judgment, but in the reasoning process that led to conviction.

[43] For the reasons that follow I am of the view that, with one exception, the instances of misapprehended evidence put forward by the appellant are not misapprehensions of the evidence by the trial judge, but are simply different interpretations of the evidence than those advanced by the appellant.

[44] In the one instance where the evidence was misapprehended, I am of the view that the misapprehension was not one of substance and was not essential to the reasoning process of the trial judge.

The Return of the Appellant's Partner

[45] The appellant testified that as he was driving home he encountered some rocks or boulders on the road that blocked his way. He drove around the rocks as he was concerned about damaging the undercarriage of his vehicle. There was evidence that the appellant discussed the rocks with his partner at home and that they decided to take pictures of them when his partner went to work the next morning. There was no evidence as to when the appellant's partner arrived home and, in particular, no evidence that his partner came home after him and would have encountered the rocks after he did.

[46] The trial judge concluded that the appellant's partner arrived home after the appellant. This was a misapprehension of the evidence, as was conceded by the respondent on the appeal. However, in my view the misapprehended evidence did not play an essential role in the reasoning process of the trial judge.

[47] The trial judge rejected the evidence of the appellant for the following reasons:

a) the theory of a conspiracy on the part of the Crown witnesses was implausible for the following reasons:

   i. it would have required time to plan and such time was not available;

   ii. there were documented injuries which would have had to have been self-inflicted; and

   iii. while there was animosity between the parties it was not sufficient to give rise to such a plot.

b) evidence that the road was blocked by rocks was not credible for the following reasons:

   i. the size of the rocks would not have prevented the appellant from driving over them;

   ii. even if there was a concern about driving over them, the appellant could have easily moved them. This would have been reasonable given that his partner was following him later;

   iii. the appellant was inconsistent about where the rocks were located; and,

   iv. the appellant's partner had no difficulty passing the rocks on her way home.

[48] The trial judge rejected the evidence of the appellant for two reasons, each substantiated by various pieces of evidence. While the trial judge did refer to the partner arriving home after the appellant twice in his reasons for rejecting the evidence of the appellant, this was only one of several reasons for rejecting the evidence of the appellant. I am of the view that the misapprehension did not play an

essential role in the reasoning process that led the judge to reject the evidence of the accused.

The Use by R.S. of Her Cell Phone to Take Pictures of the Scene

[49] The appellant argues that the trial judge failed to understand R.S.'s evidence regarding use of her cell phone for taking pictures of the scene and that this lack of understanding impacted his assessment of her credibility. I disagree.

[50] There was no dispute that R.S. took pictures of the scene with her cell phone shortly after the incident. She testified that the pictures were not good as they did not show the tracks in the road. She was cross-examined on the fact that a week prior to the incident she had taken photos with the same camera and that those photos had turned out well and showed detail. In submissions, defence counsel stressed a perceived inconsistency in the evidence of R.S. regarding both whether she actually took photos and the quality of any photos taken. The trial judge was responsive to this submission. He accurately summarized the evidence on the point and determined that there was no inconsistency.

The Use by T.S. and S.S. of Their Cell Phones

[51] The appellant argues that the trial judge misapprehended the evidence regarding the use of cell phones by T.S. and S.S. The position of the defence at trial was that it was likely that both T.S. and S.S. had cell phones with them at the time of the incident and that it was improbable that they did not take pictures of the scene following the incident. The trial judge addressed this argument. He found S.S.'s evidence to be inconclusive on whether either S.S. or T.S. had cell phones with them. He noted that T.S. testified to having no recollection as to whether he had his cell phone with him. The trial judge did not misapprehend the evidence. He simply had a different interpretation of it than that put forward by the appellant.

T.S.'s Injuries

[52] The appellant argues that the trial judge misapprehended the evidence in relation to the injuries suffered by T.S. T.S. testified to not being able to compete in sports for an extended period; however, there was evidence of T.S. participating and being recognized in sporting competitions. By way of explanation, T.S. testified that he was participating in sports, but was not at the same level as he had previous to the injury. The trial judge accepted this explanation.

Police Intervention

[53] Tensions between neighbours had led to numerous complaints to the police leading up to the events of August 20, 2014. On one occasion, R.S. made a complaint and was advised that the police could not do anything because "nobody got hurt" (at para. 29). The trial judge considered this evidence and the argument that it established a motive to fabricate. He considered this evidence in the context of all of the evidence, including the evidence of the four Crown witnesses and the injuries noted by the doctors. The decision to not give any weight to the argument of fabrication was within the purview of the trial judge.

Different Standards of Scrutiny

[54] The appellant argues that the trial judge applied differing levels of scrutiny to the evidence of the Crown witnesses and the evidence of the appellant. I disagree. The trial judge carefully reviewed the evidence of each witness. He rejected the evidence of one of the Crown witnesses except to the extent that it was corroborated by other evidence. A trial judge who extensively reviews the evidence of a witness and articulates why the evidence is not accepted cannot be said to be applying a greater level of scrutiny to the evidence of that witness when what is being done is providing the witness with an explanation as to why the evidence was not accepted. As stated in *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (O.N.C.A.), at para. 59:

> This argument or some variation on it is common on appeals from conviction in judge alone trials where the evidence pits the word of the complainant against the denial of the accused and the result turns on the trial judge's

> credibility assessments. This is a difficult argument to make successfully. It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.

[55] In conclusion, I would allow the appeal in part.

[56] I would set aside the two convictions for failing to stop at the scene of an accident and enter acquittals. I would set aside the conviction for dangerous driving *simpliciter* and enter a conditional stay of proceedings on that count.

"The Honourable Madam Justice Cooper"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Fitch"