

Citation: *R. v. Monkman*, 2005 YKTC 19

Date: 20050224
Docket: 03-07164
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Barnett

R e g i n a

v.

Jeffrey Monkman

Appearances:

Tracy-Anne McPhee
Edward Horembala, Q.C.

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] Jeffrey Monkman stands charged with careless driving. This is not a criminal charge: it is a charge under s.186 of the *Motor Vehicles Act*. It is alleged that on September 27, 2003 at about 05:33 hours he was driving a 2000 Chevrolet car on the South Klondike Highway about 25 km. north of Carcross and was doing so “without due care and attention”.

[2] Jeffrey Monkman is an RCMP constable. He lost control of the police car that he was driving. The car went off the road and was wrecked.

[3] This was a tragic incident. Heather Benson, age 38, (approximate) and the mother of two young children, was a passenger in the car. She was ejected from the wreck and killed.

[4] The evidence makes it clear that the car was in good mechanical condition before the incident and that the incident was not caused by adverse road or weather conditions.

[5] In September 2003 Cst. Monkman was a member of the three person detachment at Carcross. He had been a member of the Carcross detachment for a little more than two years, an RCMP officer for six years, and was 28 years old - in good health and physical condition.

[6] On Friday September 26, 2003, Cst. Monkman arrived at the detachment office about 10:00 hours. He did some routine office work that morning and then spent the afternoon investigating a sexual assault complaint. In the evening of September 26 he travelled to Heather Benson's home in Tagish, intending to continue his investigation of the sexual assault complaint. Nobody was at the house when he arrived about 20:00 hours. But on looking in a window Cst. Monkman saw what he believed to be marihuana plants. He therefore called a fellow officer, Cst. Turner, to attend in Tagish to confirm his suspicions, which Cst. Turner did.

[7] It was decided that Cst. Turner would stay in Tagish and maintain surveillance at the Benson house while Cst. Monkman returned to Carcross to obtain a search warrant.

[8] The work necessary to obtain a search warrant was not familiar to Cst. Monkman. The justice of the peace who received the materials prepared by Cst. Monkman rejected them twice and it was not until 03:15 hours on September 27 that Cst. Monkman received the search warrant. He says that he was then "a little bit tired" but otherwise in "good" condition.

[9] Cst. Monkman returned to Heather Benson's home in Tagish at 03:40 hours on September 27. He and Cst. Turner awakened and arrested Heather

Benson. She was, Cst. Monkman says, very angry, agitated, and upset. She was handcuffed and placed in the rear seat of the police car where she sat quietly until 05:03 hours while the two officers searched her home and removed 14 marihuana plants and a small calibre rifle that was not properly stored.

[10] At 05:03 hours Cst. Monkman departed Tagish. He intended to transport Heather Benson to Whitehorse, a distance of about 85 km. It was his expectation that Heather Benson would appear in court that morning and then be released upon conditions.

[11] Heather Benson was in the rear of the police car, on the passenger's side. Cst. Monkman says that he told her to fasten her seatbelt but she failed to do this. (He also says that although she was handcuffed, it would not have been difficult for Heather Benson to fasten her seatbelt. I note that in the Yukon Territory the *Motor Vehicles Act* does not impose a positive obligation on the driver of a motor vehicle not to proceed until any passengers are "buckled up".)

[12] Cst. Monkman says that when he departed Tagish "I was tired but not too tired to drive". He had been working for 19 hours.

[13] The posted speed limit on the South Klondike Highway is 90 km/h. Cst. Monkman says that, as is the common practice of most drivers, he usually drove at greater speeds.

[14] It was, of course, still dark when Cst. Monkman drove along the South Klondike Highway that morning. He drove along a long straight stretch of the highway before entering a curve to the right. This section of highway appears in photographs taken by Sgt. Ross Milward (Ex. 7; Appendix C; photos 1 to 4) and also by Keith Godfrey, P. Eng. (Ex. 9; Appendix A; photos 102 to 104).

[15] Photo 5 in Ex. 7 was taken at a point where a vehicle would be commencing to exit the curve. There is a cone placed along the “fog line” in the northbound lane. (The cone is a short distance south of a clearly visible traffic sign on the opposite side of the highway.) The cone marks the approximate location where, at about 05:33 hours, the police car left the travelled northbound traffic lane, went some distance down and along the embankment alongside the northbound traffic lane, then emerged and crossed the highway and went down the embankment alongside the southbound traffic lane where it “pitchpoled” and came to a stop among trees at the roadside.

[16] Sgt. Milward is an RCMP officer. He has been employed investigating motor vehicle accidents for more than 20 years and has testified as an expert witness on many occasions. He expresses his opinions with considerable certainty. He believes that Cst. Monkman was fatigued and travelling excessively fast - likely close to 131 km/h - when the car left the road because Cst. Monkman entered a period of “microsleep” as the car was exiting the curve.

[17] Cst. Monkman acknowledges that he was travelling at speeds above the posted speed limit. He says that, as was his usual practice when transporting a prisoner at night, he had turned off the dash lights (and therefore was not able to monitor his speed with the speedometer.) He estimates that he was travelling 95 to 105; maybe 110 km/h. He says “I didn’t fall asleep throughout that trip”. He explains that the incident happened because he did a momentary shoulder check (i.e.; a glance over his right shoulder to verify that Heather Benson was still okay in the rear seat) “right after I exited the corner before the accident”. He says that when he looked forward again the car was already partly on the gravel shoulder and was being pulled down. He tried to correct the situation but his efforts were not successful.

[18] Keith Godfrey is an independently employed professional engineer who has specialized in the investigation of motor vehicle accidents for more than 20

years. He has testified in a great many court cases in Canada and in the USA. In criminal cases he is called upon to testify both as a Crown and a defense witness. In this case, his opinions are expressed with more caution and reservations than those of Sgt. Milward: Mr. Godfrey says that he is unable to express a definitive opinion about the cause of the accident. Mr. Godfrey says that:

- a. One cannot be certain that the incident commenced just a few seconds before the videotape in the car ceased operating at 05:33:28 hours. It is therefore not possible to confidently calculate the car's average speed along the South Klondike Highway based upon elapsed times. (Other factors also make this calculation uncertain, I believe.)
- b. The car was travelling between 110 km/h and 126 km/h "as it left the road". It is difficult to say "with any degree of confidence" that one end of this range or the other is most likely.
- c. The physical evidence at the scene did not provide information from which he might conclude that driver fatigue was a major causal factor.

[19] The evidence in this case was presented during the course of four days by good counsel who were well prepared. I have not reviewed the evidence in exhaustive detail within these reasons but I have carefully reviewed my extensive notes and I have carefully considered each of the exhibits. I believe that my summary of the evidence accurately covers the essential aspects of this terribly unfortunate matter.

[20] I am told that Cst. Monkman is a hardworking and conscientious police officer, and I am sure that he is. And I do not doubt his credibility: I believe that

he testified truthfully concerning his recollections of the incident. But I am convinced that his recollections are substantially wrong.

[21] The evidence reveals the following facts:

1. At the time of the incident Cst. Monkman had been working continuously for 19 1/2 hours and knew he was “a little bit tired”.
2. Heather Benson was an involuntary passenger in the police car that Cst. Monkman was driving. He knew that she was not “buckled up”. There was no great urgency that required an unduly quick trip into Whitehorse: court did not open there until 10:00 hours. In these circumstances Cst. Monkman perhaps had an enhanced duty to drive carefully and he certainly had no cause to drive otherwise.
3. At the time when the incident commenced Cst. Monkman was travelling at a speed not less than 110 km/h. It was dark. Deer and other animals are known to frequent the highway in the area where the incident happened. And the posted speed limit is 90 km/h. (The fact that many drivers overlook this did not give Cst. Monkman any right or cause to do likewise on that occasion.)
4. The incident did not happen in the manner recalled by Cst. Monkman.

[22] Cst. Monkman says that he did a momentary shoulder check “right after I exited the corner”. It is difficult to appreciate why he might have chosen such an inopportune time to do that check: he might have done it safely while travelling along the long straight stretch of highway before he entered the curve and he might have done it safely along the long straight stretch of highway after exiting the curve if, indeed, he had exited the curve. But the evidence is clear: the car

did not exit the curve in a normal manner. Rather, it continued to travel as if it were still in the curve: it never did “straighten out” and therefore it left the road. While this conclusion cannot be drawn from a consideration of the physical evidence at the scene it is, I believe, the only reasonable conclusion to be reached upon a consideration of all the relevant evidence including Ex. 8. (Ex. 8 is a computerized dynamic reconstruction of the car’s path from the curve to the trees. It was prepared by the Quest Engineering Group whose employees attended to survey the scene on September 27, 2003. A copy of their survey plan is included within Ex. 7 as Appendix C.)

[23] I did not reach or write my decision in this matter quickly or casually. In addition to reviewing and considering the evidence, I have read and considered the authorities provided and cited by counsel and some other authorities also.

[24] Cst. Monkman is alleged to have driven carelessly or negligently. The allegation is not proved because there was an incident which resulted in the death of Heather Benson. As Southin J.A. observed in *Boyes v. Harris* (2000), 82 B.C.L.R. (3d) 324, at p. 328:

There are some accidents which are not caused by a lack of reasonable care on the part of any of the immediate actors.

[25] It must also be understood that the allegation of negligent driving in this case is made under the *Motor Vehicles Act* and not under the *Criminal Code*. The observations of Cory J. in *R. v. Hundal*, [1993] 1 S.C.R. 867 are oft-quoted and particularly appropriate:

Negligent driving can be thought of as a continuum that progresses, or regresses, from momentary lack of attention giving rise to civil responsibility through careless driving under a provincial Highway Traffic Act to dangerous driving under the *Criminal Code*. (p. 885)

...(T)he test for negligence is an objective one requiring a marked departure from the standard of care of a reasonable person. There is no need to establish the intention of the particular accused. The question to be answered under the objective test concerns what the accused "should" have known. (p. 883)

[26] The leading authority in the Yukon is the decision of the Court of Appeal in *R. v. Morrison*, 2002 YKCA 15; (2002), 29 M.V.R. (4th) 11. The court confirmed in that case that s. 186 of the *Motor Vehicles Act* constitutes a so-called strict liability offence and that the Crown is not required to prove that the conduct of the person charged was somehow morally blameworthy.

[27] The applicable legal principles were stated in clear and straight forward terms by Hutchison C.C.J. in *R. v. Weedon* (1987), 7 M.V.R. (2d) 21. He said that:

Driving without due care and attention is an offence under the *Motor Vehicle Act*. The purpose of the Act is the regulation and control of traffic on the highways in the interest of all users of the highway. The Act provides sanctions for improper, careless or inconsiderate driving falling short of being dangerous.

... The objective standard of the reasonable man is the basis for determining if the offence has been committed. (p. 23)

[28] The final case which I have found particularly helpful is the decision of Blair J. in *R. v. Loray* (2003), 40 M.V.R. (4th) 274; affirming (2002), 29 M.V.R. (4th) 243.

[29] I have concluded that Cst. Monkman did indeed drive without due care and attention. When one considers all of the evidence there are, I believe, only two rational possibilities:

- a. Cst. Monkman went to sleep as Sgt. Milward said. I believe this is probable.
- b. Alternatively, the shoulder check which Cst. Monkman recalls was done while the car was still in the curve.

Viewed objectively, each of these possibilities leads inevitably to the conclusion that Cst. Monkman's manner of driving was careless.

[30] I have asked myself if it can truly be said that Cst. Monkman merely suffered a momentary lapse or made a minor error of judgment for which he cannot fairly be faulted. I am convinced beyond all reasonable doubt that the answer to those questions can only be "no" and that Cst. Monkman's guilt has been proved. Indeed, to quote the words of Judge Rohrmoser, the trial judge in the *Loray* case, *supra*, at para. 45 "the manner of driving here goes well beyond a minimum case of driving without due care and attention".

[31] There is one other aspect of this case which demands comment although it does not in any way relate to Cst. Monkman's manner of driving.

[32] Cst. Monkman believed that because Heather Benson had been arrested for "a straight indictable offence" (i.e. cultivating marihuana) she could only be released by a justice of the peace or judge and that the trip to Whitehorse was therefore necessary. Cst. Turner believed this also.

[33] They were wrong.

[34] The trip to Whitehorse was not required by any law.

[35] Sections 503(2) and 503(2.1) of the *Criminal Code* have direct application to the circumstances of Heather Benson after her arrest on September 27, 2003.

Cst. Monkman was authorized by law to release Heather Benson upon conditions and so was the officer in charge of the RCMP detachment at Carcross.

[36] This is not to say that Cst. Monkman was required to release Heather Benson: his power to do so was purely discretionary and, if he had understood the law, he might nevertheless have decided that the conditions of Heather Benson's release should be settled in court. But Cst. Monkman never turned his mind to that issue because he did not understand his powers as an arresting peace officer.

[37] Although I cannot know what decision Cst. Monkman might properly have made in the early morning hours of September 27, 2003, I do know that Cst. Monkman knew Heather Benson as a local resident who had no criminal record. I find it difficult to believe that he would not have released her: she was, after all, only to be charged with cultivating a decidedly small number of marihuana plants.

[38] I have said that Cst. Monkman and Cst. Turner were not well informed upon this area of the law. The evidence makes clear the fact that other more senior officers in Whitehorse were also less than knowledgeable. If that is still the case I expect that corrective measures will be taken forthwith.

Barnett T.C.J.