

Citation: *R. v. Brazeau*, 2017 YKTC 14

Date: 20171804
Docket: 16-11324
Registry: Dawson

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

PATRICK BRAZEAU

Appearances:
Megan Seiling
Patrick Brazeau

Counsel for the Territorial Crown
Appearing on his own behalf

REASONS FOR JUDGMENT

[1] Patrick Brazeau has been charged with having committed the offence of failing to obey a flag person, contrary to s. 134(5) of the Yukon *Motor Vehicles Act*, RSY 2002, c. 153 (the “Act”).

[2] The trial took place in Dawson on March 8, 2017. On March 14, 2017, in court, counsel for the Crown and Mr. Brazeau, who was self-represented, were informed that Mr. Brazeau was acquitted of the charge, with reasons to follow. These are my reasons.

[3] Section 134(5) reads:

Despite anything in this Part, when a flagperson is stationed, or a barricade sign is erected on a highway to direct traffic in connection with any construction, repair or other work on the highway or on land adjacent to the highway, every driver shall obey the directions given by the flagperson or, if none, by the barricades or signs.

[4] I note that “flagperson” is not a term that has been defined within the *Act*.

[5] Section 246 of the *Act* makes it an offence to contravene any section of the *Act* or the *Regulations*.

Testimony of Shannon Carr

[6] Shannon Carr testified for the Crown. He stated that on May 17, 2016 he was employed by Yukon Wildland Fire Management.

[7] He was called to respond to a fire at km 24 of the Hunker Creek Road outside of Dawson. As there was no water readily accessible, a water tender (tanker) was situated on the downhill side of the road and water was pumped from the water tender up the hill to where the firefighters were fighting the fire. Mr. Carr stated that the water tender was encroaching across the centerline of the road. It was located on the second corner of an S-curve in the road where a culvert was situated.

[8] Mr. Carr contacted the fire centre and recommended that there be a road closure. He testified that the road was closed and a sign was posted on top of the Hunker Creek Road summit. There was also a barricade placed there. It was unclear from the evidence, but possible, that the road-closure sign was, in fact, mounted on the

barricade. There was no sign or barricade set up on the downhill side from where the water tender was located.

[9] Mr. Carr testified, however, that the road-closure sign and the barricade did not prevent traffic from continuing to use the road. As a result, the barricade was moved to the side. Mr. Carr further testified that he was not relying on the sign to stop traffic. He stated that he would receive a radio call whenever a vehicle was coming down from the summit. He would then leave the location of the water tender and run up approximately 150 feet towards the summit to the first corner of the S-curve in order to flag down traffic. He flagged traffic down by putting his hand out towards the vehicles in order to stop them. He testified that he was wearing his very bright, yellow uniform at the time.

[10] Mr. Carr stated that his concern was that traffic coming down and around the blind corner on the uphill could potentially fail to stop in sufficient time to avoid the water tender.

[11] Mr. Carr testified that he had to stop a large number of vehicles, and on a number of occasions the water tender was moved in order to allow traffic to pass by, as most of the traffic consisted of large trucks.

[12] At one point, Mr. Carr testified that he received a radio call advising him that several vehicles were coming down from the summit at a high rate of speed. Mr. Carr ran towards the corner in order to stop these vehicles. Mr. Carr stated that he was approximately 150 feet away from where the trucks would have been able to first spot him.

[13] While Mr. Carr was speaking to the driver of the first vehicle, a pickup with a long flat-deck fifth wheel, he observed two Fountain Tire trucks coming down from the summit. Mr. Carr stated that he was standing in the middle of the road at the driver's side of the first vehicle at the time and looking at the front of that vehicle, when he observed the two Fountain Tire trucks.

[14] The front truck, a smaller pickup truck, was travelling at a high rate of speed. The second truck, a larger dually (with two wheels on each side of the rear axle), was travelling slowly.

[15] Mr. Carr testified that he put his arm up to stop the front truck but it went by him at a high rate of speed. He put his arm up to stop the second truck, which was being driven at a much slower rate of speed. He stated that he did so in order to tell the driver of the vehicle that the water tender was in the process of being moved in order to let the trucks pass by. Mr. Brazeau was the driver of the second truck.

[16] However, Mr. Brazeau did not stop the truck he was driving. Mr. Carr stated that the second truck passed by him slowly and, when it became apparent this truck was not going to stop, he threw his hands up in the air. He testified that he made eye contact with Mr. Brazeau when he had his arm out to stop the truck. In cross-examination, however, Mr. Carr testified that it was possible that Mr. Brazeau may not have seen him. (This said, in his direct examination, Mr. Brazeau stated that he did see Mr. Carr. He stated further, however, that he did not see Mr. Carr directing him to stop his vehicle).

[17] Mr. Carr denied, when asked in cross-examination, that he had stopped the front Fountain Tire truck. He stated that the front Fountain Tire truck swerved around the flat-deck truck he had stopped and continued driving.

[18] Mr. Carr testified that the truck being driven by Mr. Brazeau attempted to pass by the water tender but stopped when it was unable to. The truck then became stuck in the shoulder of the road. He testified that the truck almost hit the water tender.

[19] As a result of the truck being driven by Mr. Brazeau becoming stuck, there was a delay of three to four hours in the supply of water to the firefighters. He stated that had Mr. Brazeau complied with the direction to stop, then the water tender could have been moved. The resultant delay would have been perhaps 30 seconds instead of several hours.

[20] A number of photos, taken by the attending RCMP officer, were filed that depicted where Mr. Brazeau's truck and the water tender were, which was not, however where the trucks were located at the time Mr. Brazeau's vehicle became stuck.

Testimony of Mr. Brazeau

[21] Mr. Brazeau testified that he had been driving a truck for Fountain Tire for approximately six years. He was familiar with road work operations and construction stops.

[22] On May 17, 2016 he was following the other Fountain Tire truck on Hunker Creek Road. They stopped at the location where the road-closure barricade was. The barricade was off to the side of the road at the time. There were some individuals from

fire management there but none of these individuals spoke to them. They waited there approximately 10 minutes before proceeding down the road. At the time, he was of the belief that the road had been closed as contrasted to a belief that it was then closed.

[23] Mr. Brazeau stated that he first saw Mr. Carr as he was just finishing up from speaking to Mr. Brazeau's co-worker at the window of his co-worker's truck.

[24] He testified that he did not see a pickup with a fifth wheel flat deck in front of him. Mr. Brazeau testified that he did not have to go around or pass any vehicle in order to drive by the water tender, other than the water tender itself.

[25] He stated that Mr. Carr walked towards him but made no hand gestures towards him and did not speak to him. Mr. Brazeau stated that his driver's side window was open.

[26] Mr. Brazeau stated that, as he was paid by the hour, he would have had no problem stopping and waiting had he thought Mr. Carr was directing him to do so. He was not under any time pressure at the time of the occurrence. As he was travelling at a low rate of speed, he would have had no trouble stopping. He stated that Mr. Carr did not, however, instruct him to stop his vehicle.

[27] Mr. Brazeau tried to pass the water tender and realized that he was not going to be able to safely do so. He stated that he was aware he had to be careful when passing the water tender. He had rolled the window down in order to be able to better see where he was driving the truck near the shoulder of the road. Mr. Brazeau stated

that there was enough room for his truck to pass the water tender but he had made a mistake when attempting to do so, by travelling too close to the shoulder.

[28] Mr. Brazeau stated that there was no-one directing him as he passed the water tender, other than when he observed Mr. Carr release his co-worker to proceed. Mr. Brazeau stated that he believed he was able to follow his co-worker as he was waived through by Mr. Carr. He stated that he made eye contact with Mr. Carr but did not recall Mr. Carr making any hand gestures to him or saying anything to him through the open window. He stated that he was specifically looking at Mr. Carr to see if he was making any hand gestures towards him but he did not see him make any. Mr. Brazeau stated that Mr. Carr continued to walk up the road as he drove his truck down the road in order to pass the water tender. Mr. Brazeau denied, when asked in cross-examination, that he was not paying attention to Mr. Carr because he was focused on how he was going to pass the water tender.

[29] Mr. Brazeau stated that he was paid for his hours by Fountain Tire and that the company was not upset that the truck had become stuck. He also stated that there was no rush with respect to the customer service that he was expected to provide on that trip. He denied that he had provided his version of events in order to look better in the eyes of Fountain Tire with respect to his role in this occurrence.

[30] Mr. Brazeau testified that, through attending to testify at this trial, he has incurred costs far beyond the fine associated with the ticket and that he was not contesting the offence in order to save any demerit points he would receive, if convicted of this

offence, as he has no demerits on his license. He stated that he brought this matter to trial in order to tell his side of the story and plead his innocence.

Submissions of Crown

[31] Crown counsel acknowledges that flagperson is not defined in the *Act*. She states, however, that Mr. Carr should be considered as meeting the definition of a flagperson under the *Act* as he was wearing high visibility clothing and he had been able to successfully stop vehicles that day. Further, counsel submits that Mr. Brazeau, by his own testimony, looked to Mr. Carr for direction, thus *de facto* establishing Mr. Carr's authority as a flagperson.

[32] Counsel submits that Mr. Carr was a flagperson who was legally entitled to give Mr. Brazeau directions to stop his truck. The evidence of Mr. Carr, which she says I should accept, establishes that Mr. Brazeau failed to obey the instructions of Mr. Carr to stop his vehicle. Further, his failure to stop was not in accord with Mr. Brazeau exercising any due diligence that would amount to a defence.

Submissions of Mr. Brazeau

[33] Mr. Brazeau states that he did not fail to comply with any directions provided by Mr. Carr, as his evidence is that, despite looking to Mr. Carr to see if he was giving him any such directions, he did not observe Mr. Carr do so.

[34] Mr. Brazeau asks why Mr. Carr's version of events should be more credible than his own and why Mr. Carr's word should be viewed as being any better than his.

Analysis

[35] The offence with which Mr. Brazeau has been charged is a strict liability offence. The Crown need only prove the commission of the act that constitutes the offence beyond a reasonable doubt, at which point the onus shifts to Mr. Brazeau to show that he has a defence of acting with reasonable care. Mr. Brazeau need only establish this defence on a balance of probabilities. (*R. v. Sault St. Marie (City)*, [1978] 2 S.C.R. 1299).

[36] I will assume for the moment that Mr. Carr was a flagperson within the meaning of s. 135 of the *Act*.

[37] In order to determine whether Mr. Brazeau did, in fact, commit the prohibited act of failing to stop for a flagperson, I have only the evidence of Mr. Carr and Mr. Brazeau. Certainly it would have been helpful to have testimony from other witnesses, for example the driver of the pickup with the fifth wheel flat-deck, the water tender driver and Mr. Brazeau's fellow employee who was driving the other Fountain Tire truck. I would expect that testimony from these witnesses could have assisted in resolving the conflicts in the testimony of Mr. Carr as compared to that of Mr. Brazeau, and in particular the conflict in the evidence as to whether the other Fountain Tire truck had been stopped by Mr. Carr or not.

[38] I do not have these witnesses, however and as such am left only with the evidence of these two witnesses.

[39] The analysis set out in the case of *R. v. W.D.*, [1991] 1 S.C.R 742 at para. 28, applies:

...

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

...

[40] I find Mr. Carr to be a credible witness. There is no reason on his evidence to find him otherwise. If I had his evidence only to consider, then there is no doubt that Mr. Brazeau would be convicted of having committed the offence with which he has been charged.

[41] However, I also find Mr. Brazeau to be a credible witness. I find that there is nothing in his evidence that causes me any concern. In particular, I do not have concerns that he is fabricating his evidence in order to avoid any significant legal or administrative consequence.

[42] I am aware that I am able to reject the evidence of Mr. Brazeau if I find the evidence of Mr. Carr sufficiently compelling to do so, as long as I give a fair consideration to all of the evidence tendered. I cannot, of course, simply jump from a finding that Mr. Carr is credible to therefore find Mr. Brazeau not to be credible.

[43] In this case, on a consideration of all the evidence, I simply am unable to reject the evidence of Mr. Brazeau that he was not provided any direction by Mr. Carr. In saying this, I am not saying that Mr. Carr's evidence is suspect that he provided Mr. Brazeau with directions that were ignored. He may well have. I am not saying that I prefer the evidence of Mr. Brazeau over that of Mr. Carr. I am only saying that the evidence of Mr. Brazeau raises a reasonable doubt in this regard. The law is clear that if I have a reasonable doubt then Mr. Brazeau is entitled to an acquittal.

[44] As such Mr. Brazeau is acquitted of the charge.

COZENS T.C.J.