Citation: *R.* v. *Kleberc,* 2007 YKTC 61

Date: 20070712
Docket: T.C. 06-00489A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Luther

REGINA

v.

JAROSLAV KLEBERC

Appearances:
Jennifer Grandy — Counsel for Crown
Gordon Coffin — Counsel for Defence

REASONS FOR JUDGMENT

[1] LUTHER T.C.J. (Oral): The Court is prepared to give its decision in the case of Jaroslav Kleberc. This was a trial that took place here in Whitehorse on July 6th. The Crown called a number of witnesses, including Crystal Gilbertson, the victim, Stephen Kragt, Ryan Munro, Pamela Jim and Constable Justin Fradette, and we did hear from the defendant.

[2] The charges are that on or about the 28th day of October 2006, at or near Whitehorse, did unlawfully commit an offence in that having the care or control of a vehicle, namely a Honda Accord that was involved in an accident with Crystal Gilbertson at 2nd Avenue, Whitehorse, with intent to escape civil or criminal liability,

failed to stop this vehicle, give his name and address and offer assistance to her, an injured party, contrary to s. 252 of the *Criminal Code*.

[3] Count 2, on the same date, did unlawfully commit an offence in that he operated a motor vehicle on 2nd Avenue and Jarvis Street in a manner that was dangerous to the public, contrary to s. 249.1 of the *Criminal Code.*

[4] On these two charges, the Court has the following to say. As to the facts, 2nd Avenue is a four lane, busy thoroughfare here in Whitehorse. The defendant was in the right lane and he left the Main Street intersection and proceeded north more quickly than did Mr. Munro, who drove in the adjacent lane. There is no evidence of excessive speed by the defendant. The defendant claims to have seen the victim one block before. Instead of coming to a full stop, or even braking, he took his foot off the gas and not until the last second did he brake. The victim stopped 90 percent of the way across the road and was struck by the passenger front side of the vehicle of the defendant.

[5] The defendant stopped his vehicle around five parking spots away, in the off-sales area. Pamela Jim, a passenger in the Munro vehicle, immediately attended to the victim, who ended up requiring medical attention and hospitalization for eight days. The defendant proceeded to the Blue Moon off-sales and got the clerk to phone 9-1-1 or the police. When he came out, Pamela Jim, in addressing the upset crowd of about 10 people, said, without naming him, "That is him," in response to the crowd's question who did this. The defendant is certainly civilly liable for the accident.

[6] Similarly, the defendant, in my view, is clearly guilty of a number of breaches of the *Motor Vehicles Act* of this Territory, obviously s. 94(1), s. 169(1), s. 160(a) and

possibly even s. 62(1). If I could, I would register convictions under s. 94(1) and s. 186(a) of the *Motor Vehicles Act* as lesser included offences. Although this practice has been in use in some parts of the country, *R*. v. *Bartlett*, [1999] O.J. 3775, Ontario Superior Court, appears to put a stop to this practice unless there has been a plea to provincial or territorial offences beforehand, consented to by the Crown, as was clearly the situation in an Ontario Court of Appeal case, *R*. v. *Martinez,* [1996] O.J. 544. I will just read from a paragraph of that decision:

> The appellant was originally charged with dangerous driving causing death contrary to s. 249(4) of the *Criminal Code*. At his preliminary hearing, he elected trial by a General Division judge sitting without a jury. After some evidence was heard, with the Crown's concurrence, he entered a plea of guilty to careless driving, contrary to s. 130 of the Highway Traffic Act. In convicting the appellant, the court accepted that careless driving, although not an included offence, was an "other offence arising out of the same transaction" as referred to in s. 606(4) of the *Criminal Code*. No issue was taken of the procedure followed.

In that case, the Court of Appeal reduced the sentence that had been imposed on Mr. Martinez down to time served of 20 days.

[7] There also seems to be some serious legal impediments to the Crown now seeking convictions under the Territorial Law, particularly s. 186(a). If we take a look at the Supreme Court of Canada case in *R*. v. *Shubley,* [1990] 1 S.C.R. 3, in quoting from a case called *R.* v. *Wigglesworth,* [1987] 2 S.C.R. at 541 and a case called *R.* v. *Mingo*, [1982] 2 C.C.C. (3d), at 23, we have the following quotes:

> The rights guaranteed by s. 11 of the Charter are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e. criminal, quasi-criminal, and regulatory offences, either federally or provincially enacted.

Then further on:

I would agree with the conclusion of Mr. Justice Toy in *R*. v. *Mingo*…:

> In my respectful view, the authors of the new Charter, when they employed the unqualified word "offence" as opposed to "criminal offence", were doing nothing more than providing for the equal protection of Canadian citizens from breaches of their rights under provincial as well as federal laws insofar as public as opposed to private or domestic prohibitions were concerned.

[8] This, what I would refer to as a serious legal impediment to the Crown now seeking convictions under these sections, is because these are offences under a territorially enacted regulatory or quasi-criminal statute involving real punitive sanctions, i.e. potential jail sentences.

[9] So let me deal first with the dangerous driving charge. What we have here is a serious error in judgment of which an experienced bus driver ought not to have made. The idea of anticipating the pedestrian to cross the street in a predictable fashion, and not to stop but to slow down suddenly and swerve, is serious and goes beyond momentary inattention. However, given the evidence or given the absence of any evidence of erratic driving, adverse weather conditions, speed, faulty vehicle condition, drugs or alcohol, the Court cannot conclude that this driving constituted a marked departure. The Court enthusiastically embraces the reasoning of the Supreme Court of Canada in *R*. v. *Hundal,* [1993] 1 S.C.R. 867. Similarly, if the facts in *Martinez*, *supra,* do not constitute dangerous driving, certainly the facts here do not. The dangerous driving charge is dismissed.

[10] As to Count 1, the defendant, by his actions on the 28th of October 2006, subjected himself to being charged and tried, and all that goes with that, including costs, stress and so on. He did stop his vehicle, in my view, and he did offer assistance, not

as well as he might have but sufficiently to meet the requirements of the *Criminal Code*. However, he clearly did not give his name and address. There is no evidence that Pamela Jim recognized him at the time. If he had clearly given his name and address to Pamela Jim or, better yet, waited for the police, even if it meant driving over to the 202 parking area or somewhere else nearby where he could still see the scene and thus approach the police, I seriously doubt whether he would have even been charged. But by leaving the scene as he did and when he did, albeit in a highly emotionally state, he has essentially caused this prosecution to take place.

[11] The presumption in s. 252 clearly applies in this case. The Court, in examining the cases filed, and some others, has found the case from the Ontario Court of Appeal called *R*. v. *Norman Alan Baker*, [2006] CanLII 19332. This case is very helpful in describing how the presumption works. At paragraph 36, the Court of Appeal of Ontario indicated.

> There is no lower standard of proof, below reasonable doubt, that can be relied upon to rebut a presumption.

Then they refer to the Supreme Court of Canada decision of *Proudlock*, and they state:

> In a much older case, *R*. v. *Proudlock* (1978), 43 C.C.C. (2d) 321 (S.C.C.), the court has said, in explaining the expression "evidence to the contrary" in s. 306(2)(a) of the *Criminal Code*:
>
> > …all the presumption does is to establish a prima facie case. The burden of proof does not shift. The accused does not have to "establish" a defence or an excuse, all he has to do is raise a reasonable doubt. If there is nothing in the evidence adduced by the Crown from which a reasonable doubt can arise, then the accused will necessarily have the burden of adducing evidence if he is to escape conviction. However, he will not have the burden of proving his innocence, it will be sufficient if, at the conclusion of the case on both sides, the trier of fact has a reasonable doubt.

[12] Thus, I clearly have to ask myself at the end of the day, is there a reasonable doubt here. The defence have filed four cases, three of which are on the point of this Count 1. The case from the New Brunswick Provincial Court, *R*. v. *Albert,* [1997] N.B.J. No. 20 (N.B. Prov. Ct.) is a case that I choose not to follow. I find the reasoning there is less than persuasive. It is a peculiar fact situation and the Court can see the concerns that the trial judge had there, but I am not satisfied that the right conclusion was reached.

[13] With regard to the next case, *R*. v. *Hofer*, (1982), 2 C.C.C. (3d) 236 (Sask. C.A.) from the Saskatchewan Court of Appeal, this also is an interesting case, which I do not think is particularly helpful to the defendant because I sense that there was a great reluctance on the part of the Court of Appeal to rule as they did. If you take a look at the last paragraph, it says:

> On the surface, it would not appear that the allegation by the accused that he failed to remain at the scene merely for the purpose of escaping the execution of outstanding warrants was plausible or reasonable explanation which would negate the presumption. However, the trial judge found it to be the sole intent of the accused. As this is a stated case, I can only assume that there was other evidence, apart from the testimony of the accused, to support the finding. Under these circumstances, although the trial judge may have erred in the point of law, stated in question 2, the acquittal should not have been set aside. The appeal is therefore allowed.

[14] The *R*. v. *Fournier* case, [1979] 8 C.R. (3d) (Que. C.A.), essentially, I find that that case was correctly decided and I do follow that one.

[15] Perhaps the most helpful case, surprisingly, is *R*. v. *Brautigam,* [1988] B.C.C.A., B.C.J. 417, where they said that "I was scared" is not enough.

[16] Here, the defendant was in a highly emotional state. There was an unruly small crowd of perhaps ten people from this bar area of town, and they started yelling out, "Who did this?" They were clearly upset. In fact, one of them leaned towards the defendant. The defendant's emotional state was partially caused by the accident itself, as was the situation in *Brautigam* and a case mentioned there called *R*. v. *Emery*, 61 C.C.C. (2d), p. 84, I believe.

[17] Unlike *Brautigam*, there was significantly more in this case. In fact, Mr. Munro, a Crown witness, understood why the defendant would have left. Also, possibly leading to his highly emotional state was a quick reflection to a beating he claims to have endured by the Czech police, when he was 19, during a 17-hour interrogation. The Court accepts the testimony of the defendant about him seeing a young man, whom we now know as Stephen Kragt, scrape the licence plate from the white Honda. Furthermore, the Court accepts the testimony of the defendant that he knew a Pamela Jim.

[18] Despite the defendant's foolish query to Constable Fradette the next day, about thinking the police were there about the credit card, I am nonetheless satisfied that at the key time, and that is the time that he left the scene of the accident, there was a reasonable doubt that he did not do so to escape civil or criminal responsibility, in the sense that he knew that he was known and he knew that his car was known. Thus, where there is a reasonable doubt, it is resolved in favour of the defendant and the Court has no option here but to dismiss this charge as well.

[19] Are there any questions here for the Crown?

[20] MS. GRANDY: No.

[21] THE COURT: Okay. Any questions for the defence?

[22] MR. COFFIN: No, Your Honour, thank you.

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LUTHER T.C.J.