

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Rai, 2018 ONCA 623

DATE: 20180709

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Doherty, MacPherson and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Sukhvinder Singh Rai

Appellant

H. David Locke and Glen Henderson, for the appellant

Davin Michael Garg, for the respondent

Heard: July 6, 2018

On appeal from the conviction entered by Justice Frederic Campling of the Ontario Court of Justice on March 17, 2016, and from the sentence imposed on July 18, 2016.

By the Court:

[1] The appellant, Sukhvinder Singh Rai, was convicted of dangerous driving. He appeals from this conviction. He also appeals his one year custodial sentence. At the conclusion of the oral hearing we advised that the appeal was dismissed with reasons to follow. These are those reasons.

BACKGROUND FACTS

[2] The appellant is a professional truck driver. On July 31, 2014, he was driving a commercial dump truck on the Queen Elizabeth Highway (“QEW”). There was a trailer attached to the truck whose box could be raised and lowered using a system of buttons and levers in the truck called the Power Take-off (“PTO”) system. That day, the appellant had left the PTO lever in the ‘On’ position. Under certain circumstances, leaving the PTO engaged permitted the trailer to rise.

[3] As the appellant approached the Burlington Skyway Bridge on the QEW, the trailer box rose higher than the bridge’s clearance and a collision ensued. The appellant’s truck, a second truck driving next to the appellant, and the bridge all suffered extensive damage. Three other motorists on the road suffered injuries.

[4] Scores of police officers and other emergency personnel were dispatched to the scene. A consistent theme of their evidence was the “chaos”, “panic” and “disaster” of what they encountered. Inspector Douglas Fenske, the top-ranking police officer on-scene, described the accident site in these terms: “In my 22 years I’ve been in traffic in the Greater Toronto Area ... I’ve never been exposed to something like that ... it was a major horrific incident.”

[5] Since the bridge’s overhead structure was damaged and partially collapsing, police focused on moving non-essential people and vehicles away from the collision site. A police officer saw the appellant sitting alone on the guardrail about

ten feet from hanging steel girders. The appellant was also seen wandering around the crash site.

[6] At 4:24 p.m., PC Andrew Halliday was directed to bring the appellant “to a safe location for his safety.” PC Halliday escorted the appellant to his police cruiser. He placed him in the cruiser. The appellant was not handcuffed. The air conditioning was running and the windows were rolled down to let in a breeze. The appellant was permitted to use his cell phone, which he did many times, including calls to his dispatcher. At this juncture, PC Halliday did not say anything to the appellant about *Charter* rights.

[7] During the time the appellant was lodged in the police cruiser, he asked questions of PC Halliday who tried to obtain answers for him. At 4:40 p.m., when Detective Mario Powell, a senior investigator, arrived, PC Halliday left the cruiser to speak to him. Detective Powell said that he was not yet ready to interview the appellant. It is at this point that the trial judge determined that the appellant became subject to an investigative detention.

[8] At about 7:14 p.m., PC Halliday again left the cruiser to ask Detective Powell if he wanted to speak to the appellant. When PC Halliday returned to his cruiser, he detected a smell of alcohol on the appellant’s breath. Up to this point in time, PC Halliday had not intended to detain the appellant. He testified that if he had

detained the appellant, he would not have permitted the appellant to use his cell phone to speak to whomever he wished.

[9] PC Halliday took the appellant to a nearby police station to administer a breath test. The appellant failed the test – his readings were 226 and 220 milligrams of alcohol in 100 milliliters of blood.

[10] The appellant was arrested and charged with four criminal offences – impaired driving, “over 80”, dangerous driving, and mischief endangering life.

[11] At trial, the appellant challenged the admissibility of the alcohol-related evidence.

[12] In a first ruling, the trial judge ruled (and the Crown conceded) that the taking of breath samples into an approved instrument violated s. 8 of the *Charter* because, contrary to s. 254(2) of the *Criminal Code*, PC Halliday did not form his suspicion that the appellant had consumed alcohol until more than three hours after the appellant had been driving the truck. The trial judge performed a *Grant* analysis (*R. v. Grant*, 2009 SCC 32) and excluded the evidence under s. 24(2) of the *Charter*.

[13] In a second ruling, the trial judge found that the appellant was not arbitrarily detained contrary to s. 9 of the *Charter* during the time he was confined to the police cruiser (approximately 2.5 hours). The trial judge also stated that if s. 9 were

infringed, he would not have excluded the evidence (the smell of the appellant's breath) under s. 24(2) of the *Charter*.

[14] In the same ruling, the trial judge concluded that the police confinement of the appellant in the cruiser was a detention. Therefore, the police should have informed the appellant of his s. 10 rights to be informed promptly of the reason for the detention and to retain and instruct counsel. However, applying the *Grant* analysis, he declined to exclude the evidence relating to the smell of alcohol on the appellant's breath.

[15] Based on these rulings, the trial judge dismissed the impaired driving and "over 80" charges.

[16] At the conclusion of the trial, the trial judge acquitted the appellant of mischief endangering life. He stated:

Having already found that I have a reasonable doubt on whether you deliberately raised the box, I conclude that the Crown has not proven beyond a reasonable doubt the element of wilfulness in the mischief charge and accordingly, I find you not guilty on that charge.

[17] The trial judge convicted the appellant of dangerous driving. He explained the basis for the conviction as follows:

As for the mental element of that offence, the Supreme Court of Canada tells us that your degree of fault in order for this charge to have been proven must be greater than mere carelessness or mere negligence. What it has to be

for the charge to be proven is a marked departure from the standard of care, a reasonable person would have exercised in the circumstances. I find that your operation of your rig with the power take-off system on and with some alcohol in your body and available to you in the truck was dangerous to the public having regard to all of the circumstances we have heard about. And I find as well that your lack of care and your consumption of alcohol raised your conduct to a marked departure from the standard of care a reasonable person would have exercised in the circumstances. And accordingly, I find you guilty of the dangerous operation charge.

CONVICTION APPEAL

[18] The appellant appeals from his conviction on three grounds. First, he contends that the trial judge erred by concluding that the appellant's confinement in the police cruiser for 2.5 hours was not an arbitrary detention contrary to s. 9 of the *Charter*. If the appellant succeeds on this argument, the result would be that the police breached both his s. 9 and s. 10 *Charter* rights. This, says the appellant, would call for a reappraisal of the trial judge's s. 24(2) analysis and lead to a different result – the exclusion of the evidence relating to the smell of alcohol on the appellant's breath.

[19] We do not accept this submission. The principal, and continuing, purpose of the appellant's detention was his own safety. His truck had caused a terrible accident with extensive damage to vehicles and a bridge and injuries to several people. The police noticed the appellant walking around a dangerous accident

scene and sitting on a guardrail very close to a damaged and collapsing girder. Importantly, his truck was crushed.

[20] Unlike other motorists who were confined to their vehicles for up to three hours while police and emergency personnel dealt with the carnage caused by the accident, the appellant could not return to his destroyed truck. In these circumstances, it made perfect sense for the police to do what they did – place the appellant in a police cruiser and try to make him comfortable. The appellant was concerned about his truck and gave no indication of a desire to leave. He asked questions of PC Halliday about the accident that caused PC Halliday to leave the cruiser to obtain information that he conveyed to the appellant. The appellant also spoke several times to his dispatcher. He also had PC Halliday speak to the dispatcher. We endorse what the trial judge said about the police conduct on the bridge that day:

[T]he overall conduct of Officer Halliday, Officer Powell and every other police officer I have heard from ... was amazingly good.

[21] In summary, in the context of a complex and dangerous accident scene and the police treatment on site of the appellant anchored in a concern for his safety, the detention of the appellant was lawful; it was the antithesis of an ‘arbitrary’ detention and, therefore, did not infringe s. 9 of the *Charter*.

[22] Second, the appellant submits that the trial judge, having found that the appellant's s. 10(a) and (b) *Charter* rights had been infringed, erred by not excluding the evidence of the smell of alcohol on the appellant's breath under s. 24(2) of the *Charter*. In making this submission, the appellant asserts that PC Halliday and Detective Powell exhibited a pattern of inadvertence to, if not ignorance of, established *Charter* principles.

[23] We disagree. Our starting point is that a trial judge's *Grant* analysis is subject to considerable deference. As expressed by McLachlin C.J. and Charron J. in *Grant*, at para. 127:

The weighing process and balancing of these concerns [the three *Grant* factors] is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision.

[24] In our view, the trial judge applied the three *Grant* factors in an entirely reasonable fashion.

[25] On the first factor – seriousness of the *Charter* breach – he said:

In my view, the failure to inform you as required by s. 10 of the *Charter* was neither severe nor deliberate state conduct. It was a mistake. Officer Powell admitted that it was a mistake. In my view, there was good faith by both Officer Halliday and Officer Powell. The mistake was quite understandable in the whole context.

[26] The “whole context” involved a terrible accident with a very dangerous post-accident scene, including great damage to vehicles and a major arterial bridge and injuries to several people, and an immediate and explicit police focus on moving the appellant to a safe place. Taken together, these factors strongly support the trial judge’s assessment of the first *Grant* factor.

[27] On the second factor – the impact of the police infringement of s. 10 on the appellant – the trial judge properly found it relevant that the police would have smelled the appellant’s odour of alcohol regardless of his detention. He would have remained at the scene with the many other motorists and eventually come into contact with police, as he did when PC Halliday returned to the cruiser after 7:00 p.m.

[28] The appellant does not assert that the trial judge erred with respect to the third *Grant* factor – society’s interest in the adjudication of criminal cases on their merits.

[29] Third, and finally, the appellant contends that although the trial judge stated the correct test for the offence of dangerous driving – a marked departure from the standard of care a reasonable person would have exercised in the circumstances – he failed to identify how and in what way the appellant’s driving departed from this standard.

[30] We are not persuaded by this submission. The trial judge identified three specific factors that, taken together, supported a conclusion that the appellant's driving constituted a marked departure from a reasonable person's driving in similar circumstances: driving with the PTO system in the 'On' position, failing to detect, in a one kilometer distance and 40 second time frame, the major change in his truck's configuration, and his alcohol consumption.

[31] In our view, the important contextual circumstances grounding the trial judge's analysis and ultimate conclusion include:

- The appellant was on duty as a professional dump truck driver.
- Driving a big rig carries additional responsibilities versus an ordinary motor vehicle because the heavy truck with a raisable box "can hurt and kill people in many ways".
- The appellant was driving in a construction zone with a bridge under repair.
- The appellant drove with the PTO engaged and did not check to ensure that it was disengaged prior to driving on the highway. Driving with the PTO engaged contravened the multi-week training that the appellant had received.
- Driving with the PTO engaged was described as "dangerous" by the defence expert because doing so "can cause damage and personal injury". This is because having the PTO engaged was a condition precedent to the dump box rising.

- The appellant approached a bridge with a maximum height allowance in a truck capable of surpassing that height allowance, with the PTO engaged. Signs alerted drivers to the maximum height.
- Prior to colliding with the bridge superstructure the appellant drove a one kilometer distance for 40 seconds without detecting the rising dump box despite its effect on the truck's handling and despite it being clearly visible from all of the truck's mirrors.
- The appellant had consumed alcohol.
- Prior to starting his shift, the appellant had placed a cooler containing open alcoholic beverages in a spot accessible to the driver. One open beverage tested at 42 per cent alcohol.
- Both consuming alcohol and having a cooler of alcohol in the cab contravened the appellant's training.

[32] We conclude that the trial judge's conviction of the appellant for dangerous driving was appropriate.

SENTENCE APPEAL

[33] The appellant also appeals his sentence on the basis that a custodial sentence of one year is unfit. He submits that a proper sentence would be either a conditional sentence or, alternatively, incarceration for 90 days.

[34] We do not accept this submission. The appellant's dangerous driving caused injuries to three people (the trial judge recorded: "Mr. Kindra [a motorist injured as

a result of the collision] is very lucky to be alive. His truck looked horrible after pieces of the bridge fell on it”) and substantial damage to a major bridge and several other vehicles. As well, the appellant had a previous conviction for impaired driving. Taken together, these factors easily support the one year sentence imposed by the trial judge.

DISPOSITION

[35] The conviction and sentence appeals are dismissed.

Released: “DD” JUL 9 2018

“Doherty J.A.”
“J.C. MacPherson J.A.”
“Paul Rouleau J.A.”