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*Nov. 29
Dec. 21

ROMAN BALCERCZYK.....APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence—Admissibility—Res gestae—Conduct of accused driver immediately after accident—Relevance to issue of anterior negligence.

Criminal law—Criminal negligence—Admissibility of evidence of driver's conduct immediately after accident.

Evidence of the conduct of an accused person immediately after an accident, if it is of such a nature that it may reasonably be thought sufficient, if believed, to warrant an inference upon the issue of criminal negligence, may be properly received in evidence and considered by the jury in determining that issue.

On a trial for causing death by criminal negligence evidence was admitted that the accused's car, immediately after striking another car, "skidded and swerved up the street" and "as soon as it got under its right control it picked up speed" and disappeared. The trial judge told the jury that they were entitled to consider this evidence in determining whether or not the accused had been guilty of criminal negligence.

Held (Cartwright J. dissenting): The evidence was properly admitted and there was no misdirection. It was open to the jury, in the circumstances of the case, to draw an inference from the subsequent conduct of the accused as to his wantonness and reckless disregard for the lives or safety of other persons at the time of and immediately before the accident. The whole conduct was part of the *res gestae*.

Gudmondson v. The King (1933), 60 C.C.C. 332, distinguished.

Per Cartwright J., *dissenting:* Criminal negligence, as defined by s. 191 of the *Criminal Code,* must be shown to have existed prior to or at the instant of the accused's car striking the other car, and although the fact that the driver fled from the scene was a relevant item of circumstantial evidence, it was essential that it be made plain to the jury that his conduct after the accident was relevant only in so far as it assisted them to determine by inference the nature of his conduct before it, and whether or not he had, before the impact, been driving with wanton or reckless disregard for the lives or safety of others. Without such a warning (which was not given) there was grave danger of their convicting because in their opinion the accused had acted with that disregard after the impact.

APPEAL by the accused from the judgment of the Court of Appeal for Ontario, affirming his conviction, before Ferguson J. and a jury, of causing the death of one Lawrence Vipond by criminal negligence. Appeal dismissed.

*PRESENT: Kerwin C.J. and Kellock, Locke, Cartwright and Fauteux JJ.

J. G. J. O'Driscoll and *Patrick Galligan*, for the appellant.

W. B. Common, Q.C., for the respondent.

THE CHIEF JUSTICE:—This appeal should be dismissed. As to the second ground of appeal, I agree with the reasons of Mr. Justice Kellock and merely add that, in addition to the references by him to the charge of the trial judge, it might be pointed out that the latter, at several earlier stages, had referred to the fact that "this is a hit-and-run case"—and necessarily so, since one of the main matters in dispute was as to the identification of the driver of the automobile. The subsequent conduct of the driver relied upon by the Crown occurred immediately after the impact and could be treated as part of the *res gestae* as accompanying those earlier acts as to which it was contended that the driver had been criminally negligent in doing, or omitting to do, anything which it was his duty to do, showing wanton, or reckless, disregard for the lives or safety of other persons. Unquestionably no appreciable time elapsed between the automobile striking Vipond and the skidding, swerving and picking up speed.

The first point upon which leave to appeal was granted is:

> Was the verbal statement attributed to the appellant by the investigating police officer improperly admitted in evidence?

Whether or not one considers that at the time of the making of this statement the appellant was under arrest on any charge, the rule laid down by this Court in *Boudreau v. The King* (1), was not infringed. Although the evidence as to this verbal statement was given before the *voir dire*, and the trial judge was apparently of the view that it should not have been so given at that time, and although he ruled against the admissibility of a subsequent written statement, there is nothing, considering all the circumstances, to take the case out of the rule so established.

The judgment of Kellock, Locke and Fauteux JJ. was delivered by

KELLOCK J.:—When the sequence of events is properly understood, I do not think the ruling of the learned trial

(1) [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81.

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judge, confirmed, as it was, by the Court of Appeal, as to the admissibility of the oral statement of the appellant to the police officer, can be questioned.

With regard to the second ground of appeal, it is contended that there was misdirection on the part of the learned trial judge in instructing the jury that in determining the issue as to criminal negligence, they were entitled to take into consideration the conduct of the appellant in leaving the scene after the accident.

The evidence was that of two witnesses, who testified as to seeing the appellant's car immediately after the accident, one of them stating that "it skidded and swerved up the street; as soon as it got under its right control it picked up speed" and disappeared. The learned trial judge instructed the jury:

> This, you see, is a hit-and-run case and you have to consider that in considering whether this was a reckless disregard for the lives and safety of other people. Is the conduct of the person who hit Vipond consistent with anything but a reckless disregard for the lives and safety of other people?

And again:

> Ask yourselves, how could he have failed to see this car; how did he get over in front of the door? You will ask yourselves about these questions. If he had any regard for the life and safety of people on the street would he not have stopped after he came in collision with this door? It is for you to say. In order to convict him you must be able to say that he showed a reckless and wanton disregard for the lives and safety of other people.

In my opinion, evidence of the conduct of an accused person immediately after an accident, if of such a nature that it may reasonably be thought sufficient, if believed, to warrant an inference upon the issue of criminal negligence, may be properly received in evidence. The appellant's subsequent conduct was, therefore, a proper consideration for the jury in the case at bar.

Counsel for the appellant referred to the decision of this Court in *Gudmondson v. The King* (1), as supporting a contrary view. In that case there was evidence on behalf of the Crown that the car which had struck the deceased kept on going after the accident and in order to get away, drove around another car which had been stopped in the middle of the highway in an effort to bring it to a stop.

(1) (1933), 60 C.C.C. 332.

In addition, there was evidence on behalf of the accused that his conduct in not stopping was due to panic and that in any event, his brakes were gone and he could not bring the car to a stop. The learned trial judge had charged the jury that the conduct of the accused after the accident was relevant on the issue of criminal negligence from the standpoint of "similar facts" and had told them: "There is no doubt he fails by hitting and running away in this case. As far as I am concerned I will tell you that has been established by the evidence." (1) It was in these circumstances that this Court said, at p. 333:

> Having said what he did upon this matter, he ought at least to have added a warning to the jury that such conduct, however reprehensible, could have no more than an indirect bearing upon the issue before them. He had already virtually withdrawn from them the charge of intoxication; but, in view of his other observations, he should have told them that they ought to be very cautious in imputing to the accused a consciousness of guilt, because of actions which, on reflection, they might think capable of explanation as due to panic.

In the case at bar there was no evidence with regard to the conduct of the appellant after the accident apart from that to which I have already referred. In my view, therefore, what the learned trial judge said to the jury was not objectionable from the standpoint which this Court considered objectionable in the case to which I have referred and, in my opinion, it was open to the jury in the circumstances of this case to draw an inference from the subsequent conduct of the appellant as to the wantonness and reckless disregard for the lives or safety of other persons at the time of and immediately prior to the accident here in question. The whole conduct was part of the *res gestae*.

I do not think the charge is open to the construction that the jury were told they could draw from the mere fact that the appellant ran away from the scene of the accident, the inference that his driving at the time of the accident amounted to criminal negligence. The learned judge had already instructed the jury with considerable care as to the elements of negligence of that character.

I would dismiss the appeal.

(1) 41 Man. R. 87 at 110, 59 C.C.C. 355, [1933] 1 W.W.R. 593.

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CARTWRIGHT J. (*dissenting*):—The appellant was tried at the assizes at Brantford before Ferguson J. and a jury and, on January 16, 1956, was convicted on the charge that at the town of Paris, on November 12, 1955, he did by criminal negligence cause the death of Lawrence Vipond, contrary to s. 192 of the *Criminal Code*. On April 9, 1956, the Court of Appeal for Ontario unanimously dismissed his appeal.

On April 24, 1956, Abbott J. granted leave to appeal on the following questions of law:

1. Was the verbal statement attributed to the appellant by the investigating police officer improperly admitted in evidence?

2. Did the learned Trial Judge misdirect the jury when he instructed them that in determining whether or not the appellant was guilty of criminal negligence they were entitled to take into consideration his subsequent conduct, namely, leaving the scene of the accident?

As in my opinion there should be a new trial I will refer to the evidence only so far as may be necessary to make clear the reasons for the conclusion at which I have arrived.

At about 11.20 p.m. on November 12, 1955 Lawrence Vipond and a Miss Pfeiffer were standing on Dundas Street in the town of Paris on the south or right-hand side of an automobile which was parked facing easterly on the north side of the street. The right-hand door of this automobile was open. A motor vehicle driven westerly struck the open door and the right rear fender of the stationary automobile with considerable violence. Vipond suffered injuries from which he died shortly afterwards. Miss Pfeiffer was seriously injured and was found 14 feet west of the stationary automobile. The motor vehicle which struck Vipond did not stop and none of the witnesses could identify its driver or say whether it was driven by a man or a woman.

The theory of the Crown was that the appellant was the driver of the motor vehicle which struck the deceased. There was circumstantial evidence to support this theory and the Crown also relied on an oral statement said to have been made by the appellant to a police officer after he had been arrested on a charge of vagrancy on the day following the fatality.

It is to the admissibility of this oral statement that the first question is directed. I do not find it necessary to answer this question. Unfortunately the statement in question was given in evidence by the police officer in the presence of the jury without any preliminary enquiry or ruling as to its admissibility. The learned trial judge appears to have been at first inclined to the view that the statement was inadmissible and that a mistrial would result; but as he did not discharge the jury and in his charge invited them to consider the statement, it must be taken that at the conclusion of the evidence he had decided that it was admissible, although he ruled against the admissibility of the written statement said to have been made by the appellant immediately afterwards. It will be for the judge presiding at the new trial to decide the question of admissibility upon the evidence then given as to the circumstances in which the statement was made.

Turning to the second question, it was, of course, incumbent upon the prosecution to prove beyond a reasonable doubt not only that the appellant was the driver of the car which struck Vipond but also that he was criminally negligent in driving it. In dealing with this question I will assume that the jury found that the appellant was the driver of the car.

Criminal negligence is defined in s. 191 of the *Criminal Code,* which reads as follows:

> 191. (1) Every one is criminally negligent who
>
> (*a*) in doing anything, or
>
> (*b*) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.
>
> (2) For the purposes of this section, "duty" means a duty imposed by law.

The appellant while driving was under a legal duty to take reasonable care to avoid injuring any persons on the highway; but, in view of the definition quoted, he could be found guilty only if the jury were satisfied not merely that he failed to perform this duty but also that his failure showed wanton or reckless disregard for the lives or safety of others. Such wanton or reckless disregard must be shown to have existed prior to or at the instant of the car striking Vipond.

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Counsel for the respondent argues that the jury were entitled to infer the existence of such disregard from the facts that it was a clear night, that the parking lights of the stationary car were on, that it was parked between two street lights, that there was nothing to prevent the driver of the car which struck Vipond from seeing the stationary car, that the impact was violent, and that the driver fled from the scene. I agree that all of these were relevant items of circumstantial evidence. But, in my opinion, it was of vital importance that the jury should be carefully instructed that they must consider the fact of flight only for the purpose of reaching a decision as to the manner in which the driver was driving up to the instant of the impact, and particularly as to whether up to that instant he was driving with wanton or reckless disregard for the lives or safety of other persons. Without such a warning there would be a grave danger of the jury convicting the appellant because in their opinion he had immediately after the impact acted with such wanton or reckless disregard. In other words, it was essential that it be made plain to the jury that the conduct of the accused subsequent to the impact was relevant only in so far as it assisted them to determine by inference the nature of his conduct prior to the impact.

Far from giving any such direction the learned trial judge used words which the jury may well have understood, and which, in my opinion, they would have understood, to mean that they might convict the appellant if satisfied that he had immediately after the impact acted with a reckless disregard for the lives or safety of others. I refer to the following passage in the charge of the learned trial judge, and particularly to the sentences which I have italicized:

> If you decide it was negligence, was it the kind of negligence I described? that is, was it criminal? *This, you see, is a hit-and-run case and you have to consider that in considering whether this was a reckless disregard for the lives and safety of other people.* Is the conduct of the person who hit Vipond consistent with anything but a reckless disregard for the lives and safety of other people? The car had crossed the bridge; there was not very much traffic on Dundas Street; the street lights were on; the driving conditions, as you have heard, were good; this is a fairly wide street; yet whoever drove this car crashed into the door of Kennedy's car and crushed these two young people.

Miss Verna Farr said they flew through the air, and Miss Pfeiffer was found fourteen feet beyond the rear of Kennedy's car, and Vipond was found with his feet sort of underneath the rear wheel. The car skidded, according to Miss Farr, and then speeded up when it righted and after swerving, passed on. You will ask yourselves how could a driver driving under those conditions with the car parked between these two lights—someone gave the exact distance the car was from the easterly light, and as you can see there is seventy-six feet from Burwell Street to the first light, and then there is some distance from the first light to the car—so that whoever passed Burwell Street and crossed this corner had, as I recall it, some ninety feet before he would come to this door. Ask yourselves, how could he have failed to see this car; how did he get over in front of the door? You will ask yourselves about those questions. *If he had any regard for the life and safety of people on the street would he not have stopped after he came into collision with this door? It is for you to say. In order to convict him you must be able to say that he showed a reckless and wanton disregard for the lives and safety of other people.*

I am unable to find anything elsewhere in the charge of the learned trial judge which would make it clear to the jury that they must not convict unless satisfied beyond a reasonable doubt that the accused was driving prior to or at the moment of impact with a wanton or reckless disregard for the lives or safety of other persons.

In considering the likelihood of the jury having been misled it is well to bear in mind the natural tendency towards a feeling of indignation at the conduct of a person who, having struck another down, leaves him lying on the roadway and flees from the scene. That Parliament takes a stern view of such conduct is evidenced by the penalty prescribed by s. 221 (2) of the *Criminal Code;* but the appellant was not on trial for an offence against that section.

In my opinion the second question on which leave to appeal was granted should be answered in the affirmative.

I would allow the appeal, quash the conviction and direct a new trial.

Appeal dismissed, CARTWRIGHT J. *dissenting.*

Solicitors for the appellant: Edmonds, Maloney & Edmonds, Toronto.