1967

*Feb. 24
June 26

HORST BINUS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Dangerous driving—Whether beyond inadvertent negligence—Whether miscarriage of justice—Criminal Code, 1953-54 (Can.), c. 51, ss. 221(4), 592(1)(b)(iii).

The appellant was convicted, before a judge and jury, of driving in a manner dangerous to the public, contrary to s. 221(4) of the *Criminal Code*. His conviction was affirmed by the Court of Appeal and he appealed to this Court on the ground that the jury was not properly instructed. Two questions were raised before this Court: Whether, in

*PRESENT: Taschereau C.J. and Cartwright, Judson, Ritchie and Spence JJ.

order to convict under s. 221(4), it was necessary for the tribunal of fact to be satisfied that the conduct of the accused went beyond inadvertent negligence and amounted to advertent negligence, and secondly, whether the Court of Appeal erred in the circumstances in applying the provisions of s. 592(1)(*b*)(iii) of the Code.

Held: The appeal should be dismissed.

Per Taschereau C.J. and Judson J.: The distinction between criminal negligence in the operation of a motor vehicle and dangerous driving is that for the former what must be shown is advertence or subjective foresight as to the consequences of one's conduct, and that for the latter all that must be shown is inadvertence in the sense of failure to exercise the care that a reasonable person would exercise in the circumstances. The jury's task is to determine whether the driving was in fact dangerous to the public having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time was or might reasonably be expected to be at such place. By its very terms s. 221(4) goes beyond the minimum of civil negligence and the task of the jury is to consider the actual facts of the driving in the light of the section. Applying the section to the facts of this case, the appellant's conduct brought him within the wording of the section. There was no error in the judgment of the Court of Appeal on the instruction to be given to a jury on a charge of dangerous driving under s. 221(4) of the Code, and the Court of Appeal did not err in applying the provisions of s. 592(1)(*b*)(iii) of the Code.

Per Cartwright, Ritchie and Spence JJ.: In *Mann v. The Queen*, [1966] S.C.R. 238, it was decided that proof of inadvertent negligence is not sufficient to support a conviction under s. 221(4) of the Code. In so deciding, the Court was expressing a legal proposition which was a necessary step to the judgment pronounced. That proposition should have been accepted by the Court of Appeal under the principle of *stare decisis*. Under the circumstances the instruction given by the trial judge was adequate. In any event, on consideration of all the record, this was a proper case in which to apply the provisions of s. 592(1)(*b*)(iii) of the Code.

Droit criminel—Conduite dangereuse—Est-ce au-delà de la négligence inattentive—Y a-t-il eu erreur judiciaire—Code criminel, 1953-54 (Can.), c. 51, arts. 221(4), 592(1)(b)(iii).

L'appelant a été trouvé coupable par un jury d'avoir conduit d'une façon dangereuse pour le public, contrairement à l'art. 221(4) du *Code criminel*. Le verdict de culpabilité a été confirmé par la Cour d'Appel et il en appela devant cette Cour pour le motif que les directives au jury n'avaient pas été les bonnes. Deux questions ont été soulevées devant cette Cour: A savoir si, en vue d'obtenir un verdict de culpabilité sous l'art. 221(4), il est nécessaire que le tribunal des faits soit satisfait que la conduite de l'accusé était au-delà de la négligence inattentive et équivalait à la négligence intentionnelle, et deuxièmement, à savoir si la Cour d'Appel a erré dans l'espèce en mettant en jeu les dispositions de l'art. 592(1)(*b*)(iii) du Code.

Arrêt: L'appel doit être rejeté.

1967

BINUS
v.
THE QUEEN

Le Juge en Chef Taschereau et le Juge Judson: La distinction entre la négligence criminelle dans la mise en service d'un véhicule à moteur et la conduite dangereuse est que dans le cas de la première ce qui doit être établi est une préméditation intentionnelle ou subjective quant aux conséquences de l'acte, et que dans le cas de la deuxième tout ce qui doit être établi est l'inattention dans le sens d'un défaut d'exercer le soin qu'une personne raisonnable exercerait dans les circonstances. La tâche du jury est de déterminer si la conduite était en fait dangereuse pour le public, compte tenu de toutes les circonstances, y compris la nature et l'état de cet endroit, l'utilisation qui en est faite ainsi que l'intensité de la circulation alors constatable ou raisonnablement prévisible à cet endroit. De par ses termes même, l'art. 221(4) va au-delà du minimum de la négligence civile et la tâche du jury est de considérer les faits actuels de la conduite à la lumière de l'article. Appliquant l'article aux faits de cette cause, la conduite de l'appelant l'a placé dans son langage. Il n'y a eu aucune erreur dans le jugement de la Cour d'Appel relativement aux directives données au jury sur l'accusation de conduite dangereuse sous l'art. 221(4) du Code, et la Cour d'Appel n'a pas erré en mettant en jeu les dispositions de l'art. 592(1)(*b*)(iii) du Code.

Les Juges Cartwright, Ritchie et Spence: Dans la cause de *Mann v. The Queen,* [1966] R.C.S. 238, il a été décidé que la preuve d'une négligence inattentive n'était pas suffisante pour supporter un verdict de culpabilité sous l'art. 221(4) du Code. En décidant de cette façon, la Cour a exprimé une proposition légale qui était un échelon nécessaire au jugement prononcé. Cette proposition aurait dû être acceptée par la Cour d'Appel en vertu du principe du *stare decisis*. Dans l'espèce, les directives données au jury étaient adéquates. A tout événement, en considérant tout le dossier, cette cause est une où il est à propos de mettre en jeu les dispositions de l'art. 592(1)(*b*)(iii) du Code.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], confirmant un verdict de culpabilité à l'égard d'une charge de conduite dangereuse. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a conviction for dangerous driving. Appeal dismissed.

Robert J. Carter, for the appellant.

R. G. Thomas, for the respondent.

The judgment of Taschereau C.J. and Judson J. was delivered by

[1] [1966] 2 O.R. 324.

JUDSON J.:—In *O'Grady v. Sparling*[1], this Court decided that s. 55(1) of the *Highway Traffic Act*, R.S.M. 1954, c. 112, was within the provincial legislative power. This section read:

> 55. (1) Every person who drives a motor vehicle or a trolley bus on a highway without due care and attention or without reasonable consideration for other persons using the highway is guilty of an offence.

At that time the *Criminal Code* dealt only with criminal negligence in the operation of a motor vehicle. What had been formerly s. 285(6) of the *Criminal Code* as enacted by 1938, c. 44, s. 16, was omitted when the new *Criminal Code* was enacted by 2-3 Eliz. II, c. 51. This dealt with dangerous driving. Dangerous driving was reintroduced into the Code by 1960-61, c. 43, s. 3, as s. 221(4). It reads:

> 221. (4) Every one who drives a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place, is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for two years, or
>
> (*b*) an offence punishable on summary conviction.

It differs from s. 285(6) of the old Code in this respect: The old Code said "recklessly or in a manner which is dangerous to the public". The new Code drops "recklessly or" and says only "in a manner which is dangerous to the public". The new section may be referred to conveniently as the "dangerous driving section".

This was the charge against Horst Binus, the appellant in this appeal. He was charged that he

> on the 15th day of May, 1965 at the Township of East Gwillimbury, in the County of York, did unlawfully drive a motor vehicle bearing Ontario licence #385703, upon a road in a manner that is dangerous to the public having regard to all the circumstances including the nature, condition and use of such road and the amount of traffic that at the time is or might reasonably be expected to be on such road, contrary to Section 221(4) of the *Criminal Code* of Canada.

He was convicted before a judge and jury. His conviction was affirmed on appeal[2] and he now appeals to this Court on the ground that the jury was not properly instructed. He says that the jury must be told that they cannot convict

[1] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 120 C.C.C. 1, 25 D.L.R. (2d) 145.

[2] [1966] 2 O.R. 324.

1967

BINUS
v.
THE QUEEN

Judson J.

of dangerous driving unless there is something more than that minimum of negligence which may involve a driver in liability to pay damages. The submission has been put in a variety of ways: that the conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment, or that there should be distinguishing marks of criminality or proof of a high degree of negligence and a moral quality carried into the act. It is argued that this type of instruction must be given because of the combined effect of *O'Grady v. Sparling, supra,* and *Mann v. The Queen*[1]. In *Mann v. The Queen* the point involved was whether the provincial Careless Driving section, similar in effect to the one involved in *O'Grady v. Sparling,* could stand after Parliament had introduced again to the *Criminal Code* the offence of "dangerous driving". This Court held that it could.

All the *obiter* observations in *O'Grady v. Sparling* and *Mann v. The Queen* have been collected in support of this submission. If the submission is accepted it means the formalization of a judge's charge or self-instruction in these cases. First of all, he must start with civil negligence, which involves liability if a driver departs from the standard that may be expected of a reasonably competent driver. Then he must say something more than is needed for dangerous driving and something more still for criminal negligence, i.e., recklessness.

We are not concerned with criminal negligence in the sense of recklessness here. Dangerous driving is an offence of lower degree. The following passage is a summary of the reasons of the Court of Appeal in this case:

> To convict of dangerous driving under s. 221(4) (enacted 1960-61, c. 43, s. 3) of the *Criminal Code* no proof is required of *mens rea* in the sense of either intention to jeopardize the lives or safety of others or recklessness as to such consequences. It is sufficient for the Crown to prove beyond a reasonable doubt that the accused did not drive with the care that a prudent person would exercise in the circumstances confronting him having regard to the nature, condition, and use of the place where the accused was driving and the amount of traffic that was or might reasonably have been expected to be in such place, and that the accused in failing to exercise such care in fact endangered the lives or safety of others whether or not harm resulted. Consideration of the ingredients of the offence of dangerous driving for the purpose of determining legislative competence of a provincial Legislature as opposed to Parliament is not controlling for the purpose of the substantive

[1] [1966] S.C.R. 238, 47 C.R. 400, 2 C.C.C. 273, 56 D.L.R. (2d) 1.

criminal law. Although an examination of the penalties provided by Parliament for criminally negligent driving, which does involve *mens rea* in the sense of recklessness, on the one hand, and for dangerous driving, on the other, suggests that Parliament envisaged these two offences as shading into each other, it does not follow that Parliament intended that dangerous driving involved *mens rea* and this conclusion is supported by the language of s. 221(4) which speaks of the objective factor of driving in a *manner* dangerous to the public. The distinction between criminal negligence in the operation of a motor vehicle and dangerous driving is that for the former what must be shown is advertence or subjective foresight as to the consequences of one's conduct, and that for the latter all that must be shown is inadvertence in the sense of failure to exercise the care that a reasonable person would exercise in the circumstances.

I think that this is the correct approach. The fallacy in the appellant's submission is this: He wants the Court to say that unless it does as he suggests, he will be convicted of the crime of dangerous driving for conduct which may amount to no more than civil negligence, or, to put it another way, negligence which should involve only civil consequences—compensation. This is not so. The section itself contains its own definition. The jury's task is to determine whether the driving was in fact dangerous to the public having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time was or might reasonably be expected to be at such place. By its very terms the section goes beyond the minimum of civil negligence and the task of the jury is to consider the actual facts of the driving in the light of the section. If this is done, there will be no conviction for negligence involving only civil consequences. To this extent the section does involve a consideration of the state of mind of the driver towards his task. A motor car does not drive itself. It responds to the direction which it gets from the driver within the limits of space and time available to him.

The application of the section to the facts of this case gives no difficulty. This motorist was driving on a county road. He came out of an "S" curve and saw ahead of him two boys on a bicycle 150 yards away. There was no oncoming traffic. He struck the bicycle from the rear. His defence was that the boys swerved ahead of him. There was evidence given by a bystander that no such thing happened and that he drove straight into the boys and did not apply his brakes or swerve until the moment of impact. The jury was confronted with a very simple situation. What

1967

BINUS
v.
THE QUEEN

Judson J.

did this man do? What should he have done? Did his conduct bring him within the wording of the section? It obviously did.

I would answer the points in issue in this appeal generally by saying that there was no error in the judgment of the Court of Appeal on the instruction to be given to a jury on a charge of dangerous driving under s. 221(4) of the Criminal Code and that the Court of Appeal did not err in applying the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*.

I would dismiss the appeal.

The judgment of Cartwright, Ritchie and Spence JJ. was delivered by

CARTWRIGHT J.:—The facts out of which this appeal arises and the grounds for the decision of the Court of Appeal[1] are summarized in the reasons of my brother Judson.

This appeal raises two questions, (i) whether in order to convict on a charge of dangerous driving under s. 221(4) of the *Criminal Code* it is necessary for the tribunal of fact to be satisfied that the conduct of the accused went beyond inadvertent negligence and amounted to advertent negligence and (ii) whether the Court of Appeal, having reached the conclusion that the charge of the learned trial Judge was not adequate, erred in the circumstances of this case in applying the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*.

In stating the first question I am using the terms "inadvertent negligence" and "advertent negligence" in the sense in which they were employed by all members of this Court in *O'Grady v. Sparling*[2], adopting the phraseology used in Kenny's Outlines of Criminal Law, 17th ed., p. 34, and in Glanville Williams' Criminal Law, 1953, p. 82.

If the matter were *res integra* I would find the reasoning of my brother Judson and that of Laskin J.A. in the case at bar most persuasive; but it appears to me that in *Mann v. The Queen*[3] at least five of the seven members of this

[1] [1966] 2 O.R. 324.

[2] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 120 C.C.C. 1, 25 D.L.R. (2d) 145.

[3] [1966] S.C.R. 238, 47 C.R. 400, 2 C.C.C. 273, 56 D.L.R. (2d) 1.

Court who heard the appeal decided that proof of inadvertent negligence is not sufficient to support a conviction under s. 221(4) and that in so deciding they were expressing a legal proposition which was a necessary step to the judgment pronounced. I find it impossible to treat what was said in this regard as *obiter,* and, in my respectful view, that proposition should have been accepted by the Court of Appeal under the principle of *stare decisis.* The binding effect of a proposition of law enunciated as a necessary step to the judgment pronounced is not lessened by the circumstance that the Court might have reached the same result for other reasons.

I do not doubt the power of this Court to depart from a previous judgment of its own but, where the earlier decision has not been made *per incuriam,* and especially in cases in which Parliament or the Legislature is free to alter the law on the point decided, I think that such a departure should be made only for compelling reasons. The ancient warning, repeated by Anglin C.J.C. in *Daoust, Lalonde & Cie Ltée v. Ferland*[1], *ubi jus est aut vagum aut incertum, ibi maxima servitus prevalebit,* should not be forgotten.

Turning now to the second question, as to whether the Court of Appeal erred in applying the provisions of s. 592(1)(*b*)(iii) of the Code, I have reached the conclusion that they did not.

Following the charge of the learned trial Judge to the jury, counsel for the appellant raised certain objections and after some discussion the jury were recalled for further instructions as follows:

> THE COURT: Gentlemen, I thought that perhaps you might require a little more assistance than I gave you on this word "dangerous" to be found in Section 221, subsection 4 of the Code.
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> As you recall, the section speaks of driving in a manner that is dangerous to the public having regard to all the circumstances including the nature and condition and use of such place and the amount of traffic that at that time is or might reasonably be expected to be on such place. *Now, since the word is found in the Criminal Code and this is a criminal prosecution it's to be presumed that what we are talking about is criminal conduct, something that is more than mere civil negligence; that is, mere inattention from which civil liability might flow.* You will in this case, determine from the evidence the manner in which the accused was driving. You will determine from the evidence the circumstances which existed at the time he was driving in this fashion. And after considering the manner in which he was driving determine whether or not that way he was

[1] [1932] S.C.R. 343 at 351, 2 D.L.R. 642.

1967

BINUS
v.
THE QUEEN

Cartwright J.

driving is in your opinion dangerous to the public. *Evidence which shows mere failure to exercise reasonable care under all the circumstances and perhaps resulting in civil liability is not sufficient to support a conviction for dangerous driving.* All right.

Counsel for the defence, rightly as I think, expressed his satisfaction with this and stated he had no further comments.

Later the jury returned to ask a question. The record at this point reads as follows:

> CLERK OF THE COURT: Gentlemen of the Jury, I understand you wish to ask the Court a question. Mr. Foreman, will you please put your question to the Court?
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> FOREMAN OF THE JURY: Your Honour, I have been requested to ask you to define for us "dangerous". Could it be dangerous without intent? Would you define it?
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> THE COURT: Yes, if you find on the facts that the manner of driving was dangerous in your opinion you may disregard the matter of intent. Does that answer your question?
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> FOREMAN OF THE JURY: Yes.

On the view of the meaning of s. 221(4) of the Code which I have expressed above, I incline to think that the instruction given by the learned trial Judge when the jury were re-called, and particularly the passages which I have italicized, was adequate in the circumstances of this case. Be that as it may, on consideration of all the record I agree with the conclusion of Laskin J.A. that this was a proper case in which to apply the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: Robert J. Carter, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.