HER MAJESTY THE QUEEN ....APPELLANT;

AND

RUSSELL TAYLOR ....RESPONDENT.

1963

*Jun. 3
Jun. 24

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Criminal negligence causing death—Motor vehicle—Jury trial—Lack of evidence—Insufficiency of evidence—Question of law.

The respondent was found guilty of criminal negligence causing death. The evidence relating to the accident itself was given by one witness who testified that a car going about 70 m.p.h. overtook her own car and cut suddenly in front of her. The right side of the car appeared to rise from the ground and then the car veered to the left side of the road and continued on. The place where this observation occurred was the place where the body of a nine-year old boy was found in the ditch the following morning. The respondent denied any knowledge of the accident and sought to show that neither he nor his automobile had anything to do with it. Debris found at the scene connected his car with the accident. Subsequent to the accident, the respondent kept his car in his garage for two or three days, which was unusual for him to do. Then four days later, he drove to Oshawa during the night and had his car repaired. The Court of Appeal

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Judson JJ.

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quashed the conviction. The Crown was granted leave to appeal to this Court.

Held (Cartwright J. dissenting): The appeal should be allowed and the conviction restored.

Per Taschereau C.J. and Fauteux, Abbott and Judson JJ.: It was a common basis to both sets of reasons for judgment in the Court below that there was no evidence to go to the jury. This was a question of law and it was erroneously decided by that Court. In addition to the witness's description of the driving, there was the subsequent conduct of the respondent which was of real significance when linked with the driving. All this was properly before the jury, so that there was evidence of criminal negligence to go to the jury. *Balcerczyk v. The Queen,* [1957] S.C.R. 20, referred to.

Per Cartwright J., *dissenting:* A reading of the reasons for judgment of Casey J., with which Badeaux J. concurred, where he used the very words of clause (i) of s. 592(1)(a) of the Criminal Code, after which he went on to hold that guilt could not be "reasonably deduced" from the evidence, forces the conclusion that the Judge based his judgment on the insufficiency of the evidence rather than the lack of it. It is well settled that if one of the grounds on which a Court of Appeal quashes a conviction is that it cannot be supported by the evidence this Court is without jurisdiction even though the judgment is also based on other grounds raising questions of law in the strict sense. *The Queen v. Warner,* [1961] S.C.R. 144, referred to.

APPEAL by the Crown from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], quashing the respondent's conviction. Appeal allowed, Cartwright J. dissenting.

Yvan Mignault, for the appellant.

Lawrence Corriveau, Q.C., for the respondent.

The judgment of Taschereau C.J. and of Fauteux, Abbott and Judson JJ. was delivered by

JUDSON J.:—The conviction of the respondent Russell Taylor on a charge of criminal negligence causing death was set aside by a judgment of the Court of Queen's Bench, Appeal Side[1], from which judgment the Crown now appeals by leave of this Court.

The evidence relating to the accident itself was brief and given by only one witness. She was Madame Léonard Lemieux, who was driving north on Boulevard Henri Bourassa on April 5, 1960, between 7 and 7:15 in the evening. She says that a car overtook her and cut suddenly

[1] [1963] Q.B. 96.

in front of her. She thought it was going to strike a power pole on the side of the road. The right-hand side of the car appeared to rise from the ground and then the car veered suddenly to the left-hand side of the road and from there went on its way to the north. It did not stop. She estimates its speed at 70 miles an hour. She says she herself was going at 40 miles an hour. The place where this observation occurred was the place where the body of Marcel Berthiaume, a boy of 9 years of age, was found in the ditch the following morning. The boy had left his house in the early evening of April 5 to go on an errand for his mother.

Taylor's defence was that he had nothing to do with the accident; that he was not at the scene of the accident at the hour in question but was at home with his car in the garage; and that at no relevant time had he given his car into the possession of any other person. This defence could not succeed against the evidence adduced by the prosecution. Debris from a car which was found at the scene of the accident connects Taylor's car with the accident beyond any doubt. Taylor's conduct after April 5, 1960, is also significant. He kept his car in the garage for two or three days with the doors closed. This was an unusual thing to do and was noted by his neighbours at Lac Beauport. On April 9, four days after the accident, he left Lac Beauport at 9 p.m. and drove to Oshawa during the night. He had the car repaired in Oshawa and the explanation he gave for this trip could not possibly be accepted by the jury.

When the case came to appeal the Court concentrated its attention upon the evidence of Madame Lemieux. I take the finding of Casey J. to be that there was no evidence to go to the jury and that, in consequence, he held that the verdict was unreasonable and could not be supported by the evidence. Rinfret J. held that the learned trial judge ought to have directed a verdict of acquittal. Badeaux J. agreed with both his colleagues and, in my opinion, without any inconsistency for it is a common basis to both reasons for judgment that there was no evidence to go to the jury. This is a question of law and I am of the opinion that the ruling upon it was erroneous.

Even if the attention of a Court is limited entirely to Madame Lemieux's description of the driving, I cannot agree that there was no evidence of criminal negligence to

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go to the jury. There was, in addition, Taylor's subsequent conduct which is of real significance when linked with the driving. All this was properly before the jury. *Balcerczyk v. The Queen*[1].

I would set aside the judgment of the Court of Queen's Bench, Appeal Side, and restore the jury's verdict of guilty. I note from the record that the accused has already been sentenced.

CARTWRIGHT J. (*dissenting*):—This is an appeal brought by the Crown, pursuant to leave granted by this Court, from a unanimous judgment of the Court of Queen's Bench, Appeal Side[2], quashing the conviction of the respondent on a charge of criminal negligence.

On April 5, 1960, Marcel Berthiaume died as a result of having been struck by an automobile. It was the theory of the Crown that the respondent was the owner and driver of the car which struck the deceased. The defence was a denial that this was so. The respondent sought to show that neither he nor his automobile had anything to do with the accident.

The Court of Queen's Bench was composed of Casey, Rinfret and Badeaux JJ. Casey J. and Rinfret J. each delivered written reasons and Badeaux J. agreed with both of them.

The appeal is met *in limine* by the submission of counsel for the respondent that we are without jurisdiction as the judgment sought to be appealed was based on the ground that the conviction was unreasonable or could not be supported by the evidence and that the appeal raises no question of law in the strict sense.

In my opinion this submission is entitled to prevail.

The question whether there is any evidence (as distinguished from sufficient evidence) to support a verdict is a question of law. The answer to the question whether Casey J. decided that as a matter of law there was no evidence or that the evidence was insufficient depends on the construction of the words used by that learned Judge.

After a review of portions of the evidence, Casey J. says:

> It was the burden of the Crown to prove that the victim had been struck by appellant's car, that appellant had been driving the automobile

[1] [1957] S.C.R. 20, 117 C.C.C. 71. [2] [1963] Que. Q.B. 96.

and that (CC 191) in his driving he had shown 'wanton or reckless disregard for the lives or safety of other persons'.

Before a jury can be called upon to pass judgment, before it can be asked to decide whether there was 'wanton or reckless disregard' there must be some evidence from which the existence of this element can be reasonably deduced. If no such evidence exists then the verdict that finds the accused guilty is one that in the words of CC 592 is 'unreasonable or cannot be supported by the evidence'. In this case the only person who testifies as to the conduct of the appellant was Mrs. Lemieux. Assuming that the appellant was driving the automobile that struck the victim the evidence of Mrs. Lemieux does not establish facts from which the existence of 'wanton or reckless disregard' can be reasonably deduced.

For the foregoing reasons I would maintain this appeal and quash the conviction.

It will be observed that the learned Judge used the very words of clause (i) of s. 592(1)(*a*) of the *Criminal Code* which must be contrasted with clause (ii). The section reads in part:

592(1) On the hearing of an appeal against a conviction, the court of appeal

(*a*) may allow the appeal where it is of opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

Casey J. goes on to hold that guilt cannot be "reasonably deduced" from the evidence.

I have reached the conclusion that Casey J. based his judgment on clause (i) quoted above and not on clause (ii). It has already been pointed out that Badeaux J. agreed with Casey J.

It is settled by the judgment of this Court in *The Queen v. Warner*[1], that if one of the grounds on which a Court of Appeal quashes a conviction is that it cannot be supported by the evidence we are without jurisdiction even although the judgment is also based on other grounds raising questions of law in the strict sense.

For these reasons I have reached the conclusion that we are without jurisdiction to interfere with the judgment of

[1] [1961] S.C.R. 144, 34 C.R. 246, 128 C.C.C. 366.

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the Court of Queen's Bench, Appeal Side, in this case, and I would dismiss the appeal.

Appeal allowed, CARTWRIGHT J. *dissenting.*

Attorney for the appellant: Jean Bienvenu, Quebec.

Attorney for the respondent: Lawrence Corriveau, Quebec.