



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Reid*, 2021 NLCA 13

Date: February 23, 2021

Docket Number: 202001H0001

BETWEEN:

ROBERT REID

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Fry C.J.N.L., Welsh and Goodridge JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
(St. John's) 0119A01385

Appeal Heard: November 10, 2020

Judgment Rendered: February 23, 2021

Reasons for Judgment by: Goodridge J.A.

Concurred in by: Fry C.J.N.L. and Welsh J.A.

Counsel for the Appellant: Derek Hogan

Counsel for the Respondent: Arnold Hussey Q.C.

Authorities Cited:

CASES CONSIDERED: *R. v. Aisthorpe*, 2006 NLCA 40, 257 Nfld. & P.E.I.R. 1; *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 (B.C.C.A.); *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *R. v. Warsing*, [1998] 3 S.C.R. 579; *R. v. Roach*, 2009 ONCA 156; *R. v. R. (R.)*, (1994), 19 O.R. (3d) 448, 91 C.C.C. (3d) 193 (Ont. C.A.); *R. v. Steer* (1982), 30 C.R. (3d) 269, 17 M.V.R. (2d) 217 (B.C. Prov. Ct.); *R. v. O'Brien* (1987), 67 Nfld. & P.E.I.R. 68 (N.L.S.C.); *R. v. Hansen* (1988), 46 C.C.C. (3d) 504 (B.C.C.A.); *R. v. Riseberg*, 1987 CarswellQue 1408 (Que. C.A.); *R. v. Modeste*, 2012 NWTSC 31; *R. v. Hill*, [1975] 2 S.C.R. 402 (S.C.C.); *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *Michel v. Graydon*, 2020 SCC 24

STATUTES CONSIDERED: *Criminal Code*, R.S.C. 1985, c. C-46; *Interpretation Act*, R.S.C. 1985, c.-I-21

TEXTS CONSIDERED: Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983)

OTHER: *Roget's International Thesaurus* (sixth edition)

REASONS FOR JUDGMENT

Goodridge J.A.:

[1] Robert Reid, age 43, appeals his conviction for failing to stop at the scene of an accident, contrary to section 252(1) of the *Criminal Code*.¹ The appeal turns on whether an “accident”, in the context of that section, includes the situation where a driver intentionally strikes a pedestrian. The relevant section states:

Every person commits an offence who has the care, charge or control of a vehicle ... that is involved in an accident with (a) another person, ... and with intent to escape civil or criminal liability fails to stop the vehicle, ... give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

¹ S. 252 was repealed by *An Act to Amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21, s. 14, and the new provision, in force as of December 18, 2018, now appears at s. 320.16 in Part VIII.1 of the *Criminal Code*.

[2] Mr. Reid had been convicted of assault with a weapon (section 267), dangerous driving causing bodily harm (section 249), and failing to stop at the scene of an accident (section 252). The three convictions flow from the intentional act of driving his vehicle into a pedestrian – Sean Mulcahy – just after midnight on November 16, 2018. The convictions under sections 267 and 249 are not being appealed.

[3] Mr. Reid admits that he was the driver, that his act of driving into Mr. Mulcahy was intentional, and that he did not stop at the scene. Under section 252(2) these admissions, in the absence of evidence to the contrary, are proof of an intent to escape civil or criminal liability. Mr. Reid’s argument, in its simplest form, is that because his act was intentional, he is not a person “involved in an accident”, and is therefore not a person included within this section 252 offence.

[4] For the reasons that follow, I would reject that argument and dismiss the appeal. Section 252 does capture Mr. Reid’s intentional act of leaving the scene with intent to escape civil or criminal liability. There was no error by the trial judge in convicting Mr. Reid for breach of section 252.

BACKGROUND

[5] On November 14 and 15, 2018, Mr. Reid was at the residence of Patricia Avery drinking alcohol with Mr. Mulcahy and Ms. Avery. At some point on the second day of drinking, things became rowdy and Mr. Reid was asked to leave. Later that evening, or just after midnight on November 16, 2018, Mr. Reid drove back to the Avery residence. He began cruising up and down the street in front of the residence, sounding his horn, blaring music, and shining his headlights through the living room window. Mr. Reid then parked outside and yelled in a manner that implied a challenge, “Come on, let’s go”. Mr. Mulcahy, hearing the challenge, stepped outside the residence, took a shovel, and walked toward Mr. Reid’s vehicle. In response, Mr. Reid accelerated toward Mr. Mulcahy; he rammed his vehicle into Mr. Mulcahy; he backed up and repeated the deed striking Mr. Mulcahy with the vehicle a second time; he failed to stop the vehicle; and he left the area. Mr. Mulcahy suffered various injuries including a broken foot, torn knee ligaments, road rash, and multiple cuts and abrasions on his legs, face and arms.

[6] At trial, the sole issue for all three charges was whether the Crown had proven that Mr. Reid was the driver. The legal meaning of “accident” in the context of section 252 was not raised as an issue at trial. Both counsel conceded that if the trial judge found that Mr. Reid was the driver, then convictions under

all charges, including the section 252 charge, should follow. Defence counsel (not the same counsel who appeared on this appeal) stated in closing submissions:

“We can all agree this [trial] turns on identity. If Mr. Reid is the individual driving the vehicle when it hits Mr. Mulcahy, he is guilty of all three offences”.

ISSUES

[7] The threshold issue is whether this Court should exercise its discretion to grant leave to address an issue not raised at trial.

[8] If leave is granted, the issues include the meaning of “accident” in the context of section 252, and whether the trial judge erred in law in convicting Mr. Reid for failing to remain at the scene.

ANALYSIS

Leave to Address New Issue Not Raised at Trial

[9] In *R. v. Aisthorpe*, 2006 NLCA 40, 257 Nfld. & P.E.I.R. 1, at paragraph 36, Rowe J.A., for a unanimous panel, held that “a new issue cannot be raised first on appeal, save with leave of the court”. At paragraph 37, he referred with approval to the following comments of Lambert J.A., from *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 (B.C.C.A.):

...only in those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done, that a new ground is likely to be permitted to be raised on appeal. Such a new ground is more likely to be permitted where it raises an issue of law alone than where it requires the leading of evidence either in the appeal court or at a new trial.

[10] Appellate courts sit in review of decisions made in trial courts. The requirement that issues be raised and adjudicated at trial before they will be considered on appeal is inherent in the appellate function. For this and other reasons, leave is granted only in exceptional circumstances.

[11] In *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, Rothstein and Cromwell JJ., for the majority, in the context of a constitutional question raised for the first time on appeal, stated at paragraph 23 that the “Court’s discretion to hear and decide new issues [on appeal] should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties”.

[12] In the earlier decision of *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, in the context of a contractual dispute, Binnie J. (for a unanimous court on this point) discussed the exceptional circumstances that may justify the exercise of discretion to grant leave. At paragraph 33, he stated “[t]he Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice”. See also *R. v. Warsing*, [1998] 3 S.C.R. 579, at paragraph 16, *R. v. Roach*, 2009 ONCA 156, at paragraph 8, and *R. v. R. (R.)*, (1994), 19 O.R. (3d) 448, 91 C.C.C. (3d) 193 (Ont. C.A.) at 198.

[13] Applying these principles favours granting leave in this case. The new issue raised by Mr. Reid is an issue of law alone; the facts relevant to Mr. Reid’s legal position are not in dispute. If the issue is resolved in Mr. Reid’s favour, it would result in his acquittal of the section 252 charge. The appeal can proceed without procedural prejudice to the Crown. Under these circumstances, I am satisfied that Mr. Reid’s new issue falls within the exceptional circumstances. I would exercise my discretion and grant Mr. Reid leave to address this new issue on appeal.

Meaning of “Accident” in the Context of Section 252

[14] Mr. Reid’s primary argument is that, within the context of section 252, “accident” has its ordinary meaning, and that does not include something that arises from an intentional act. *R. v. Steer* (1982), 30 C.R. (3d) 269, 17 M.V.R. (2d) 217 (B.C. Prov. Ct.) and *R. v. O’Brien* (1987), 67 Nfld. & P.E.I.R. 68 (N.L.S.C.), are on point and support this view. The *O’Brien* decision quoted from and followed the *Steer* decision. In *R. v. Hansen* (1988), 46 C.C.C. (3d) 504 (B.C.C.A.), at paragraph 29, Hutcheon J.A., for a unanimous panel, effectively overruled *Steer*, saying, “I ... disagree with the decision in *R. v. Steer*”.

[15] Mr. Reid’s secondary argument is that, if there is an ambiguity in section 252, then the section must be strictly construed, and the ambiguity must be resolved in a way that is least unfavorable to him.

[16] The Crown’s argument is that, within the context of section 252, “accident” contemplates any incident in which a person operates a vehicle so as to cause injury to another person or vehicle, and it includes intentional conduct on the part of the accused. *Hansen, R. v. Riseberg*, 1987 CarswellQue 1408

(Que. C.A.), and *R. v. Modeste*, 2012 NWTSC 31 are on point and support this view.

[17] The term "accident" is not defined in the *Criminal Code* and its definition, in different contexts, has been the subject of judicial comment. In *R. v. Hill*, [1975] 2 S.C.R. 402 (S.C.C.), Dickson J., writing for the majority, at paragraph 8, said that the word is "not easy of definition as its meaning has a certain chameleon-like quality, changing its colour with the context in which it is found". The chameleon-like quality of the word is evident when one considers its various synonyms suggested in *Roget's International Thesaurus* (sixth edition) – e.g. event, occurrence, incident. Clearly, intention is not a factor in these sample synonyms.

[18] We see the term "accident" colloquially used to describe both intentional and unintentional acts. For example, in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paragraph 79, Wagner J. referred to "motor vehicle accidents that result from impaired driving". In the context of section B of the Newfoundland and Labrador Standard Automobile Policy, approved by the Superintendent of Insurance, pursuant to the *Automobile Insurance Act*, RSNL 1990, c. A-22, "accident" is used to describe both intentional and unintentional acts.

[19] As a starting point in interpreting section 252, helpful guidance is found at page 87 of Elmer A. Driedger's text, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983): "...read [the words of an Act] in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". This is referred to as the modern principle of interpretation, and it has been cited and relied upon many times by the Supreme Court of Canada, including most recently in *Michel v. Graydon*, 2020 SCC 24 at paragraph 69.

[20] Section 12 of the *Interpretation Act*, R.S.C. 1985, c.-I-21, directs that the wording "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[21] Reading section 252 in its entire context, and in the manner as directed by the *Interpretation Act*, leads to the conclusion that intention of the driver is not an element of "accident". This interpretation, treating "accident" as synonymous with "incident", is supported by the sample synonyms referred to above, and by two factors within the context of section 252.

[22] Firstly, the language within section 252 – “with intent to escape civil or criminal liability” – contemplates that “accident” can include intentional criminal acts. That is because (except for strict liability crimes) there is no criminal liability, and therefore no possibility of intent to escape criminal liability, unless the act was intentional, or involved some form of *mens rea*, such as knowledge, recklessness, or willful blindness.

[23] Secondly, section 252 is concerned with the harm of drivers leaving the scene without leaving a name, or without rendering assistance to an injured person. Whether an unintended collision or an intended collision, the objective of guarding against the public harm of leaving the scene remains the same. That public harm occurred here, with Mr. Reid driving away without rendering assistance to the injured Mr. Mulcahy.

[24] As noted above, the authorities relied upon by the Crown support this interpretation. Writing for a unanimous panel of the British Columbia Court of Appeal in *Hansen*, Hutcheon J.A. held, at paragraph 26, that “section [252] contemplates any incident in which a person so operates his vehicle so as to cause injury to another person or vehicle”. He continued:

[27] In my opinion, the emphasis I have drawn from the section tells against involving the intention of the driver as an element of “an accident.” I think the section contemplates any incident in which a person so operates his vehicle so as to cause injury to another person or vehicle.

[25] A similar conclusion was reached by the Quebec Court of Appeal in *Riseberg* where a driver intentionally chased down a vehicle on the highway, and ran into it. More recently, in *Modeste*, Charbonneau J. found that “accident”, in the context of section 252, includes intentional conduct on the part of an accused.

[26] Within the context of section 252, “accident” contemplates any incident in which a person operates a vehicle so as to cause injury to another person or vehicle, and it includes intentional conduct on the part of the accused. There was no error by the trial judge in convicting Mr. Reid under section 252.

DISPOSITION

[27] I would dismiss the appeal.

W. H. Goodridge J.A.

I concur:_____

D. E. Fry C.J.N.L.

I concur:_____

B. G. Welsh J.A.