Osawa v. Fujiwara

[1938] S.C.J. No. 45

[1938] 3 D.L.R. 369

Supreme Court of Canada

1938: February 17.

Present: Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Alfred Bull K.C., for the appellant.
C.H. Locke K.C., for the respondent.

On the appeal to the Supreme Court of Canada, after hearing the argument of counsel for the appellant, the Court, without calling in counsel for the respondent, delivered judgment orally dismissing the appeal with costs, the Chief Justice, for the Court, stating that there was no reason to disagree with the finding of the trial judge.

Appeal dismissed with costs.

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ANNOTATED

For Consolidated Table of Annotations see [1930] 4 D.L.R., pp. XI et seq. and Supplement in [1938] 2 D.L.R., or Canadian Annual Digest.

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REX v. BURNS.

Alberta Supreme Court, Appellate Division, Ford, Lunney and McGillivray, JJ.A. November, 18, 1937.

Trial III C — Evidence XII A — Misdirection — Corroboration of accomplice.

It is misdirection and ground for new trial for the trial Judge to fail to instruct the jury as to what in law would constitute an accomplice of the facts constituting complicity in the offence charged, and if they found that the witness was an accomplice there would be danger of convicting the defendant upon such testimony standing alone and uncorroborated.

[See annotation on "Accomplice as a Witness," 53 Can. C.C. 1.]

APPEAL from conviction on ground of misdirection. Reversed and new trial ordered.

H. C. Macdonald, K.C., for appellant.

W. S. Gray, K.C., for the Crown.

The judgment of the Court was delivered orally by

FORD, J.A.:—We are all agreed that the appeal must be allowed and a new trial ordered. There was evidence upon which the jury might have found that the witness Winkler was, at some relevant time, an accomplice of the appellant Burns. That being so it was misdirection on the part of the learned trial Judge not to have followed the course laid down in *Vigeant* v. *The King*, [1931] 3 D.L.R. 512, 54 Can. C.C. 301, *i.e.*, to have instructed the jury as to what, in law, would constitute an accomplice; to call their attention to any facts which would serve to indicate Winkler's complicity in the offence alleged, leaving it to the jury to say whether he was, at any stage of the proceedings, an accomplice therein; and then to instruct the jury that if they concluded that he was an accomplice there would be danger in convicting upon Winkler's evidence, standing alone and uncorroborated, that the law does not preclude their doing so—indeed they are at liberty to do so—but that there is danger in basing a conviction on such uncorroborated evidence. As laid down in *Boulianne* v. *The King*, [1932] 1 D.L.R. 285, 56 Can. C.C. 338, the rule requiring this warning to be given applies equally whether there be or be not corroborative evidence of the testimony of an accomplice.

As to the application of s. 1014 following *Lawrence* v. *The King* [1933] A.C. 699, recently referred to in *The King* v. *Labine*, [1937] 4 D.L.R. 284 we cannot say that "properly directed the jury must have returned the same verdict."

Appeal allowed.

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OGAWA v. FUJIWARA.

Supreme Court of Canada, Sir Lyman P. Duff, C.J.C., Rinfret, Crocket, Kerwin and Hudson, JJ. February 17, 1938.

Automobiles III B—Negligence of driver—Cutting in resulting in plaintiff's incorrect driving—Chain of causation.

Where due to the defendant's negligent cutting in sharply in front of plaintiff's car, plaintiff on the impulse of peril of collision attempted to step on the foot brake but stepped on the accelerator instead with the result that his car swerved over the sidewalk and collided with a pole, the defendant was held liable. Whether or not defendant's car actually struck plaintiff's is not a needed finding as the negligence arose in defendant putting plaintiffs in imminent peril of their lives.

[*Harding* v. *Edwards & Tatisich*, [1929] 4 D.L.R. 598, apld.]

Judgments & Orders I A—Expression of opinion—Whether finding of fact.

The expression of opinion as to whether or not an impact, which, if it occurred, was the proximate cause of an accident, in the words "I think it did" held to be a finding of fact.

APPEAL by defendant from the judgment of the British Columbia Court of Appeal, *infra*, affirming the judgment of Manson, J., [1937] 2 D.L.R. 133, maintaining plaintiff's action for damages arising out of an automobile accident as a result of defendant's cutting in. Affirmed.

The judgment appealed from is as follows:—

MARTIN, C.J.B.C.: *Per Curiam*:—The appeal is dismissed, our brother McQuarrie dissenting.

So far as my brother McPhillips and myself are concerned, we take the view that the learned Judge has reached the right conclusion.

A somewhat unusual question arises, *viz.*: that what was apparently regarded by the plaintiff below and by my brother McPhillips and myself as a cardinal fact of the case, *i.e.*, the alleged impact was, it is submitted, found in favour of the plaintiff, but Mr. Bull on behalf of the appellant presented a strong argument to the effect that the expression of opinion of the learned trial Judge ([1937] 2 D.L.R. 133) in regard to that impact, which, if it occurred, was the proximate cause of the accident, was not definitely found by the learned Judge and that all he said was "I think it did" happen. Under ordinary circumstances Mr. Bull was prepared to admit that "I think" would be a judicial finding, but he submitted that in view of the fact that the learned Judge had proceeded after that expression to deal elaborately with the rest of the case apart from impact, therefore it should be regarded as a mere passing ex-

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pression of his mind and not as a judicial finding; but on the other hand Mr. Nicholson presented very strongly to us his submission that we should regard it as a finding. My brother McPhillips and I, in view of that, have examined this aspect of the case very carefully and we find that even if it could be said, and there is something to support it, that perhaps it was not as definite a finding as is usual, nevertheless we feel that in giving his judgment the learned Judge ought to have found that primary fact in favour of the plaintiff, and that the expression he used "I think it did" (take place) should be regarded as being used in the same way as, for example, the House of Lords used the word "think" repeatedly in *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.*, [1924] A.C. 522. Such being the case, in our opinion, the judgment can be primarily sustained upon that fact of impact, as well as upon the other facts on which the learned Judge relied.

MCPHILLIPS, J.A.:—At the outset I have no hesitation in stating that I am in complete agreement with the judgment here under appeal, being a judgment relative to an automobile accident delivered after a trial without a jury by Manson, J. ([1937] 2 D.L.R. 133). The facts may be shortly stated as follows:—The plaintiff Dr. Fujiwara was driving his automobile in the Port Moody neighbourhood close to the City of Vancouver and had with him his wife and other passengers. The highway was paved in the travelled way with gravel strips on each side. The defendant came along in the rear of the Doctor's automobile and proceeded to pass and in so doing greatly increased his speed, and, coming up alongside the Doctor's automobile, suddenly cut in towards the Doctor's automobile in a diagonal course and at great speed which greatly startled the Doctor as there was apparent and imminent likelihood of a dire tragedy—excited as he naturally would be and in the agony of an apparent likely collision the Doctor attempted to swerve off and in the agony of the moment unfortunately put his foot on the accelerator and the car raced up a slight incline and over the sidewalk and in its course struck an electric light pole and serious injuries ensued to the passengers in the automobile for which the plaintiffs sued in this action and for which the learned trial Judge has awarded damages and against which this appeal is brought. The case is one which does not differ from many such actions of a more or less similar character occurring now so frequently. That the defendant was negligent there can be no question. There is evidence that the automobile of the defendant actually struck the Doctor's automobile although the learned trial Judge does not make a very pronounced

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finding to that effect, yet he did say "I think it did." Upon the facts, as I read them, there was an impact but, in my view, to support the action that is not a needed finding—there need be no actual impact—the negligence really arises by the defendant putting the plaintiffs in imminent peril of their lives, a likelihood of loss of life—in truth a dire tragedy—and that was this case. I do not consider it necessary to further cite any of the surrounding facts and so completely set forth in the evidence which is at length in the appeal book. I will now proceed to refer to some of the decisions which in my opinion fully support in law the conclusion at which the learned trial Judge arrived and which I consider warrants the upholding of the learned trial Judge's judgment. I would refer to *Rowan* v. *Toronto R. Co.* (1899), 29 S.C.R. 717, at p. 723, Sir Henry Strong; *Armand* v. *Carr*, [1926] 3 D.L.R. 592, and at p. 596; *Harding* v. *Edwards & Tatisich*, [1929] 4 D.L.R. 598, 64 O.L.R. 98 (affirmed by the Supreme Court of Canada in [1931] 2 D.L.R. 521) at pp. 602-3, Hodgins, J.A., at p. 599, and Middleton, J.A., at p. 602; *Kelvin Shipping Co.* v. *C.P.R.* (1928), 138 L.T. 369; *SS. "Singleton Abbey"* v. *SS. "Paludina,"* [1927] A.C. 16, at p. 26. It is to be noted that Davie in his work—Common Law and Statutory Amendment in Relation to Contributory Negligence, 1936, at pp. 254, 255, 256, discusses the *Harding* case above referred to, also the *SS. "Singleton"* case and also referred to the words of Hamilton, L.J., in *Latham* v. *R. Johnson & Nephew Ltd.*, [1913] 1 K.B. 398, at p. 413—and a quotation appears at p. 255 by Davie of what Middleton, J.A., said in [1929] 4 D.L.R. 598, at p. 606:—

"'The case emphasizes the necessity of charity in judging the conduct of one who is not, it is true, in the actual agony of collision, but upon whom, in the language I have already quoted, "the hand of the original wrongdoer was still heavy," before his conduct can be regarded as the act of a conscious intervening agent. If in truth such a one is "acting on the impulse of personal peril" he may yet be "only a link in a chain of causation extending from the initial negligence to the subsequent injury," to quote again the words of Hamilton, L.J., in *Latham* v. *R. Johnson & Nephew Ltd.*'"

Davie also, at pp. 255-56 of his work above referred to has this to say relative to the *Harding* case, [1931] 2 D.L.R. 521:—

"In the Supreme Court of Canada the Chief Justice states that the question involved was merely a question of fact on which the Court had the explicit finding of the trial judge, confirmed by the majority of the Appellate Division, that question of fact being whether Edwards had recovered sufficiently from

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the condition of nervous excitement, into which the rash act of Mrs. Tatisich had thrown him, to be held responsible for what subsequently occurred, or whether he should be regarded as still acting involuntarily under the influence of that condition; and the Court took the view that nothing had been shown which would entitle it to determine the question otherwise than had been decreed by the judgments below.

"Consequently it is not necessary for a person to be actually in the physical throes of collision in order to fall within the protective principle of the agony of collision rule. If the excitement of the situation has robbed a person of conscious volition and, while labouring under this impediment, he plunges into danger instead of avoiding it, or as it is said, jumps from the frying pan into the fire, the principle which exonerates from liability is the same whether the victim's injurious actions occur immediately before, during, or immediately after collision became imminent. And the determination of the question as to whether a person is overwhelmed with this 'agony of doubt' is a question of fact for the jury."

The following is a footnote in Davie's work at p. 256:—

"The reader will find an able discussion by the learned jurists of the Appellate Divisional Court upon the law as declared in *Polemis* v. *Furness, Withy & Co.* [1921] 3 K.B. 560, 90 L.J.K.B. 1353, and followed in *Hambrook* v. *Stokes Bros.*, [1924] W.N. 296, with especial reference to the responsibility of the author of initial negligence for the probable consequences of that negligence in relation to a person who causes damage as a result of his normal state of mind having been upset by circumstances brought about by the original wrongdoer."

It is evident that the cases I have referred to amply support the judgment of Manson, J., here under appeal and I have no hesitancy in arriving at the conclusion that the judgment should be sustained. I would, therefore, dismiss the appeal.

MCQUARRIE, J.A. (dissenting):—In this case, with due deference to the learned trial Judge ([1937] 2 D.L.R. 133), I consider that the real issue involved is, whether the appellant's automobile when passing it came into contact with the automobile in which the respondents were riding. If it did not do so there was clearly no excuse for the respondent Asa J. Fujiwara running off the roadway and taking the remarkable course which eventually led to the collision with the pole on the boulevard causing the damages complained of nor was there any excuse for the said respondent putting his foot on the accelerator instead of on the brake and thereby increasing his speed when he was endeavouring to stop the car. As to contact there is no

finding by the learned trial Judge who in his reasons for judgment says at pp. 133-4:—

"I accept the evidence of the doctor and the witnesses for the plaintiffs that the defendant cut in sharply in front of the doctor's car immediately he passed it. It was alleged that, as the defendant passed, his car caught the front end of the doctor's car. It is not particularly material whether it did so or not (I think it did) because I have no manner of doubt that he cut in altogether too sharply, without excuse—and negligently. The doctor was upset, as he says, by the bump of the defendant's car, or in any event by imminence of a collision as a result of the defendant's negligence. He attempted to step on the foot brake but instead, seemingly, stepped on the accelerator and swerved to the south running over a small bush, over the sidewalk, part way up on a terrace, over the edge of some steps, into the side of an electric light pole and on farther into collision with a second pole. He thought his brakes must have failed him and pulled on the hand brake (when it does not appear) but too late to save the situation."

If my view be correct it is essential that this Court should weigh the evidence and arrive at a conclusion as to whether there was contact or otherwise. I should also draw attention to the further statement of the learned trial Judge at pp. 134-5 to the word "poise," as follows:—

"The doctor travelled after he swerved some 180 ft. His car was a 1933 Chevrolet Sedan with a high speed motor and a quick pick-up. The question to be determined is, should the doctor have recovered his mental equilibrium after the first disturbance and not pursued the course he did—should he as a driver of a motor car (he was a driver of 10 years' experience) have immediately sensed that his foot was on the accelerator and not on the brake? Had he realized that his foot was on the accelerator he would, of course, have removed it and put it on the brake and the accident and its consequences would have been avoided. While the maintenance of his foot upon the accelerator for some 180 ft. or for three or four seconds does seem extraordinary and while it seems somewhat harsh to charge the defendant with the damage that ensued as a result of the doctor's error, nevertheless, one or two facts must be borne clearly in mind. A sharp cut in by a passing car on a highway is one of the most disconcerting experiences which even an experienced driver can encounter and such an experience is even more disconcerting when one has the responsibility of a car full of passengers. An experienced driver instantly senses

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the danger of such a manoeuvre on the part of a passing car and very few drivers can maintain equanimity in such circumstances. One asks how long a defendant is to be held liable for incorrect driving by the driver whom he has upset? In this particular case should the doctor not have recovered his equilibrium in time to avoid, if not the first collision with a pole, at least the second one. Other drivers might have done so but very many drivers might not have done so. What he did was extraordinary and yet I think it unfair to say that it was not understandable and excusable in the circumstances. It can hardly be said of Dr. Fujiwara that he had time to think—the bush, the steps and the first pole all loomed in front of him one after another, giving him no time to regain his poise."

He evidently depends on his own experience to some extent as there is apparently no evidence supporting this statement in its entirety. I refer particularly to the learned trial Judge's assertion that:—

"A sharp cut in by a passing car on a highway is one of the most disconcerting experiences which even an experienced driver can encounter and such an experience is even more disconcerting when one has the responsibility of a car full of passengers."

Whether the experience was disconcerting or not must surely depend upon the speed at which the two automobiles respectively were travelling at the time. It is here to be noted that there is no finding of excessive speed by the learned trial Judge nor would such a finding have been warranted by the evidence. The appellant in his factum submits that the evidence does not support the finding of the learned trial Judge that the appellant "cut in" sharply in front of the respondent Asa J. Fujiwara's car and in substance I think that contention is worthy of consideration. By "cutting in" I presume the learned trial Judge meant that the appellant after passing the said respondent's automobile turned sharply to the right side of the road in front of the respondent's automobile thereby causing the said respondent to lose control of himself and his car. As I see it any such "cutting in" should not have produced such disastrous results under the circumstances. The respondent, Asa J. Fujiwara, in his evidence in chief, says that he noticed that the appellant's car was travelling twice as fast as his own when it passed him. See A.B. 55, line 3 to 5, reading as follows:—

"Mr. Nicholson: Q. Yes, just continue, Doctor? A. First I noticed this car passing twice faster than my car."

With only two cars involved I cannot see that there was anything to bother the said respondent. By the time the appellant's car was in front of the respondent's it would have been so far ahead as to eliminate any possible danger of the respondent's car coming into contact with it. But even if the respondent were disconcerted by the appellant driving so close to his car or "cutting in" ahead of his car that was not responsible for the damages complained of. The respondent admits that after he went off the roadway, for which I consider there was no good reason, he put his foot on the accelerator instead of on the brake as previously mentioned and after travelling some 180 ft. on the boulevard and side-walk ran into the pole on the boulevard. As I see it the respondent's negligent driving was the real cause of the damages and the appellant should not be held responsible therefor. In other words the ultimate cause of the accident was the lack of care and skill of the respondent Asa J. Fujiwara. Here I might refer to the unanimous judgment of the Court of Appeal in Alberta—*McGinitie* v. *Goudreau* (1921), 59 D.L.R. 552.

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As to the essential feature referred to by me, namely, whether the appellant's car, in passing it, came into contact with the respondent Asa J. Fujiwara's car, I am of opinion that the weight of evidence is strongly in favor of the appellant's contention that it did not do so. In that connection the undisputed fact, that after the appellant's car passed the other car the appellant's car kept to an unswerving course on his right side of the roadway until stopped by the appellant, has influenced me to some extent as it does not seem possible that it could have done so if it had struck the respondent's motor-car. I would, therefore, allow the appeal and dismiss the action.

A. Bull, K.C., for appellant; *C. H. Locke*, K.C., for respondent.

SIR LYMAN P. DUFF, C.J.C., delivering judgment orally for the Court, after hearing argument of counsel for appellant and without calling on counsel for respondent stated there was no reason to disagree with the finding of the trial Judge ([1937] 2 D.L.R. 133) and dismissed the appeal from the judgment, *supra*, with costs.

FRANCIS, DAY & HUNTER Ltd. v. TWENTIETH CENTURY FOX Corp. Ltd.

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Ontario Court of Appeal, Middleton, Masten and Henderson, JJ.A. June 13, 1938.

Copyright—Copyright Act, 1921 (Can.), c. 24, s. 41—Subsisting rights—Meaning of—Title to song—Infringement by motion picture—Passing-off.

Section 41 of the Copyright Act, 1921, (s. 42 of R.S.C. 1927, c. 32) dealing with all subsisting rights on January 1, 1924, means