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*Mar. 21, 22
Mar. 22

RAYMOND GEORGE SAUNDERS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law—Motor vehicle—Care or control while impaired—Car in a ditch and unable to move under own power—Whether car a "motor vehicle"—Criminal Code, 1953-54 (Can.), c. 51, ss. 2(25), 222, 223.

The appellant was acquitted by a magistrate on an impaired driving charge on the ground that the automobile was not a motor vehicle within the meaning of s. 223 of the *Criminal Code*. At the time of his apprehension, the appellant was in an impaired condition behind the steering wheel of his car with the key in the ignition. The car was in a ditch and could not move under its own power until it was extricated by a tow. The Crown appealed by way of a stated case. The appeal was allowed and the case remitted to the magistrate. A further appeal

*PRESENT: Fauteux, Martland, Judson, Ritchie and Hall JJ.

to the Court of Appeal was dismissed without written reasons. The appellant was granted leave to appeal to this Court on the following point of law: "Is an automobile, which cannot be set in motion by its own power, by reason of conditions existing at the time of the alleged offence, a 'motor vehicle' within the meaning of those words where they appear in the phrase 'care and control of a motor vehicle' in section 223 of the *Criminal Code*?"

Held: The appeal should be dismissed.

The true object of the provisions of ss. 222 and 223 of the Code is to cope with and protect the person and the property from the danger which is inherent in the driving, care or control of a motor vehicle by anyone who is intoxicated or under the influence of a drug or whose ability to drive is impaired by alcohol or a drug. The definition of motor vehicle in s. 2(25) of the Code refers to the type, the nature and not the actual operability or effective functioning of the particular vehicle. It is therefore immaterial if a motor vehicle, at the time of the alleged offence, cannot be set in motion by its own power by reason of internal or external conditions.

Droit criminel—Véhicule à moteur—Garde ou contrôle alors que la capacité de conduire est affaiblie—Véhicule dans un fossé et incapable de se mouvoir de son propre pouvoir—L'automobile est-elle un «véhicule à moteur»—Code criminel, 1953-54 (Can.), c. 51, arts. 2(25), 222, 223.

L'appelant a été acquitté, par un magistrat, de l'offense d'avoir conduit une automobile alors que sa capacité était affaiblie, pour le motif que l'automobile n'était pas un véhicule à moteur dans le sens de l'art. 223 du *Code criminel*. Lors de son arrestation, les capacités de conduire de l'appelant étaient affaiblies et il était assis au volant de son automobile. La clef d'allumage était en place. L'automobile était dans un fossé et ne pouvait pas se mouvoir de son propre pouvoir jusqu'à ce qu'elle fut dégagée au moyen d'une remorque. La Couronne en appela par voie d'un dossier imprimé. L'appel fut maintenu et le dossier renvoyé au magistrat. Un appel subséquent fut rejeté sans motifs écrits par la Cour d'Appel. L'appelant a obtenu permission d'en appeler devant cette Cour sur la question de droit suivante: «Est-ce qu'une automobile, qui ne peut pas être mise en mouvement de son propre pouvoir, en raison de conditions existantes au temps de l'offense, est un «véhicule à moteur» dans le sens de ces mots dans la phrase «garde et contrôle d'un véhicule à moteur» dans l'article 223 du *Code criminel*?»

Arrêt: L'appel doit être rejeté.

Le véritable but des dispositions des arts. 222 et 223 du Code est de conjurer le danger et de protéger les personnes et la propriété contre le danger qui est inhérent à la conduite, à la garde ou au contrôle d'un véhicule à moteur par toute personne en état d'ivresse ou sous l'influence d'un narcotique ou dont la capacité de conduire est affaiblie par l'effet de l'alcool ou d'une drogue. La définition de véhicule à moteur dans l'art. 2(25) du Code réfère au type, à la nature et non pas à la capacité actuelle de manœuvrer ou au fonctionnement effectif

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du véhicule en question. Le fait qu'un véhicule à moteur, lors de l'offense, ne puisse se mouvoir de son propre pouvoir en raison de conditions internes ou externes, est sans importance.

APPEL d'un jugement de la Cour d'Appel de la province de Saskatchewan, confirmant une décision du Juge Balfour. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Saskatchewan, affirming a decision of Balfour J. Appeal dismissed.

Robert Carleton, for the appellant.

Serge Kujawa, for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—The appellant was charged with having, on the 6th day of October A.D. 1963, at Herbert District, in the province of Saskatchewan, the care or control of a motor vehicle while his ability to drive a motor vehicle was impaired, committing thereby the offence described in s. 223 of the Criminal Code. To this charge, he pleaded not guilty and was ultimately acquitted by Police Magistrate C. W. Vause.

Dissatisfied with this determination of the case, as being erroneous in point of law, the Attorney General for the province appealed to the Court of Queen's Bench[1], by way of a stated case. The relevant facts and grounds, as well as the question submitted for the consideration of the Court, are set forth in the following terms by the Magistrate:

In the early morning, 1.20 a.m., on the 6th day of October, 1963, the accused was found in an automobile in the ditch on the west side of the highway and off the travelled portion thereof. He was asleep seated behind the steering wheel, the key was in the ignition switch, and the ignition was turned off. The motor was not running but was capable of running, as Constable Burch of the R.C.M. Police had attempted to drive the automobile out of the ditch without success and later, after it had been extricated by a tow, drove the automobile back to Swift Current, Saskatchewan. The automobile was at right angles to the highway with the rear wheels in the ditch, while the two front wheels were on the shoulder of the gravel road. The left rear wheel of the automobile was completely clear and would spin freely. The position of the vehicle in the ditch, plus that fact that it was, what is commonly known as 'high centered',

[1] [1965] 3 C.C.C. 326, 44 C.R. 322, 50 W.W.R. 610.

prevented movement of the automobile under its own power, and it was absolutely necessary for it to be extricated from its position in the ditch by means of a winch on a tow truck.

The evidence clearly indicated that the accused was in an impaired condition at the time of apprehension.

There is no evidence to establish that the accused did not enter or mount the automobile for the purpose of setting it in motion.

Part of a case of beer was found in the rear seat of the automobile.

No evidence was adduced to prove the condition of the accused when his automobile left the highway. There was no positive or reliable proof as to the length of time the automobile of the accused had been in the ditch before the arrival of the police constables or when or where he had consumed intoxicating liquor.

I found as a fact that the accused was in an impaired condition at the time of apprehension by the R.C.M. Police.

I found as a fact that the accused had care or control of the vehicle at the time of his apprehension.

I found as a fact that it was absolutely necessary to have the vehicle extricated from its position in the ditch by means of a winch on a tow truck.

I found as a fact that the vehicle in its position in the ditch was not a danger to the public or property as contemplated by Section 223 of the Criminal Code.

* * *

CASE:

(1) The proceeding was questioned on one ground, namely:

That I erred in my finding of law, namely: that the automobile was not a motor vehicle within the meaning of Section 223 of the Criminal Code.

With respect to ground (1), in view of the fact that I found the vehicle was not a danger to the public or property as contemplated by Section 223 of the Criminal Code, due to its position in the ditch and my finding of fact that it was absolutely necessary to have the automobile extricated from the position in the ditch by means of a winch on a tow truck, I was of the opinion that the vehicle was not a motor vehicle. I came to the said conclusion based on the test of whether a vehicle is a motor vehicle within the meaning of Section 223, as decided by Rex v. Thornton, 96 C.C.C. The test as stated in the said case was simply whether or not it did constitute a danger such as was contemplated by Section 223.

The appeal was heard by Mr. Justice Balfour of the Court of Queen's Bench. In his reasons for judgment, the learned judge referred particularly to and quoted extensively from the reasons of MacDonald J.A., who delivered the judgment of the Court of Appeal for Alberta, in *R. v. Rye*[1], and from the reasons given by Ilsley C.J., and concurred in by the majority, in the decision of the Court of Appeal for Nova Scotia, in *R. v. Wolfe*[2]. On the authority of the

[1] (1958), 119 C.C.C. 370, 27 C.R. 153, 24 W.W.R. 49.
[2] (1961), 130 C.C.C. 269, 45 M.P.R. 355.

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decisions of these two Courts of Appeal, Mr. Justice Balfour decided that the Magistrate, in the case at bar, did err in his finding of law that the automobile was not a motor vehicle within the meaning of s. 223 of the *Criminal Code* and hence remitted the case to the Magistrate for determination in the light of this finding.

An appeal was then entered from this decision to the Court of Appeal of the province of Saskatchewan. The Court, constituted of Culliton C.J.A., Hall and Maguire JJ.A., dismissed this appeal, but did not deliver any written reasons.

Appellant finally sought and obtained leave to appeal to this Court on the following point of law:

> Is an automobile, which cannot be set in motion by its own power, by reason of conditions existing at the time of the alleged offence, a 'motor vehicle' within the meaning of those words where they appear in the phrase 'care and control of a motor vehicle' in section 223 of the Criminal Code?

Having heard counsel for the appellant and retired to further consider the matter, the Court then informed counsel for respondent that it was not necessary to hear him and, indicating that reasons for judgment would be later delivered, the Court dismissed the appeal.

In the consideration of the question, it is appropriate to note that conditions, preventing an automobile to be set in motion on its own power, are, according to their nature, conveniently differentiated as being either *internal,* such as, for example, a lack of gasoline, a mechanical breakdown or the like, or *external,* such as, for instance, a loss of traction attributable to the miring of the automobile in snow or mud. The above question, in the scope of which both *internal* and *external* conditions are contemplated, has given rise to conflicting judicial opinions in cases decided under the former *Criminal Code,* R.S.C. 1947, c. 36, as well as, though to a much lesser and decreasing degree, in those decided under the new *Criminal Code.* Most of the cases are reviewed in an article mentioned by Mr. Justice Balfour and written by L. K. Graburn,—cf. vol. 1 (1958-59) of *The Criminal Law Quarterly,*—and little would be gained by discussing them here. Sufficient it is, I think, to quote the provisions of s. 2(25) and the relevant parts of ss. 222 and

223 of the *Criminal Code* and then indicate and consider the nature and basis of the conflict.

> 2. In this Act,
>
> (25) *"motor vehicle"* means a vehicle that is drawn, propelled or driven by any means other than by muscular power, but does not include a vehicle of a railway that operates on rails;
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> * * *
>
> 222. Every one who, while intoxicated or under the influence of a narcotic drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of...
>
> 223. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction and is liable...

It should be noted that there was no definition of *motor vehicle,* in the former Code, and that the present definition was introduced with and at the time of the coming into force of the new Code, to wit, on the 1st of April 1955.

Obviously, every one agrees that the true object of the provisions of ss. 222 and 223 is to cope with and protect the person and the property from the danger which is inherent in the *driving, care or control* of a motor vehicle by anyone who is intoxicated or under the influence of a drug or whose ability to drive is impaired by alcohol or a drug. At this point, however, the unanimity ends and the conflict arises.

In one category of cases, it is held that since protection against the above danger is the true and sole object of the legislation, it follows that, if, when the involved automobile cannot be set in motion by its own power by reason of conditions existing at the time of the alleged offence, there is actually or potentially no such danger, then the automobile cannot be said to be a *motor vehicle* within the meaning which ought to be given to these words in the context of ss. 222 and 223 and, in such circumstances, these sections have no application. This interpretation is held to be unaffected by reason of s. 2(25) for, defining as it does, *motor vehicle as a vehicle that is drawn, propelled or driven by any means other than by muscular power,* this definition, it is said, contemplates a motor vehicle actually free of internal or external conditions preventing it to move by its own power.

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In the other category of cases, it is held that the fact that a motor vehicle is not free of such conditions at the time of the alleged offence, is entirely immaterial. That this is so, since at least the introduction in the legislation of the statutory definition of *motor vehicle,* is uncontrovertible for, it is said, the definition refers to the type, the nature and not the actual operability or effective functioning of this particular vehicle.

In my respectful opinion, the holding in the latter category of cases is the correct one, and *R. v. Rye, supra,* and *R. v. Wolfe, supra,* were rightly decided, as also were, amongst others, the cases of *R. v. Weaver*[1] and *R. v. Simpson*[2], where the lack of danger alleged and pleaded in defense, was related, in the first case, to an *internal* condition, and in the second case, to an *external* condition. The definition of a *motor vehicle* is in plain and ordinary language. It contemplates a *kind* of vehicle, not its actual operability or functioning. Its application is not confined to a portion of the Code, it extends uniformly throughout. The definitions of the offences mentioned in ss. 222 and 223 are also couched in a language that is plain and simple and in which nothing, either expressed or implied, indicates an intent of Parliament to exact, in every case, as being one of the ingredients of the offences, the proof of the presence of some element of actual or potential danger or to accept, as a valid defense, the absence of any. On the contrary, these and the other related provisions of the Code manifest the determination of Parliament to strike at the very root of the evil, to wit: the combination of alcohol and automobile, that normally breeds this element of danger which this preventive legislation is meant to anticipate.

We are unanimously of the opinion that the question, upon which leave to appeal was granted, must receive an affirmative answer and, for that reason, the appeal, as above indicated, was dismissed.

Appeal dismissed.

Solicitor for the appellant: D. C. Wilkinson, Swift Current.

Solicitor for the respondent: The Attorney General, Regina.

[1] (1958), 28 C.R. 37, 121 C.C.C. 77.

[2] (1958), 28 C.R. 202, 41 M.P.R. 133, 121 C.C.C. 295.