OLIVER V. POGUE, C. P. Franklin County Branch, No. A.D. 1981 - 254

Trespass - Demurrer - Allegation of Negligence

1. Where three vehicles collide and two hit a building, the driver of the vehicle not hitting the building may be liable to the building's owner if the driver is negligent and causes the collision.

2. A demurrer may be sustained only in cases where it is certain there can be no recovery.

George F. Douglas, Jr., Esq., Attorney for Plaintiff

William C. Cramer, Esq., Attorney for Defendant, Jeffrey Sollenberger

OPINION AND ORDER

EPPINGER, P. J., February 19, 1982:

E. Budd Olver, plaintiff, was the owner of the Sherk building at the southeast corner of Main and Queen Streets in Chambersburg. On April 11, 1981, three vehicles collided at the intersection, and the automobiles of defendants Robert Pogue (Pogue) and Dennis Sanders (Sanders) hit the building, damaging it.

Jeffrey Sollenberger was the third operator. His car didn't hit the building, and he was, according to plaintiff's complaint, traveling on Queen Street and had a green light to proceed. The negligence that Olver alleges is that Sollenberger, in going through the green light, failed to look and observe Pogue approaching the intersection at a high rate of speed and note that it was obvious Pogue would not come to a stop.

Sollenberger demurred, saying the complaint failed to set forth a cause of action, arguing that while the complaint alleges the existence of negligence and injury, there is no link between the two as far as his conduct was concerned.

We believe the complaint states a cause of action against Sollenberger. The collision is alleged to have been caused at least in part by Sollenberger's negligence and that as a result of the collision the two other cars went into the building. We must accept these allegations as true in ruling on the demurrer before us. 2 Goodrich-Amram 2d Sec. 1017 (b):11, n.42-44. Thus we consider causation adequately raised to send

the issue to the trier of facts. To recover against Sollenberger the plaintiff will have to prove that Sollenberger's negligence was a "substantial factor" in bringing about the injuries for which damages are sought. *Fransis v. Duquesne Light Co.*, 232 Pa. Super. 420, 335 A.2d 796 (1975).

We may sustain a demurrer only in cases where it is certain there can be no recovery. 2 Goodrich-Amram 2d Sec. 1017(b):11; *Pike Co. Hotels Corp. v. Kiefer*, 262 Pa. Super. 126, 393 A.2d 677 (1978). In this factual situation everyone should have the opportunity to present testimony on the question of the liability of each. Compare *Cherry v. Grissinger*, 20 Chester 140 (C.P., 1972).

Sollenberger also alleged the complaint failed to state facts establishing that he violated a duty of due care owed to plaintiff. His brief does not address this, so we may consider it abandoned. In addition, we conclude that the plaintiff's allegation of negligence as in this case means that a given standard of care required of the defendant toward the plaintiff was breached by Sollenberger.

We will overrule the demurrer.

ORDER OF COURT

Feburary 19, 1982, the demurrer of the defendant Jeffrey L. Sollenberger is overruled. The defendant is given twenty days from this date to file an appropriate pleading if required or suffer non pros.

COMMONWEALTH v. HORTON, C. P. Franklin County Branch, No. 40 of 1980.

Criminal Law - Involuntary Manslaughter - 180 Day Rule

1. Where defendant was living in another state, the Commonwealth is required to use due diligence in executing an arrest warrant.

2. Where state police actively sought assistance from out of state authorities on whom state police had to rely to serve arrest warrant, the requirements of Rule 1100 are met.

3. The court may hear evidence of the manner a defendant drove over a distance of 1½ miles prior to an accident provided it fits logically into the pattern of asserted negligence or recklessness leading to the culminating event which is the subject of litigation.

4. Where two automobiles are proceeding down the highway trying to keep the other from passing, they are engaged in the most reckless kind of conduct, and if, as a result of this conduct, someone is killed, the drivers are guilty of involuntary manslaughter.

David W. Rahauser, Esquire, Assistant District Attorney, Attorney for the Commonwealth

Michael B. Finucane, Esq., Attorney for Defendant

OPINION AND ORDER

EPPINGER, P. J., April 19, 1982:

Two automobiles were traveling in the same direction on a two-lane road. The defendant, David Horton, was driving a green Toyota, and William Reihart was driving a gray Nova. While traveling a distance of about a mile and a half, Horton passed Reihart three times, and Reihart passed Horton twice. On the last pass attempted by Horton, he lost control of the Toyota and struck a pole, and his passenger was killed. In a trial without jury, the defendant was found guilty of Involuntary Manslaughter and Reckless Driving. Post-trial motions in arrest of judgment and for a new trial were filed by the defendant.

The defendant was not brought to trial within 180 days, as required by Pa. R. Crim. P. 1100, which he claims was the first error. At trial the court admitted evidence of events occurring between the two cars during the mile and a half or so they were confronting each other. Defendant sought to limit the testimony to the events of the last pass when he lost control and hit the pole and claims it was error to hear the other testimony. Finally Defendant alleges error in finding him guilty of both reckless driving and involuntary manslaughter.

The complaint in this case was filed August 20, 1980, and, upon filing it, the State Trooper notified a Maryland attorney who said he represented the defendant, that it was filed. The attorney called the Franklin County District Attorney who advised that if the defendant promptly, voluntarily appeared, nominal bail would be agreeable. The trooper was notified by the District Attorney not to be concerned or obtain a warrant,

as the defendant was going to do that. But he didn't.

The Justice of the Peace fixed a hearing for September 2, 1980, and notified the defendant, at an address he had given the trooper, to appear. In the meantime defendant had moved and filed a change of address form, and the certified article was delivered to his Johns Hopkins University address (he was a student there). A person named "Faust" signed for the article, which defendant received eight days after the time for the hearing. When defendant advised his attorney that he had received the notice after the hearing date, his attorney advised him to wait for another one.

The trooper again spoke with the District Attorney because he had heard nothing and on September 16, 1980, obtained an arrest warrant and sent it and other papers to the Fugitive Warrant Squad in Baltimore, Md., giving the address he had received from the defendant. He told the squad that the defendant was a student at Johns Hopkins and notified them of the name of the defendant's attorney.

Between September and December, 1980, the Trooper called the defendant's attorney approximately six times at a number given him by the attorney but couldn't reach the attorney. He also contacted the Fugitive Squad and was told they were working on it. After other contacts, on February 5, 1980, the Fugitive Squad finally got in touch with the attorney, who requested they delay execution of the warrant for a week to give the defendant an opportunity to appear, which he did on Feburary 29, 1981. At arraignment before the court on March 25, 1982, he was advised his trial was set for May 11, 1981. By the time he appeared, the 180 days had expired, and no application for an extension of time had been filed by the District Attorney.

Under Rule 1100(d) (1) any period of time during which the defendant or his attorney is unavailable is excluded from the computation. Until February 29, 1981, the defendant was living in the State of Maryland and not subject to direct execution of process by Pennsylvania officers. He had not been arrested or placed in custody in Maryland. Pennsylvania authorities had to rely on the Fugitive Unit in Maryland to make the arrest. As is clearly set forth in Judge Keller's opinion when he refused the motion to dismiss, the Pennsylvania authorities actively sought the assistance of that unit, but it took them 4½ months to communicate with the defendant or his attorney. Until he was apprehended, there was no opportunity to institute extradition proceedings.

In situations like this the Commonwealth is required to use due diligence in executing an arrest warrant, and what that means is that the Commonwealth is required to make a reasonable effort. It does not demand perfect vigilance and punctilious care. *Commonwealth v. Polsky*, 493 Pa. 402, 426 A.2d 610 (1981), and cases cited. In *Commonwealth v. Emmett*, 274 Pa. Super. 23, 417 A.2d 1232 (1979), the court found due diligence in five communications between Pennsylvania and Maryland authorities where defendant was in custody awaiting sentencing on a Maryland charge. No burden was placed on the Commonwealth to monitor those proceedings, and it was held the Commonwealth could proceed when it learned of the disposition of the Maryland case and that the defendant was available. Where defendant is in another state and not even in custody, as in this case, the Commonwealth has no option except to rely on the authorities of the state. *Commonwealth v. Gallagher*, Pa. Super , A.2d (1981, Dec. 29, No. 93 Hsbg. slip opinion affirming on the opinion of Judge Quigley).

In trying this case, the Court took the view that the manner in which these two cars were being driven over the distance of about a mile and a half was relevant. If we had limited the testimony as requested by the defendant, it would have shown only that in making the last pass, defendant tried to get around the gray Nova and was forced off the road. Defendant was therefore doing a legal act and the onus of the death of his passenger might have been imputed to the operator of the other car. But in *Gregg v. Fisher*, 377 Pa. 445, 105 A.2d 105 (1954), a civil case where evidence of events many hours before the act of the defendant in causing death was admitted, the court wrote, in approving admission of the evidence:

> Examining only the tip of a pyramid can offer no intelligence as to the height, width, breadth or the materials which hold it together and raise the crest toward the sky. It is just as important to know what precedes a storm as what followed it in order to ascertain scientifically its meteorological cause.
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> The tragedy . . . was but the apex of the pyramid of occurrences which had its base . . . when (defendant) initiated the ill-starred drinking excursion.

377 Pa. at 453, 105 A.2d at 110. The court therefore concluded that any evidence is relevant and proper provided it fits logically into the pattern of asserted negligence leading to the culminating event which is the subject of the lawsuit.

In *Commonwealth v. Hinds*, 244 Pa. Super. 182, 366 A.2d 1252 (1976), where defendant wanted to exclude testimony of the way he had made a pass less than one-half mile from the scene of the accident, the court held that the evidence was proper when recklessness was at issue because it was probative of the state of mind of the driver at the time of the accident, and a state of mind which demonstrates a marked disregard for the safety of others is not likely to change significantly in a matter of seconds.

That brings us to a discussion of defendant's recklessness in these circumstances, and whether that recklessness was sufficient to convict him of involuntary manslaughter.[1] In finding defendant guilty of involuntary manslaughter in this case, the court found that he did a lawful act (pass the gray Nova) in a reckless or grossly negligent manner.

We have briefly described the multiple passing and bumping engaged in by defendant in his Toyota and Reihart in his Nova. The first time Horton passed it was another car, and he swerved in behind Reihart. Then he passed Reihart in the face of an oncoming automobile which had to leave the road to avoid hitting Horton, while Horton had to cut in on Reihart to get in line, forcing Reihart off the road. Then Reihart passed Horton, and there was some bumping back and forth between them as they forced each other off the road. Reihart then got in line and slowed suddenly in front of Horton. There was testimony about another effort of Horton to pass Reihart before the crash, but the details are not definite. And Reihart got out in front again. All during this time both parties were driving recklessly and dangerously, endangering themselves, their passengers and other users of the highway.

Finally Horton tried to pass Reihart again, and Reihart began forcing him off the road. The cars side-swiped each other, Horton tried to get back in line, and when he did the two cars came together, the front of Reihart's and the back of Horton's. This is when Horton lost control; his car went sideways and flipped over into a pole, killing the passenger.

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1. Act of December 16, 1972, P.L. 1482, No. 334, Sec. 1, 18 P.C.S.A. Sec. 2504 (a) (1973) provides: A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another.

In *Commonwealth v. Youngkin*, Pa. Super. , 427 A.2d 1356 (1981), the court said:

> "The reckless or criminal negligence required to sustain an involuntary manslaughter conviction may be found if the accused consciously disregarded or, in gross departure from a standard of reasonable care, failed to perceive a substantial and unjustifiable risk that his action might cause death or serious bodily harm." Pa. Super. at , 427 A.2d at 1360.

> "A prudent driver takes into consideration all possibilities of danger in any situation confronting him—and that includes the danger of the 'other fellow' doing the wrong thing instead of the right thing. It is the duty of every driver to be prudent to the end that the lives and bodily well-being of all persons who may be affected by either his act or his inattentiveness in driving shall not be destroyed or imperiled." *Peters v. Shear* 351 Pa. 521, 526-27, 41 A.2d 556, 559 (1945).

In this case, Horton knew that Reihart would interfere in his attempt to pass. Faced with this knowledge, in deference to the well-being of all persons affected, he should have refrained from attempting another pass. When he went ahead with it, he was reckless or grossly negligent. For there to be recklessness, there must be evidence of negligent acts, amounting to a careless disregard of the rights or safety of others, the consequences of which could reasonably have been foreseen. *Commonwealth v. Forrey*, 172 Pa. Super. 65, 92 A.2d 233 (1952); *Commonwealth v. Fisher*, 184 Pa. Super. 75, 132 A.2d 739 (1957).

Two automobiles, the most lethal and deadly weapons entrusted to our citizenry, *Focht v. Rabada*, 217 Pa. Super. 35, 268 A.2d 157 (1970), which are proceeding down the highway playing a game of seeing which can keep the other from passing are engaged in the most reckless kind of conduct, and, if as a result of this conduct someone is killed, then the drivers are guilty of involuntary manslaughter.

Finally the defendant contends that he cannot be convicted of both reckless driving and involuntary manslaughter. In his basic argument on the involuntary manslaughter, defendant contended that in making the last pass, he was doing a lawful act. We agreed, but found that he did it in a reckless or rash manner resulting from his prior knowledge of the way the other person would react. We are persuaded

that even before these events occurred, the defendant was driving recklessly on the highway in violation of the vehicle code.

However, it is our understanding that the question is not one of whether the defendant is convicted of two crimes, one of which is necessarily included or merged in the other, but how many penalties are imposed. If there is a merged crime, the accused is subject only to a single penalty. Ordinarily the court will impose the penalty on the count that charges the highest degree of the offense involved and not impose a penalty on the lesser included offense. 24 C.J.S. Criminal Law, Sec. 1457(5).

In *Commonwealth v. Soudini*, 398 Pa. 546, 159 A.2d 687 (1960), a defendant was convicted of an offense and a lesser included offense, with the sentences to run concurrently. On appeal the court held that only one penalty could be imposed and set aside the sentence on the lesser included offense, allowing the sentence on the greater to stand.

The defendant's post-trial motions will be denied.

ORDER OF COURT

April 19, 1982, the defendant's post trial motions are denied. It is ordered that the Franklin County Probation Department prepare a presentence investigation report and that the defendant appear at the office of the Franklin County Probation Department on the call of a probation officer to facilitate the preparation of this report. Sentence is deferred until May 26, 1982, at 9:00 o'clock a.m.

COMMONWEALTH V. WEST, C. P. Franklin County Branch, No. 414 of 1981

Criminal Law - Conspiracy - Entrapment

1. Conviction for conspiracy requires an overt act which is an act done in furtherance of the object of the conspiracy.

2. The making of a downpayment on the sum demanded for the killing of a person is an overt act upon which a conspiracy conviction can be based.

3. A conspiracy to commit murder threatens bodily injury and the defense of entrapment is statutorily unavailable to a defendant in such a case.