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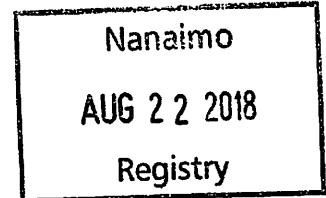
Date: ☼
File No: 39953
Registry: Duncan

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
Held in Duncan

REGINA

v.

David J.Buchanan



**DECISION
OF THE
HONOURABLE JUDGE J.E.SAUNDERS**

Counsel for the Crown:

L. Chu

Counsel for the Defendant:

Ravi Hira QC; Ryan Hira

Counsel for :

Place of Hearing:

Duncan, B.C.

Date of Hearing:

June 18-20, 2018

Date of Judgment:

August 22, 2018

THE CHARGE

[1] David Buchan is charged by indictment that on February 20th, 2016 at Duncan, British Columbia, he operated a motor vehicle in a manner dangerous to the public having regard to all the circumstances including the nature, condition and use of the place at which the motor vehicle was being operated, and the amount of traffic that at the time was or might reasonably be expected to be, and caused bodily harm to Bryce McKay, contrary to section 249(3) of the Criminal Code.

[2] There was a three day preliminary inquiry which was contested.

[3] Jurisdiction, identity and Mr. McKay's leg injury were admitted by defence.

[4] The uncontested facts of the incident on February 20, 2016 are that Constable Buchanan was on duty around 10.50 pm in Duncan. He is on the Integrated Road Safety Unit (IRSU) for Nanaimo to the north Malahat region. It was dry and clear. There was little to no traffic in the area. He was driving an unmarked Tahoe police cruiser (the "police vehicle"). A moped drove by his vehicle with no licence plates. He followed the moped and it failed to stop at a stop sign and made a right hand turn the wrong way. He turned on his lights and siren and followed the moped which did a u-turn. It turned into a parking lot and onto a concrete abutment. The driver fell off and got back onto the moped and cut across the path of the police vehicle onto a grassy area. It then turned to the left and the driver fell off and broke his ankle.

[5] The incident was recorded on the officer's dashcam video (the "video") from the front and back of the police vehicle.

[6] Defence submits there is no evidence of mens rea, actus reus or causation shown on the video.

[7] Crown submits that the video shows how risky the pursuit was, and the manner of driving of the accused which forced McKay off the road causing his accident and injury.

THE EVIDENCE OF THE CROWN

[8] Crown called four witnesses: Corporal Jean Gelderbom, Bryce McKay, Constable Todd Bozak and Constable Tad Narraway. Crown sought to introduce RCMP policy documents by way of a statement made by Sgt. Sapinder Mund pursuant to section 540(7) of the Code.

[9] Corporal Gelderblom was the first Crown witness. He is the Watch Commander in Duncan and was so employed on February 20, 2016. He has eighteen years of police experience. He has oversight of police operations and provides directions to members on more serious matters such as assault and traffic violations.

[10] On the evening in question he stated in chief that he arrived at the scene within minutes and noted the emergency lights on showing the grassy area where Mr. McKay was lying and a moped leaning against a telephone pole.

[11] Constable Buchanan explained what happened and said he had recorded the incident with his dashcam video. Constables Bozak and Klein arrived soon after. Mr. McKay was taken away for treatment in an ambulance.

[12] He seized the video from Constable Buchanan and secured the police vehicle at the scene. He confirmed there had been no tampering with the downloading of the video onto a USB drive which was done with Buchanan's assistance as he was the only person with the skill set to do so.

[13] The contents of the USB were downloaded and stored by Corporal Gelderblom and a working copy given to the Crown and one sent to the IIO which is required in these circumstances.

[14] After a voir dire the USB and the copy of the USB on the disc were marked as exhibits.

[15] Corporal Gelderblom in chief was asked to comment on what he observed on the video which was played in court. He noted the movements and direction of the moped and what the police vehicle was doing. He noted when the moped stopped, when McKay came off, how he got on again and took off when Constable Buchanan approached him.

[16] More specifically, Corporal Gelderblom in direct was asked for more detail of the events on the video as they unfolded from beginning to end. That evidence was as set out below.

[17] Firstly, the moped, which had no apparent licence plate, passed the police vehicle, and went the wrong way down a street and then failed to stop at a stop sign at an intersection, and then made a left turn at a right turn only sign.

[18] Secondly, the police vehicle followed “normally” in his words, and activated “very discernible emergency lights and sirens”. When the two vehicles stopped at the intersection, the moped went into a blind corner and entered the opposite merge lane the wrong way at speed and dodged around a concrete median followed by the police vehicle. It appeared that Constable Buchanan was trying to pull him over.

[19] Thirdly, Mr. McKay turned into a parking lot and it appeared that household items such as a lamp fell from the moped and Mr. McKay then jumped the concrete abutment onto a grassy area. He fell as a result and came to a stop and the police vehicle pulled over and stopped.

[20] Fourth, Mr. McKay got back on the moped and drove off again and Constable Buchan followed again in the police vehicle. Mr. McKay appeared to lose control and fell against a fence and accelerated away across the street with the police vehicle some way back and the moped then struck a fire hydrant on a grassy area past the intersection and Mr. McKay fell off.

[21] In cross examination he confirmed that the video in court was an accurate account of what was on the USB disc and that it had been recorded from the original onto the copy in court.

[22] He was asked to comment on his observations of what was on the tape relating to the way Mr. McKay was driving the moped before he fell off and the officer's movements. He said that there was no traffic, no pedestrians (except two on the pavement who did not appear at risk), the area was well lit, the road appeared dry with no ice, and there was nothing unusual about the conditions at the time.

[23] He commented that a police officer has to uphold the law and apprehend people that break the law failing which the officer could be the subject of a conduct proceeding for failure to do his or her duty and uphold the oath.

[24] He pointed out the way the moped was driving the wrong way, failed to stop at a stop sign, failed to signal at his turn, and the police vehicle was lit up and sounded noisy on the tape with lights and siren flashing.

[25] Crown objected to the nature of the questioning by defence counsel on a number of occasions as it called for lay opinion evidence and after hearing from both counsel, the objections were overruled on the basis of the criteria set out in *R v Graat*, [1982] 2 SCR 819.

[26] Corporal Gelderblom also stated that from his observation of the video there was no evidence of any collision between the two vehicles. In his view, if there had been any contact, the moped "would go down" as he put it, because of the discrepancy in the weight of the vehicles and the instability of the moped.

[27] He was shown a number of photographs (exhibits 3A-3Q) which he confirmed depicted his understanding of how the incident occurred relating to the movements of the moped and his own inspection at the scene when he arrived shortly after, which he described as consistent with his viewing of the video as well.

[28] He explained that Constable Buchanan had taken him to his vehicle when he arrived and shown him a dent in the driver's side front panel just by the headlight which he examined and concluded that he did not believe it was caused by any collision or

lateral movement from one object to another (exhibit 3Q). Constable Buchanan did not say anything about the dent other than show it to him.

[29] He confirmed the moped was stolen with the ignition punched out and that Mr. McKay had been charged with possession of stolen property in relation to the moped (exhibit 3R). He also confirmed that he did not witness any dent or mark on the police vehicle consistent with it striking the back of the moped.

[30] He confirmed the entire distance as depicted by the video was 1.2 kms and that the distance after the emergency equipment was activated, was 700 metres. He had checked these distances himself the next day. He described the pursuit as a "slow speed pursuit" and that he viewed the actions of the moped, judging by the video, to be out of control.

[31] He finally confirmed under cross examination that the original USB stick had been located but is corrupted and apparently is no longer of any use.

[32] Bryce McKay testified as to his version of the events, before he was shown the video. He described what happened. He said the police vehicle had pushed him when he turned off Canada Drive onto Beverly Street. The headlights were close behind him.

[33] He went faster to move away and the police vehicle "bumped my back tyre on the right-hand side on the back, I guess with the front driver's side on that vehicle". He was not sure whether it was the tire or the front bumper or the fender somewhere on his back tire but he spun around and was going in the opposite direction.

[34] He said that the police vehicle pushed him again on University street and pushed him onto the sidewalk. "He was forcing me, nowhere else to go, would have been squished" were his words. He was scared and went onto the kerb and bounced off that and fell off. He got back on again and the cruiser hit his back tyre again and swung him out so he hit the fence. He had no control and he pushed the throttle and it shot him across the road and he collided with the hydrant and broke his leg. He said the other vehicle was "really close, it felt like it was pretty much contacting me".

[35] According to this evidence there were three or four "impacts" with the police vehicle due to it "squishing" him, as he put it.

[36] At that point while he lay on the ground, he said the police officer got out of the police vehicle and ran up to him and kicked him in the face mask of his helmet, pulled the helmet off and then started hitting him in the face and then pulled his goggles off and punched him in the nose about six to eight times.

[37] His evidence in chief is not consistent with the video in all material respects.

[38] In cross examination Mr. McKay was somewhat vague about his criminal record but admitted it when he was told it was documented (exhibit 9). He admitted he knew the Tahoe was a police vehicle and that he was fleeing from it. He confirmed he was on probation with a curfew of 11 pm on the night in question and the incident occurred just prior to 11 pm.

[39] He denied the moped was stolen which was subsequently confirmed by Constable Bozak to have been stolen nine months earlier. He denied dropping the lamp

and debris on the road which appears to have come from his moped as shown on the video. He agreed that he knew it was a police vehicle behind him and agreed that he had fled from the police. He was adamant that he had been struck a number of times by the police vehicle.

[40] At the end of his evidence Crown asked the court to disregard and not rely on his evidence and rely on the video and the evidence of Corporal Gelderblom in chief, for committal.

[41] Constable Todd Bozak testified that he attended at the scene to help out. He was the investigator and took photographs in relation to the charges against McKay.

[42] He looked at the video, exhibit 2, and described his observations of what occurred. He noted how the moped had tried to go over the kerb and has lost control and had veered across Clement Street and struck the fence.

[43] In cross examination he confirmed the moped had been stolen in October, 2015 from Andrew Freeland, the owner. He was asked about the chronology of events as he saw them and noted the lights of the police cruiser were still flashing when he arrived and Constable Buchanan told him what had happened and appeared upset. Constable Buchanan told him McKay was evading him and when he fell off he stopped his vehicle and got out to arrest McKay when he got back on the moped and sped away. He lost control and struck the fence and the hydrant.

[44] The photographs show the marks of his tracks on the grass. Constable Buchanan told him he had no contact with the moped at any time.

[45] He took photographs of the debris from the moped such as the headlamp in the parking area, the bottle of Fireball whiskey, the green coke bottle, litre bottle of coke, Jack Daniels Tea, cola, balaclava mask and the gold coloured lamp found on the street which Constable Buchanan's dashcam video record coming from the moped.

[46] He said there was no licence on the moped which must be licensed. The ignition was punched out so it could be started without a key.

[47] He confirmed that in his statement to the IIO he had said that the Tahoe (the police cruiser) tracks as shown in his photographs indicated straight tracks from which he inferred it was under control.

[48] Constable Tad Narraway is a member of the RCMP and responsible for the data collection as it relates to dashcams and how they are installed, calibrated and other duties under the IRSU.

[49] He described it as a Watch Card system and he manages the unit for checking the thumb drives in the vehicles and in the office and uploading the information to the ELX library.

[50] It is a wireless system. It records accidents and shows whether lights and sirens are turned on. There is an audio recording in the vehicle and the dashcam can be turned on from inside as well.

[51] The thumb drives provide information about the activity of the police vehicle and is a transfer medium for the videos from the car to the office. There are four different ways to activate the in-car system namely: i) if the vehicle is in a collision; ii) if the

vehicle goes over 150 kmh; iii) by manual operation in the vehicle; iv) from outside the vehicle with a lapel mike.

[52] He confirmed in cross examination that if there is a collision in a police vehicle the Watch Card system would record it.

[53] Crown sought to introduce the evidence of Sgt Sapinder Mund pursuant to section 540(7) and after a voir dire was held the Crown's application was denied. Crown then sought to call Sgt Mund to testify by telephone pursuant to section 714.3 which was also denied.

[54] Defence elected not to call any evidence on the preliminary inquiry.

CROWN SUBMISSIONS

[55] Crown is seeking a committal on the basis that there is some evidence on each element of the offence as demonstrated through the video evidence which in her submission amounts to direct evidence (exhibit 2).

[56] Crown is not relying on the evidence of the complainant, Bryce McKay.

[57] Relying on R v Roy, 2012 SCC 26 Crown argues that there is some evidence of the prohibited conduct (the actus reus) and the requisite degree of fault (the mens rea) for a committal due to the video evidence which she says establishes that the driving, viewed objectively, was dangerous to the public in all the circumstances, and that the dangerous manner of driving amounted to a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances.

[58] Crown submits that fault is assessed objectively and in order to amount to a marked departure there must be evidence that a reasonable person would have been aware of the risk created by the conduct and not have engaged in it (R v Beatty 2008 SCC 5).

[59] In relation to the actus reus of the offence Crown argues that there is some evidence for a committal because the video indicates that the driving was objectively dangerous due to speed and proximity and that the court should accept Mr. McKay's evidence that he was struck several times during the pursuit by the police vehicle.

[60] Furthermore, Crown submits that the court should accept that the existence of the dent on the police vehicle, which Crown says may have occurred during the pursuit, and that evidence allows for one inference only and that is to show the dangerous proximity of the vehicles.

[61] Crown also submits that there is some evidence of mens rea amounting to a marked departure due to the accused's comment that he made to Corporal Gelderblom that he had tried to "box" Mr McKay in from which the court should infer that he ought to have realized that his manner of driving showed a determination to restrict Mr. McKay's path of travel and forced him, McKay, to drive in a dangerous manner and evasive manner.

[62] This conduct, according to the Crown relying on R v Nasogalauk, 2010 SCC 6 at paragraph 32, was unreasonable and disproportionate to the threat posed by Mr. McKay of not having a licence plate on his moped.

[63] Crown's final submission is that "but for" Constable Buchanan's dangerous driving, Mr. McKay would not have sustained bodily harm as it was a significant contributing factor (R v Maybin, 2012 SCC 24 at paras. 15 and 20). Furthermore, Crown submits that even if there was no actual contact between the vehicle and the moped, the court should find that causation has been established (R v Menezes, 2002 CanLII 49654 (Ont.S.C.)).

DEFENCE SUBMISSIONS

[64] Defence submits that the Crown has failed to show evidence sufficient for a committal on all three criteria required under section 249(3) of the Code, namely the actus reus and mens rea (citing R v Creighton, [1993] 3 SCR 3; R v Roy and R v Beatty) and that the conduct of the accused caused the bodily harm to Mr. McKay.

[65] Defence further submits that the court should not consider the evidence relating to the "dent" on the police vehicle because the Crown has indicated it is not relying on Mr. McKay's evidence regarding the impacts he described, that the evidence before the court is that it was not caused by motion, and finally there is no evidence, other than conjecture of the Crown, of when the dent occurred and under what circumstances so the trier of fact, acting reasonably, ought not make the inference that it was the result of Constable Buchanan's actions.

[66] Referring to R v Brander, 2003 ABQB 756 at para.68, defence submits that it is not unreasonable for police officers to commence a pursuit by closing the distance without activating their emergency equipment and accelerate to close the distance if

the road conditions and traffic allow for it and they are sometimes required to make spur of the moment decisions due to the nature of their work.

[67] Furthermore, in this instance, defence submits that Constable Buchanan was required to comply with the RCMP Act due to the various traffic violations by Mr. McKay as shown on the video including an indictable offence of flight from a police officer which Mr. McKay himself conceded in his cross-examination.

[68] In relation to factual and legal causation, defence concludes that Mr. McKay was the author of his own fate as he continued to flee even after he had stopped and was aware that it was a police vehicle behind him with its lights and siren activated.

[69] According to the defence, the Crown's submission that Constable Buchanan failed to follow internal RCMP policy as proof of the mens rea element of the offence, is an error in law by the Crown and contrary to the finding of the Supreme Court of Canada in *HMTQ v Dallas, Hinchcliffe & Terezakis*, 2002 BCSC 760, followed in *R v Jageshur*, 2002 CanLII 45116 (Ont.CA) and adopted in *R v Beaudry*, 2007 SCC 5 at para.46.

[70] On the strength of the video evidence which the Crown is relying on for a committal, defence submits that the video speaks for itself that Mr. McKay chose to flee and commit further offences in that endeavour and despite being aware the vehicle was a police vehicle, continued to flee even after he stopped and came off the moped and the officer began to approach him.

[71] Referring to the other evidence, defence submits that Corporal Gelderblom confirmed that on his viewing of the events on the video he concluded that nothing on the video indicated that Constable Buchanan's driving was dangerous in the circumstances namely few or no pedestrians, no traffic, clear and dry roads, well-lit streets, no contact between the vehicles and a two and a half minute pursuit of 1.2 kms of which the last 700 metres was with the emergency lights and siren activated. Furthermore, the rest of the Crown's evidence does not assist in amounting to some evidence as Mr. McKay's evidence is not reliable or credible and Constables Bozak and Narraway provided no evidence that Constable Buchan was driving dangerously as charged.

APPLICABLE LAW AND ANALYSIS

[72] It is trite law that at preliminary inquiry the test for committal is that the Crown has to establish that there is some evidence on which a jury, properly instructed, could convict and where necessary, the judge must weigh the evidence in a limited way, to determine whether the evidence supports the inferences that the jury would be asked to draw, particularly where the evidence is largely circumstantial (R v Acuri, 2001 @CC 54 at para.1).

[73] At trial, on these charges, the Crown has to prove that the accused drove in a manner dangerous to the public, that the conduct was a marked departure from the normal standard of care and that the conduct of the accused caused bodily harm to Bryce McKay.

[74] Accordingly, the Crown has to prove some evidence on the preliminary inquiry on all the elements of the offence with which the accused is charged pursuant to section 249(3) of the Code for a committal.

[75] The Crown has failed to do so for the following reasons.

[76] The Crown is not relying on the evidence of Mr. McKay because it is unreliable and not credible. Furthermore, he is awaiting trial for charges arising out of his own actions on the night in question which presumably meet the Crown standard of charge approval in relation to those charges. Specifically he is charged on information 38856 in Duncan with dangerous driving, evading a peace officer pursuant to section 294.1 which is an indictable offence, and possession of stolen property, namely the moped he was driving on the night in question. He has a lengthy criminal record. He was on probation with a curfew of 11 pm on February 20, 2016.

[77] By virtue of his evidence, in cross examination, that he was aware that he was being pursued by a police vehicle, certainly from the time he first stopped his moped and Constable Buchanan stopped as well to effect an arrest, his actions of getting back onto the moped and continuing to flee, give rise to what defence calls Mr. McKay's voluntary choice to engage in dangerous driving to escape and being the author of his own misfortune.

[78] That finding is corroborated by the video which speaks for itself and confirmed by Corporal Gelderblom in his assessment of what the video depicts.

[79] In relation to the actus reus, the extent of the Crown evidence is the video and evidence of Corporal Gelderblom. Crown calls him a fact witness who should not be commenting on the video in what could be construed as lay opinion evidence. The evidence of Corporal Gelderblom in both direct and cross examination was a factual account of his observations of what transpired according to the video and lay opinion evidence and the court accepts the evidence on the basis of R v Graat as confirmed in subsequent case law on the issue of lay opinion evidence.

[80] His evidence related to self-evident facts such as the condition of the road, the lighting, the lack of traffic, the lack of pedestrians other than two people walking along the sidewalk at some point and the behaviour of the police vehicle and moped recorded on the dashcam video from the start of the incident.

[81] Even if the court did not consider Corporal Gelderblom's evidence in cross examination on his observations of the events displayed on the video, the Crown has failed to call any evidence let alone some evidence which supports the Crown's theory that Constable Buchanan was operating his motor vehicle as charged, in relation to the actus reus and mens rea and causation.

[82] Had the Crown sought to rely on the contents of the video only, which it now asks the court to do, there ought to have been expert evidence produced by the Crown as to the relevant and material aspects of the events recorded on which the court could conclude that there was some evidence on which the accused could be committed to trial. Crown chose not to do so.

[83] Neither Constable Bozak nor Constable Narraway could give further evidence amounting to sufficient evidence for a committal.

[84] In closing submissions, Crown counsel sought to interpret the events on the video in much the same manner as Corporal Gelderblom had which cannot translate into some evidence to justify a committal.

[85] In relation to the mens rea, the video does not indicate that the accused failed to foresee the risk caused by his actions nor does it show a marked departure from the standard of care required in the circumstances. The video shows him closing the distance when he first observed Mr. McKay and his moped with no licence, committing a number of traffic violations, failing to stop after the siren and lights were activated, fleeing again when the officer stopped to arrest him. Mr. McKay confirmed this fact in his evidence.

[86] The video does not show any impact between the police vehicle and the moped for the entire duration.

[87] The dent in the police cruiser cannot be relied on as some evidence of contact in light of the fact that the Crown has failed to establish through an expert or through other evidence that it was caused during the "pursuit" by contact between the vehicles.

[88] The Crown submits that Mr. McMckay's evidence cannot be relied on but suggests in closing submissions that the court should accept the impacts he testified about. The court finds that Mr. McKay's evidence is not supported by the video on

which the Crown relies for some evidence to commit. Furthermore, there is no reliable Crown evidence that there was a collision.

[89] While a preliminary inquiry judge is not required to make findings of credibility, it is appropriate in circumstances such as this, where the Crown's case depends on a video of the events alleged, to weigh the evidence in order to determine whether it amounts to some evidence to support the inferences the jury would be asked to draw at trial. On weighing Mr. McKay's evidence to that extent, it is not creditworthy in all material respects.

[90] Furthermore, the Crown has failed to lead some evidence on causation either through the evidence or as depicted on the video.

[91] Had the Crown sought to have the video interpreted by a qualified expert in relation to the elements of dangerous driving by Constable Buchanan, that ought to have been done but absent such evidence, the court cannot rely on the contents of the video to find there is some evidence on all elements of the offence, to commit the accused to trial.

[92] A further difficulty for the Crown is that the original USB showing the events on the dashcam is corrupted and its contents no longer retrievable so the video in court is not the best evidence as it is not the original USB (*R v Nikolovski* [1996] 3 S.C.R. 1197 at para.28).

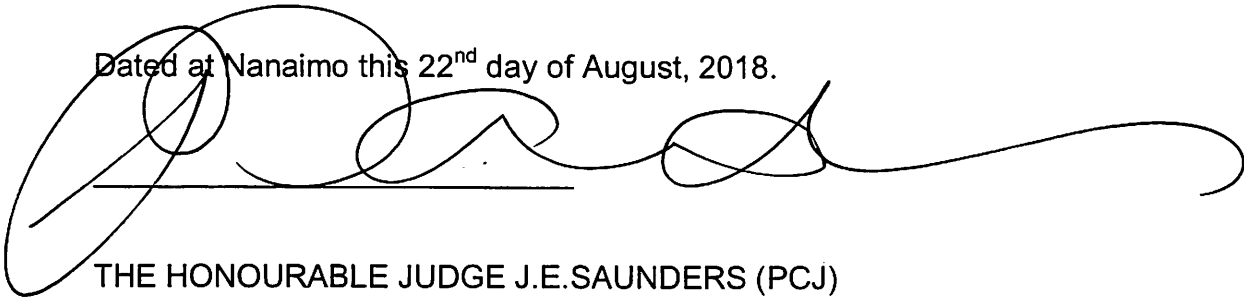
[93] Crown seeks to rely on the policy documents which were not admitted and their relevance was to assist Crown in asking the court to draw inferences from the policy

provisions that Constable Buchanan's conduct fell below policy standard. As defence submits, policy is trumped by the law which the Supreme Court of Canada has pronounced and is the state of the law (HMTQ v Dallas et al). The Crown cannot rely on policy documents as some evidence that the accused's conduct amounted to a marked departure from the standard of care of a reasonable person.

[94] For these reasons, the Crown has failed to introduce some evidence on all material elements of the offence that David Buchanan is charged with, to support a committal to trial as charged.

[95] Accordingly, David Buchanan is discharged.

Dated at Nanaimo this 22nd day of August, 2018.

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THE HONOURABLE JUDGE J.E.SAUNDERS (PCJ)