

COURT OF APPEAL FOR ONTARIO

CITATION: York (Regional Municipality) v. Wadood, 2017 ONCA 45

DATE: 20170119

DOCKET: C60339

Laskin, Sharpe and Miller JJ.A.

BETWEEN

Her Majesty the Queen ex rel. The Regional Municipality of York

Appellant

and

Amatal Wadood and Douglas Davis

Respondents

Chris G. Bendick, for the appellant

Arvin Ross, appearing as *amicus curiae*

Heard: September 1, 2016

On appeal from the decision of Justice James R. Chaffe of the Ontario Court of Justice, sitting as a Provincial Offences Appeal Court, dated February 13, 2015, allowing the appeals from the convictions of the appellants entered on January 3, 2013 and August 14, 2013 in Provincial Offences Court.

Laskin J.A.:

A. INTRODUCTION

[1] When a police officer stops a motorist for a minor traffic offence, typically the officer will fill out the relevant information on a form called the “certificate of offence”. Underneath the certificate is a carbon copy called the “offence notice”. The officer gives the offence notice (commonly called a “ticket”) to the motorist, and then files the certificate of offence with the court, which has the effect of commencing proceedings against the motorist.

[2] Is the officer entitled to change the information on the certificate of offence after giving the offence notice to the motorist, but before filing the certificate with the court? Suppose the officer does so, but the motorist does not initially dispute the charge and is convicted. If the motorist then appeals, and the appeal judge is made aware of the variance between the certificate of offence and the offence notice, should the judge set aside the conviction? These two questions are raised by this appeal. And trial judges have answered them in different ways.

B. BACKGROUND FACTS

[3] The respondent Amatal Wadood was charged with the offence of “turn not in safety”, contrary to s. 142(1) of the *Highway Traffic Act*.¹ She was served with the offence notice and drove away. The certificate of offence was incomplete, because it did not contain the name of the municipality where the alleged offence

¹ R.S.O. 1990, c. H.8.

occurred. So the officer added “City of Vaughan” before filing the certificate of offence with the court.

[4] The respondent Douglas Davis was charged with “speeding 149 kph in a posted 100 kph zone”, contrary to s. 128 of the *Highway Traffic Act*. He was served with the offence notice and left. The officer then realized that the certificate of offence contained the incorrect year for the alleged offence – 2012 instead of 2013. So before filing the certificate of offence with the court, the officer inserted the correct year.²

[5] Both Wadood and Davis asked for a trial, but neither appeared at their scheduled trial date. Because of their failure to appear, they were deemed to not wish to dispute their charges under s. 9.1 of the *Provincial Offences Act*.³ When a defendant fails to appear for trial, s. 9.1 directs the justice of the peace to examine the certificate of offence and enter a conviction if the certificate is “complete and regular on its face”. The justice of the peace in each case concluded that the certificate of offence was “complete and regular on its face”, and Wadood and Davis were each convicted.

[6] Both Wadood and Davis then appealed and asked to set aside the certificates of offence and their convictions on the ground that the *Provincial*

² Although the record is unclear who made the change to the certificates, I have presumed in each case the officer did so. Nothing turns on who made the changes; only that they were made before the certificates were filed with the court.

³ R.S.O. 1990, c. P.33.

Offences Act did not authorize an “after-service amendment”. In other words, they argued that the officers did not have statutory authority to make changes to the certificates of offence after having served Wadood and Davis with their offence notices.

[7] The appeal judge in the Ontario Court of Justice allowed their appeals. Although he concluded that neither Wadood nor Davis was misled by the change to each certificate of offence – “both were aware of the charge that they had to answer” – he nonetheless quashed both convictions, because in his view, the changes to the certificates of offence “were made without authority”.

[8] The appellant, the Regional Municipality of York, sought leave to appeal to this court. Weiler J.A. granted leave. She wrote:

The test for granting leave to appeal under s. 139 of the POA is met. The questions posited in the Crown’s factum at para. 20 are questions of law, there is conflicting jurisprudence, the statute in issue has wide applicability and is of general application and the issue will undoubtedly arise again; it is essential in the public interest and for the due administration of justice that leave be granted.

C. ISSUES

[9] Section 90 of the *Provincial Offences Act* is at issue on this appeal. That section states:

90. (1) The validity of any proceeding is not affected by,

(a) any irregularity or defect in the substance or form of the summons, warrant, offence notice, parking infraction notice, undertaking to appear or recognizance; or

(b) any variance between the charge set out in the summons, warrant, parking infraction notice, offence notice, undertaking to appear or recognizance and the charge set out in the information or certificate.

(2) Where it appears to the court that the defendant has been misled by any irregularity, defect or variance mentioned in subsection (1), the court may adjourn the hearing and may make such order as the court considers appropriate, including an order under section 60 for the payment of costs.

[10] The Municipality raises two specific issues regarding s. 90:

1. Does s. 90(1)(b) of the Provincial Offences Act impliedly authorize an officer to amend the certificate of offence before it has been filed with the court, but after the offence notice has been served?
2. Did s. 90 preclude the appeal judge from invalidating the convictions?

[11] I have concluded that though s. 90 does not authorize an officer to amend the certificate after serving the offence notice, but before filing the certificate with the court, nothing in the *Provincial Offences Act* prevents an officer from doing so. Whether an amendment will invalidate a conviction depends on the nature of the amendment and its impact on a defendant.

[12] In the appeals before us, each amendment did no more than correct a minor clerical error on the certificate; neither Wadood nor Davis was misled or

prejudiced by the amendment; and thus the validity of the proceeding against each of them was preserved by s. 90.

[13] I would allow the Municipality's appeal and restore both convictions.

D. DISCUSSION

(1) The effect of s. 90 of the *Provincial Offences Act*

(a) Overview

[14] An important goal of the *Provincial Offences Act* is that cases be decided on their merits. A corollary to that goal is that a minor defect in a proceeding, not prejudicing a defendant, should not be given effect to. Section 90 is one of several provisions in the statute that allows courts to meet this goal.

[15] The Municipality relies especially on s. 90(1)(b). It submits that by stating that a variance between an offence notice and a certificate does not affect the validity of the proceeding, this provision implicitly (though not expressly) authorizes a provincial offences officer to amend a certificate of offence before filing it with the court.

[16] The respondents Wadood and Davis do not agree with the Municipality's position. They submit that it would be unfair to permit an officer to change information on the certificate after having served an offence notice on a defendant; the defendant assumes that the information on each document is identical.

[17] The issue between the parties is narrow, but important. It is narrow because both parties agree that once a certificate of offence is filed with the court, only the court can amend it. That only the court can do so is evident from s. 3(1) of the *Provincial Offences Act* and rr. 2(1) and 15(1)2 of the *Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings*.⁴

[18] Under s. 3(1) of the *Provincial Offences Act*, the filing of a certificate of offence with the court commences a proceeding against a defendant. Rule 2(1) states that the rules “apply to proceedings under the Act and a word or term in the Act has the same meaning in these rules as it has in the Act.” Thus, the rules apply to a proceeding commenced by filing a certificate of offence with the court. And r. 15(1)2 provides that amending a certificate of offence “shall be dealt with only in court.”

[19] Thus, the issue narrows to whether an officer can amend a certificate of offence before filing it with the court and the effect of doing so. The issue is nonetheless important, largely because of ss. 9(1) and 9.1 of the *Provincial Offences Act*. These sections apply when a defendant fails to respond to an offence notice, or fails to show up for trial.

[20] Under s. 9(1), a defendant who does nothing after being served with an offence notice is “deemed to not wish to dispute the charge”. And under s.

⁴ R.R.O. 1990, Reg. 200.

9(2)(a), the presiding justice shall convict the defendant in the defendant's absence, but only if the certificate of offence "is complete and regular on its face". Under s. 9(2)(b), if the certificate is not complete and regular on its face, the presiding justice must quash the proceeding. The requirement that the certificate be complete and regular on its face thus provides some protection to a defendant who chooses not to dispute a charge.

[21] Similarly, under s. 9.1, a defendant served with an offence notice who does not appear for a scheduled trial date "is deemed to not wish to dispute the charge". And under s. 9.1(2), the presiding justice shall convict the defendant in the defendant's absence, but again only if the certificate of offence "is complete and regular on its face". If it is not, under s. 9.1(3), the justice must quash the proceeding.

[22] It is thus understandable why an officer, to ensure a conviction if a defendant does not dispute a charge, will want to correct minor errors or omissions on the certificate of offence – be it a missing name of a municipality, an incorrect spelling of a defendant's name, or the incorrect year the offence was alleged to have been committed. These minor errors may occur as officers issue thousands of tickets annually.

[23] However, I do not entirely agree with the Municipality's submission. I would be hesitant to read into s. 90 an implicit authority to amend. But I see nothing in

the statute or rules that precludes an officer from amending the certificate. If the officer does so, and the variance between the certificate and the offence notice comes before the court, then the presiding judge will have to decide whether the defendant was misled or prejudiced by the amendment. If not, then s. 90 will validate the proceeding.

[24] To put my conclusion in context, I will briefly discuss the options available to a defendant after being served with an offence notice, ss. 9(1) and 9.1 proceedings, and the case law in the trial courts.

(b) The offence notice

[25] A defendant served with an offence notice has four options, each of which is specified on the notice:

1. Plead guilty in writing and send in the amount of the fine specified in the offence notice;
2. Agree to plead guilty, but ask to appear before a justice to make submissions on penalty;
3. Give notice of an intent to appear in court and dispute the charge at a trial;
4. Do nothing or not appear, and thus be deemed not to wish to dispute the charge and be liable to conviction.

It is the fourth option that gives rise to the issues on appeal.

(c) The certificate of offence and ss. 9(1) and 9.1 proceedings

[26] When a defendant decides to do nothing after being served with an offence notice, or at first requests a trial and then does not appear for trial, the presiding justice examines the certificate of offence in the defendant's absence.

[27] Significantly, the presiding justice has the certificate of offence, but not the offence notice. Thus, any variance between the two documents will not be apparent to the presiding justice. Equally, the presiding justice will have no way of knowing whether an officer had amended the certificate of offence after having served the offence notice. The presiding justice's only task is to examine the certificate of offence and determine whether it is complete and regular on its face. If it is, the defendant will be convicted; if it is not, the proceeding must be quashed.

[28] In the present case, both Wadood and Davis initially opted to dispute the charge and requested a trial. Each was given a trial date. But neither appeared for trial. So, in each case, the presiding justice of the peace proceeded under s. 9.1. Each certificate of offence was examined and found to be complete and regular on its face, and thus both Wadood and Davis were convicted, even though each certificate of offence had been amended after the offence notice had been served. This is not the case to discuss what is required for a certificate

of offence to be complete and regular on its face. Neither Wadood nor Davis dispute that each certificate placed before the presiding justices was complete and regular on its face.

[29] What follows from this discussion, however, is that s. 90 has no role to play in proceedings under ss. 9(1) or 9.1 of the *Provincial Offences Act*. Section 90 – especially ss. 90(1)(b) and 90(2) – contemplates a comparison between the certificate of offence and the offence notice to determine whether a “variance” exists between the two documents. But in ss. 9(1) or 9.1 proceedings, that comparison cannot be made, as the offence notice is not before the court.

[30] As Feldman J.A. said succinctly in *London (City) v. Young*, 2008 ONCA 429, 91 O.R. (3d) 215, at para. 23: “s. 90 applies in the context of a hearing before the court, and therefore not where the justice is proceeding on default under s. 9(1) where no hearing is held.” Apart from any other consideration, I thus find it hard to imply in s. 90 a power to amend a certificate of offence, where s. 90 is irrelevant to ss. 9(1) and 9.1 proceedings, which are important proceedings under the Act.

[31] Where s. 90 is relevant is at a trial, where the offence notice is put before the court, or as in this case, on appeal, where the defendant tenders the offence notice as a piece of fresh evidence. In these two situations, the presiding judge can compare the information on the two documents and, if a variance exists,

determine its impact. Trial judges have disagreed on the impact of a variance resulting from an amendment to the certificate of offence before it has been filed.

(d) Case law in the trial courts

[32] Several trial judges have concluded that an amendment to the certificate of offence before it has been filed with the court, but after the offence notice has been served on a defendant, invalidates the proceeding. Here is a sampling of five decisions reaching that conclusion. In none of them did the court analyze the effect of s. 90 of the *Provincial Offences Act*.

[33] In *R. v. Pawar* (2007), 36 M.P.L.R. (4th) 90 (Ont. S.C.), before the certificate of offence was filed, it was amended by adding the day and month and correcting the year in which the alleged offence occurred. When the charge came up for trial, the justice of the peace quashed the ticket before the defendant had entered a plea. The prosecutor (the City of Brampton) sought judicial review to quash the justice of the peace's ruling and remit the matter back to the provincial court. O'Connor J. dismissed the application. At para. 28 of his reasons, he held:

Neither the *P.O.A.* nor the regulations appear to contemplate an amendment to the certificate made between service of the notice and filing the certificate with the court. Thus the notice should contain exactly the same personalized information as the certificate. The accused must be aware of the information before the court. The requirement that amendments be made only by the court guards against the potential mischief of alterations prejudicial to the accused being made without the accused's knowledge.

[34] In *R. v. Nandalall*, [2008] O.J. No. 6034 (Ont. S.C.), Langdon J. followed *Pawar*. He held, at para. 33, that “a certificate of offence that is amended by the issuing officer, after he has served the offence notice, but before he has filed the certificate, is a nullity. A nullity cannot be amended” (footnotes omitted).

[35] Similarly, in *R. v. McGonigal*, [1990] O.J. No. 3400 (Ont. C.J.), where the defendant was charged with the offence of “red light fail to stop” and the officer corrected the section number of the offence under the *Highway Traffic Act*, Wolder J. held, at para. 8, “there is no provision under the *Provincial Offences Act* to amend the original document after execution or acceptance of service by the accused.” He held that the amendment had “nullified” the proceedings.

[36] And in *R. v. Tizzard*, 2011 ONCJ 821, [2011] O.J. No. 6156, where the defendant had been charged with speeding, but the officer had forgotten to specify the rate of speed on the certificate and then added it after, the defendant was convicted in his absence. But on appeal, Bellefontaine J. set aside the conviction and quashed the certificate of offence, because in his view, the amendment was “substantive” and deprived the defendant of the ability to make an informed decision whether to plead guilty or have a trial.

[37] Finally, in *R. v. Koza*, [1995] O.J. No. 4278 (Ont. C.J.), where the officer corrected the date on the certificate of offence after serving the offence notice, Smith J. quashed the conviction. He held, at para. 29, “if anybody wants to play

with the document after they have been generated, they are not going to get the support of this judge”.

[38] On the other side of the disagreement among trial judges are the decisions of Lampkin J. in *R. v. Aristidou*, 2007 ONCJ 250, [2007] O.J. No. 2229 and Libman J. in *R. v. Mirza*, [2012] O.J. No. 6505 (Ont. C.J.).

[39] In *Aristidou*, the defendant was charged with speeding. He was clocked at 93 kph in a 70 kph zone. The officer initially used his roadside discretion to reduce the speed to 85 kph. However, unhappy with the defendant’s apparent rudeness, the officer then amended the certificate of offence to show a rate of 93 kph and correspondingly amended the set fine from \$42.50 to \$91.25. The justice of the peace concluded that the amendment was improper and convicted the defendant of speeding at 85 kph. York Region appealed.

[40] Lampkin J. correctly acknowledged that once the certificate of offence was filed with the court, it could only be amended by the court. But importantly, he also held that an officer could correct an error on the certificate of offence before filing it with the court. He wrote, at para. 20:

But what if the provincial offences officer discovers an error prior to filing the certificate in the office of the court or the laying of an information and proceeds to correct the error before filing the certificate or laying the information? The error may be as simple as the misspelling of a name. In my opinion the officer is entitled to make the correction before the proceeding

has been commenced by filing the certificate or laying the information.

[41] Nonetheless, Lampkin J. dismissed the appeal. He upheld the justice of the peace, inferring either that she had rejected the officer's evidence that the defendant was speeding at 93 kph, or that she had used her power to amend the certificate.

[42] In *Mirza*, the defendant was charged with failing to stop at a red light. The officer, however, put the wrong section number on the certificate of offence – he had written the section of the *Highway Traffic Act* for speeding. After serving the offence notice, the certificate was amended by crossing out the wrong section number and inserting the correct one. The defendant did not appear, and a justice of the peace convicted him in his absence.

[43] The defendant appealed, and Libman J. dismissed his appeal. He distinguished the cases of *Pawar* and *Koza*, holding that the amendments in those cases were matters of substance. In the case before him, Libman J., at paras. 71-72, held that the defendant had not been misled and the officer simply corrected an obvious error.

Here, the effect of the argument as I apprehended it is that if an officer noticed an obvious error on a ticket, such as the spelling of a street or the offence, he or she would not be permitted to correct it to give logical effect to the argument made by Mr. Manoukian. I am unable to accept that this is in accord with the intent of this legislation.

[44] *Mirza* and a companion case were appealed to this court: see *R. v. Farah*, 2015 ONCA 302, [2015] O.J. No. 2240. This court allowed both appeals, relying on the prosecutor's concession. But as the court noted in its brief endorsement, the concession was a limited one – that the certificates of offence, though “complete”, were not “regular” on their face, as there was a discrepancy between the short-form description of the offence and the specified section number of the *Highway Traffic Act*. That concession, of course, has no application to the case before us, as the certificates of offence for Wadood and for Davis were both complete and regular on their face.

(e) My analysis

[45] The effect of s. 90 has to be assessed not only in the light of the words of the section, but as well in the context of the scheme of the Act as a whole and its purpose.

[46] Section 90 itself does not confer on an officer an express power to amend a certificate of offence. And I do not think it would be appropriate to imply a power to amend as the Municipality contends. The scheme of the Act suggests otherwise. Where the legislature and rule-makers wanted to provide for an amendment power, they have done so expressly in ss. 34(1) and (2) of the statute and r. 15(1)2. And, as I said earlier, s. 90 does not apply to certificates of offence considered in ss. 9(1) or 9.1 proceedings.

[47] However, for the prosecution to achieve its goal of allowing officers to correct minor errors or omissions on a certificate of offence, it is not necessary to go as far as implying an amendment power in s. 90. In my opinion, officers are entitled to change information on a certificate of offence before filing with the court, even after serving a defendant with an offence notice. Nothing in the Act or the rules precludes officers from doing so. Proceedings against a defendant have not yet commenced. And neither the Act nor the rules requires that the information on a certificate of offence be identical to the information on an offence notice before it is filed with the court.

[48] Allowing an officer to correct the certificate of offence before filing it with the court furthers the purpose of the *Provincial Offences Act* and proceedings under it. The express purpose of the Act is set out s. 2(1):

2. (1) The purpose of this Act is to replace the summary conviction procedure for the prosecution of provincial offences, including the provisions adopted by reference to the *Criminal Code* (Canada), with a procedure that reflects the distinction between provincial offences and criminal offences.

[49] This court and other judges have elaborated on this purpose. The Act is intended to permit judges to decide cases on their merits, to deal efficiently and inexpensively with the province's large volume of minor regulatory offences, and to avoid having proceedings invalidated because of technical objections or irregularities having no prejudicial impact on a defendant. See, for example, *London (City) v. Young*, per Doherty J.A. and *Ontario (Ministry of Labour) v.*

Discovery Place Ltd., [1996] O.J. No. 690 (Ont. C.J.), varied on other grounds, [1997] O.J. No. 1887 (Ont. C.A.).

[50] If officers were not permitted to correct information on a certificate of offence before filing the certificate with the court, then many proceedings under ss. 9(1) or 9.1 would be quashed simply because the officer misspelled a name, left out a name of a municipality, or incorrectly wrote down the year of the alleged offence. In all of these examples – and many other examples of minor errors or omissions on certificates of offence – the defendant charged would not be misled. Quashing the certificate of offence because of minor errors that cause no prejudice would not promote the fair administration of justice in the provincial court.

[51] Defendants are protected if they were misled or prejudiced by a change to information on the certificate of offence that produced a variance between the certificate and the offence notice. Where a variance comes to light, s. 90 has an important role to play in promoting the purpose of the Act.

[52] A variance could come to light in one of two situations: (1) at a contested trial, where the defendant puts the offence notice before the court and invites the presiding judge to compare the information on the certificate with the information on the offence notice; or (2) as in the present case, on appeal, after a conviction is registered against the defendant under ss. 9.1 or 9(1) of the statute. In the

latter situation, the appeal court has wide power under s. 136 of the *Provincial Offences Act* to receive further evidence, which presumably could include the offence notice, even though it was not before the justice of the peace in the default proceeding.

[53] The judge, either at trial or on appeal, faced with a variance, would have to determine its impact. If the variance had the potential to mislead the defendant, then the judge would be justified under s. 90(2) in adjourning the trial and even ordering the prosecution to pay costs. On appeal, the judge may be justified under s. 138 in reversing a conviction or varying a penalty, or if “necessary to do so to satisfy the ends of justice”, ordering a new trial.

[54] In his judgment in *R. v. Montone*, 2007 ONCJ 251, [2007] O.J. No. 2230, at paras. 38-39, Lampkin J. gives a good example of a case where a defendant would be misled by a change to the certificate of offence and where a conviction would result in an injustice. An officer arrives at the scene of an accident and issues a certificate of offence for following too closely. The officer then calls in to report the accident to his staff sergeant who advises that the defendant should have been charged with careless driving, a more serious offence with a greater monetary penalty and more demerit points. The officer then changes the certificate of offence to record the more serious offence and files it with the court. The defendant, thinking he had been charged only with following too closely, does not dispute the charge; the justice of the peace, in the defendant’s absence,

examines the certificate, concludes it is complete and regular on its face, and convicts the defendant of careless driving. The defendant is notified of the conviction and appeals. As Lampkin J. notes, upholding the conviction on these facts would not be just; the defendant would have been convicted of an offence for which he received no notice whatsoever.⁵

[55] But against those cases – likely few – where the defendant has been misled or prejudiced by a change to the certificate of offence, are those many cases where the change may correct clerical errors or supply missing information, and the defendant is not misled or prejudiced at all. In these cases, s. 90 preserves the validity of the proceeding.

(2) Did s. 90 preclude the appeal judge from invalidating the convictions of Wadood and Davis?

[56] In Wadood's case, the certificate of offence was changed before filing by adding the name of the municipality where the offence was alleged to have occurred. In Davis' case, the certificate of offence was changed by correcting the year in which the offence was alleged to have occurred. In neither case was the defendant misled by the change. The appeal judge so found when he observed "both were aware of the charge that they had to answer".

⁵ Lampkin J. also notes, and the Regional Municipality accepts, that s. 124 (2) of the Act – "where an appeal is based on a defect in a conviction...judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect" – would not bar the appeal.

[57] Yet the appeal judge erred in law, because he failed to give effect to, or even consider, s. 90 of the *Provincial Offences Act*. Section 90(1)(b) is a complete answer to the position of Wadood and Davis. The minor variances between the certificates and the offence notices did not affect the validity of either proceeding or the conviction of each respondent.

E. CONCLUSION

[58] I would allow the Municipality's appeal and restore the convictions against Wadood and Davis.

Released: *RTJ* JAN 19 2017

Wadood

Agree with 9th Nov 9A

d agree with 9A