

COURT FILE NO.: CV-06-00002778-004086

DATE: 20070425

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

- and -

MAHANBIR SINGH PAWAR

Respondent

)
)
) Christopher C. Cooper, for the City of
) Brampton
)
)

)
) Eugene J. Bhattacharya, for the
) Respondent
)
)

) HEARD: April 2, 2007
)

REASONS FOR JUDGMENT

O'Connor J.

Introduction

[1] Mahanbir Pawar was stopped by the police on January 8, 2006 and received a "speeding ticket". He filed a notice of intent to defend the charge on January 17, 2006 and engaged Traffic Tickets Points Buster Inc. to represent him, on January

18, 2006. The ticket Mr. Pawar received showed the year of the offence as 2005. The day and month section had not been completed by the officer.

[2] The officer is required to complete a two part form, the Certificate of Offence ("certificate") being the top or original and the Offence Notice ("notice") being the second or "carbon copy". These names are on the different forms as their pre-printed titles. This procedure ensures that the individualized information on the notice is the same as that on the certificate. The notice is then separated and handed to the alleged offender. The officer files the certificate with the court to initiate the process should the motorist elect to contest the charge rather than pay the fine indicated on the ticket.

[3] In this case, at some point prior to filing the certificate with the court, the officer noticed his error, added the day and month and corrected the year. Thus, when filed with the court, the certificate appeared complete and correct. The notice in Mr. Pawar's possession was not, of course, connected by these changes.

[4] When Mr. Pawar's matter came up for trial, the Justice of the Peace quashed the ticket before Mr. Pawar had entered a plea. No record of the proceeding is available because the recording equipment was not functioning.

[5] The City seeks an order of *certiorari*, quashing the ruling of the J.P. and an order of *mandamus* remitting the matter back to the Provincial Offence Court to consider either amending the certificate or ordering particulars.

[6] The City has indicated it does not wish to pursue Mr. Pawar personally. In fact, the City has given him assurances that he will not be prosecuted on this ticket, should it be reinstated. Instead, the City is concerned that the decision to quash was flawed and may lead to other similar charges being quashed for what it considers minor errors or omissions in the ticketing process. The City argues that such errors or omissions may be corrected by the Justice of the Peace in accordance with the amendment procedure provided in the *Provincial Offences Act*, R.S.O. 1990, c. P. 33 (*P.O.A.*). This Application is one of several brought by the City to reinstate charges.

[7] Mr. Pawar, having received assurances from the City that his ticket would not be pursued regardless of the outcome of this application, was not personally present at the hearing. However, Traffic Ticket Points Busters Inc. continued to represent him and engaged counsel to respond to the application.

Issues

[8] It is undisputed that the application was brought outside the time limits set out in the *P.O.A.* Although counsel for the respondent argued that this court

should not hear the matter as the City has not shown that an extension should be granted, there is no actual prejudice to Mr. Pawar, as the City has indicated that, regardless of the outcome of this application, the matter will not be pursued against him. Further, since both parties were present and prepared to argue the matter on its merits, the application was heard despite the delay.

[9] The next issue is whether this is a proper case for the Superior Court of Justice to apply the remedy of *certiorari*. *Certiorari* is provided for in the *P.O.A.*, but only where there is no other appeal route. If this matter properly falls into another appeal route provided by the *P.O.A.*, that route should be pursued.

Positions of the Parties

The Applicant City of Brampton

[10] The City submits that the Justice of the Peace has power to quash a certificate only under s. 36 of the *P.O.A.* which reads:

36. (1) An objection to an information or certificate for a defect apparent on its face shall be taken by motion to quash the information or certificate before the defendant has pleaded, and thereafter only by leave of the court.

(2) The court shall not quash an information or certificate unless an amendment or particulars under section 33, 34 or 35 would fail to satisfy the ends of justice.

[11] The City argues that the certificate of offence was not a certificate of offence until it was filed with the court and when filed it was correct. That is, because the certificate was complete when filed with the court, it did not require

amendment because prior to filing, it was not a certificate of offence as defined in the Act. It was merely a "piece of paper". In the alternative, the City argues that the Justice of the Peace had the duty to amend the certificate under the broad powers of amendment mandated in the *P.O.A.* The City notes that the corrections did not prejudice Mr. Pawar as he was aware of the correct day and year and that, in any case, a notice of trial later sent to Mr. Pawar contained the full date of the offence. Thus the City argues that quashing a certificate outside the s. 36 restrictions exceeds the J.P.'s jurisdiction.

[12] The City further submits that s. 90 of the *P.O.A.* mandates that a proceeding is not affected by any variance between the charge in an offence notice and the charge in the certificate. That section reads:

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.

Adjournment to meet irregularities

(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.

[13] Thus if there is such variance and the defendant has been prejudiced by it, the Justice of the Peace may adjourn the hearing and award costs but not quash the charge.

[14] In lieu of a proper record of the proceeding before the Justice of the Peace the City offers affidavit evidence of the Crown prosecutor present at the original hearing. The City submits that the Justice of the Peace failed to call on the prosecutor or to provide notice to the prosecutor prior to quashing the certificate. This, in the City's submission, is a failure of natural justice and a jurisdictional error.

The Respondent Mahanbir Pawar

[15] Mr. Pawar submits that a certificate can only be altered by the court. Once the notice is issued there is no authority in the *P.O.A.* for an officer to change the certificate. There is, instead, a procedure for the Court to amend the certificate when the matter comes before the court. Since the certificate was altered prior to filing with the court, the certificate was quite properly not recognized by the J.P.

[16] The respondent also notes that without an official record of the proceeding, this court has no insight into the Justice of the Peace's reasons or into the procedure followed. The onus to produce the record is on the City and it has failed to do so. Without a record, there is prejudice to the respondent by the delay

in this application, a matter dealt with above, but also, because of this failure, this court does not have the evidence necessary to rule on any failure of natural justice in the proceeding.

The Law

Routes of Appeal and Jurisdiction

[17] There are two possible routes to overrule a Justice of the Peace in these matters. First, s. 135 (1) of the *P.O.A.* provides for an appeal of an "acquittal, conviction or sentence" to the Ontario Court of Justice. S. 40 of the *Courts of Justice Act* confirms that an appeal under the *P.O.A.* does not lie to the Superior Court of Justice, stating:

40.(1) If no provision is made concerning an appeal from an order of the Ontario Court of Justice, an appeal lies to the Superior Court of Justice.

(2) Subsection (1) does not apply to a proceeding under the *Criminal Code* (Canada) or the *Provincial Offences Act*.

[18] The second route is set out in s. 140 of the *P.O.A.* which governs *mandamus*, prohibition and *certiorari*, as follows:

140. (1) On application, the Superior Court of Justice may by order grant any relief in respect of matters arising under this Act that the applicant would be entitled to in an application for an order in the nature of *mandamus*, prohibition or *certiorari*.

[19] S. 141 states the additional requirements for the relief of *certiorari*. S. 141 (3) provides that s. 141 cannot be used for a "conviction, order or ruling" for which an appeal is provided under the *P.O.A.*. Further, s. 141 (4) of the *P.O.A.* provides that the Superior Court of Justice shall not grant *certiorari* unless there was a "substantial wrong or miscarriage of justice".

[20] Thus if the quashing of the certificate is considered to be an acquittal, the matter should properly be appealed to the Ontario Court of Justice. In *London (City) v. Young*, 2006 Carswell Ont 7618 Kennedy J. considered the case law on this point at paras. 27 to 31. He noted, at para. 32:

The question is whether the Justice of the Peace quashed the certificate of offence in exercising his jurisdiction or whether he quashed the certificate because he concluded that he had no jurisdiction by virtue of the certificate being a nullity.

[21] He held that the quashing was tantamount to an acquittal and stated at para 38:

If the justice had quashed the certificate without examining it, a jurisdictional error would have resulted that would be reviewable upon application to the SCJ for prerogative relief.

[22] The process followed by the Justice of the Peace in reaching his conclusion is, in this case, not reviewable because of the lack of record. Both parties agreed that the Superior Court of Justice has inherent jurisdiction to

consider an appeal of an acquittal and both also recognized the authority granted under s. 140.

[23] Thus, this decision does not rely on the lack of a record of the prior proceedings but rather on the interpretation of the powers of the Justice of the Peace under the *P.O.A.*. Given the conclusion below, this point is not determinative and alternatives to an official record need not be considered.

Analysis

Should the Ruling of the Justice of the Peace be Quashed?

[24] The *P.O.A.* and its regulations govern the procedures necessary for charging, pleas and trials for offences such as speeding which are created by Provincial legislation. Both parties agree that the *P.O.A.* emphasizes substance over form as noted in *R. v. Salim*, [2000] O.J. No. 507 in which MacKinnon J of this court stated at para. 7:

Appellate case law requires Provincial Offences courts to look at substance and not at procedural irregularities in its adjudications. The overall philosophy is to ensure that technical objections do not impede an impartial verdict on its merits.

[25] However, the *P.O.A.* does include numerous procedural requirements for the protection for the accused.

[26] The certificate of offence is the pre-printed title of the form used by the officer. The *P.O.A.* makes no mention of a change in title when the document is filed with the court. There are consequences if the certificate is not filed but the act of filing is not deemed to change the title of the document nor is there any authority to treat the certificate differently prior to filing.

[27] The *P.O.A.* sets out a procedure for amendments to a certificate in s. 34 and 35.

34. (1) The court may, at any stage of the proceeding, amend the information or certificate as may be necessary if it appears that the information or certificate,

- (a) fails to state or states defectively anything that is requisite to charge the offence;
- (b) does not negative an exception that should be negated; or
- (c) is in any way defective in substance or in form.

(2) The court may, during the trial, amend the information or certificate as may be necessary if the matters to be alleged in the proposed amendment are disclosed by the evidence taken at the trial.

(3) A variance between the information or certificate and the evidence taken on the trial is not material with respect to,

- (a) the time when the offence is alleged to have been committed, if it is proved that the information was laid or certificate issued within the prescribed period of limitation; or
- (b) the place where the subject-matter of the proceeding is alleged to have arisen, except in an issue as to the jurisdiction of the court.

(4) The court shall, in considering whether or not an amendment should be made, consider,

- (a) the evidence taken on the trial, if any;
- (b) the circumstances of the case;
- (c) whether the defendant has been misled or prejudiced in the defendant's defence by a variance, error or omission; and

- (d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.
- (5) The question whether an order to amend an information or certificate should be granted or refused is a question of law.
- (6) An order to amend an information or certificate shall be endorsed on the information or certificate as part of the record and the trial shall proceed as if the information or certificate had been originally laid as amended.

35. The court may, before or during trial, if it is satisfied that it is necessary for a fair trial, order that a particular, further describing any matter relevant to the proceeding, be furnished to the defendant.

[28] 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.

[29] In considering the argument that the certificate is not a certificate until filed with the court, it is instructive to consider *P.O.A.* ss. 9 (1) and 9.1, which govern a Justice of the Peace when no plea has been entered or an accused does not appear at trial. The Justice of the Peace may enter a conviction on an imperfect certificate although the accused would not be aware of the changes required to

correct the imperfections. However to enter a conviction in that circumstance, the Justice of the Peace must find the certificate is "complete and regular on its face".

[30] In *R. v. Wilson*, [2001] O.J. No. 4907 at para. 21 Livingstone J. held that "regular on its face" means that the certificate must set out the person commencing the process, the person charged, the statute name and section number, where and when the allegations arose and what the result of a conviction would be.

[31] Thus s. 9 and 9.1 of the *P.O.A.* appear to hold the certificate to a higher standard than s. 34 which governs amendment when the accused is present. Thus ss. 9 and 9.1 bolster the argument that in considering an amendment under s. 34, the Justice of the Peace weighing the factors would anticipate hearing from the parties. So changes made without input and without the presence of the accused can only be made if the certificate meets the higher standard of "complete and regular on its face".

[32] A change made prior to filing with the court would raise similar concerns as it too would be made without the accused's input or knowledge. Further, as noted above, the *P.O.A.* is silent respecting changes made prior to filing with the court. This silence in the *P.O.A.* is consistent with s. 15 of Ont. Reg. 200 which states:

15. (1) The following matters shall be dealt with only in court:

1. Quashing a proceeding, except under section 9, 18.3 or 18.5 of the Act or under section 205.7 or 205.19 of the Highway Traffic Act.
2. Amending an information, a certificate of offence or a certificate of parking infraction.

[33] Two additional points support the view that only a court may amend the date shown on a certificate.

[34] First, in interpreting the powers intended to be exercised by a Justice of the Peace and the importance accorded to the elements of a certificate it is instructive that time of the offence, but not date, has been accorded special treatment under s. 34 (3) (a) above. Second, s. 34 (6) provides not that the certificate be altered but that an order be made and that order endorsed on the certificate.

[35] It is undisputed that the *P.O.A.* stresses the broad power to amend and narrow power to quash. S. 36 and 90 reinforce this interpretation.

[36] However, the particularity of the provisions for amendment in the *P.O.A.* and in Ont. Reg. 200 indicates that these sections would override the broader s. 36 and s. 90.

Analysis

Jurisdiction

[37] On the jurisdiction issue there are two factors that suggest that this court should hear this application.

[38] First it is agreed that this court has inherent jurisdiction to hear an appeal; the question is merely if that jurisdiction should be exercised. As a practical matter and without deciding whether the ruling in question was an acquittal, the parties were present and prepared to proceed. This court exercised its inherent jurisdiction to hear the matter.

Use of Certiorari

[39] In this situation, and lacking a record of the proceedings, this court considered the disputed ruling either as a ruling under s. 34 or under s. 140. Because of the lack of record, this court cannot determine whether the J.P. considered the information in the certificate or found the certificate was a nullity.

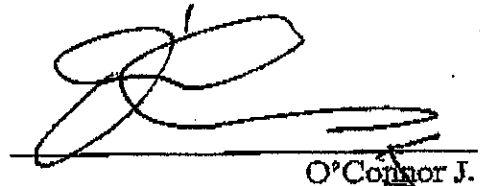
[40] If the information in the certificate was considered, the appeal would, following *Wilson*, have properly been considered to be an appeal of an acquittal and thus have been to the Ontario Court of Justice. However, as determined above, this court will use its inherent jurisdiction. As appeal court, this court would defer to the Justice of the Peace on any factual determination. Even had the J.P. been

prepared to overlook the changes made by the officer and amend the certificate following the alteration by the officer, the City has failed to show that the s. 34 considerations were not properly made and s. 36 (2) was not properly followed.

[41] In the more likely alternative, the Justice of the Peace could have decided that the document had been improperly amended in violation of Ont. Reg. 200 s. 15 and, faced with a document not contemplated by the *P.O.A.* or its regulations, found that it was simply no longer a valid certificate, but was a nullity. This conclusion follows from the protections in the *P.O.A.* against alterations without knowledge of the accused and preserves those protections against the mischief of alterations to a certificate made prior to filing with the court.

Order

[42] The application of the City of Brampton to quash the order of the Justice of the Peace is dismissed.



O'Connor J.

Released: April 25, 2007

