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R. v. Bellomo

Between
Her Majesty the Queen, respondent, and
John Bellomo, appellant

[1995] O.J. No. 313

Ontario Court of Justice (Provincial Division)
Provincial Offences Appeal Court - Toronto Region
Fairgrieve Prov. J.

February 13, 1995.
(36 pp.)

Motor vehicles — Offences — Driving while disqualified or suspended — Knowledge of suspension — Standard of proof --Civil rights — Presumption of innocence — Imprisonment — Canadian Charter of Rights and Freedoms — Application, exceptions — Reasonable limits prescribed by law (Charter, s. 1).

The accused appealed from conviction under the Highway Traffic Act of the offence of driving while his licence was suspended. The issue on appeal was whether a person whose driver's licence was suspended must prove on a balance of probabilities or must merely raise a reasonable doubt that he or she was unaware of the suspension. The appellant's defence in the present case had been that he knew nothing about the licence suspension, which arose from his failure to pay an earlier fine. The justice of the peace at trial considered that the appellant had the burden of establishing his defence on a balance of probabilities, and that he had failed to discharge that onus.

HELD: The appeal was allowed. The conviction was quashed, and a new trial was ordered. The justice of the peace had erred in law in placing the burden on the accused to establish the defence on a balance of probabilities. The proper test was whether the defence had left the court in a state of reasonable doubt as to whether the appellant was aware of the suspension. Requiring an accused to prove on a balance of probabilities that he or she was unaware of the suspension of his or her licence, i.e. that there was a reasonable mistaken belief that the licence was valid, violated the presumption of innocence guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms, 1982 because it permitted a conviction despite a reasonable doubt as to any negligence or fault on the part of the accused, a constitutionally required element of the offence. It also contravened section 7 of the Charter because it permitted the imprisonment of a "morally innocent" person. rights was a reasonable limit within section 1 of the Charter. The legislation did not meet the "proportionality" test under section 1 of the Charter. The limit to rights protected by the Charter could not be viewed as impairing the rights as little as possible. There was no reason why the obvious alternative measure, convicting only those who had not raised a reasonable doubt as to their knowledge of their licence suspension, would not be regarded as achieving the objectives of enforcing compliance with the rules of the road and compelling the payment of fines just as effectively.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 7, 11.
Competition Act, R.S.C. 1970, c. C-23, s. 37.3.
Criminal Code, s. 238(3).
Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 46, ss. 52(1), 53(1), 53(3), 128(15), 130.
Occupational Health and Safety Act, R.S.O. 1980, c. 321. s. 37(2).
Provincial Offences Act, R.S.O. 1990, c. P.33, s. 69(1).

Counsel:

J. Stinson, provincial prosecutor, agent for Attorney General of Ontario.
W. Halkiw, counsel, and F. Alibhai, student at law, for the appellant.

¶ 1 **FAIRGRIEVE PROV. J.**:— The issue of significance in this appeal concerns the impact of the Charter on the burden borne by a defendant charged with the offence of "driving while suspended:, contrary to s. 53(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8. Specifically, the question is whether a person who was driving while his driver's licence was suspended can avoid conviction only by establishing on a balance of probabilities that he was unaware of the suspension, or whether, in the alternative, merely raising a reasonable doubt that such was the case is sufficient to require an acquittal.

¶ 2 The appellant was convicted of this offence of "driving while suspended" in the Provincial Offences Court at Toronto on April 22, 1994. He was fined $500, the minimum penalty under s. 53(1)(a), and his driver's licence was suspended for six months as required by s. 53(3). Mr. Bellomo was not represented by counsel at trial, and the issue concerning the onus on the defendant was not argued before the learned justice of the peace at all. Indeed, the entire submissions at the conclusion of the evidence consisted of the appellant's statement, "I just didn't know anything about it, sir", and the prosecutor, not Mr. Stinson, indicating that she had no submissions to make. As well, the Notice of Appeal was completed by Mr. Bellomo himself, and it failed to identify the grounds of appeal that were eventually argued.

¶ 3 When the appeal came on for hearing, the correctness of the approach taken by the justice of the peace in his assessment of the credibility of the defendant's evidence was challenged by Mr. Alibhai, the student at law who appeared on behalf of the appellant. In addition, for the first time, the issue concerning the proper legal test to be applied to the defence evidence was expressly raised. Mr. Stinson, the provincial prosecutor appearing for the respondent, had no prior notice that the nature of the burden on the defendant would be in issue. Accordingly, on consent, the appeal was adjourned to allow both parties to prepare written submissions and to permit the Crown to file whatever additional material it considered relevant to the issue.

¶ 4 Submissions in writing were filed both by Mr. Halkiw, Mr. Alibhai's principle and counsel for the appellant, and by Mr. Stinson on behalf of the Crown. Mr. Stinson took the position that the justice of the peace had not erred in placing a burden on the defendant to establish the defence of due diligence on a balance of probabilities, and that there was no Charter violation in doing so. The Crown did not, however, take the opportunity to file any further evidence relating to the issue, and the matter was left to be decided essentially on the basis of the argument that had already been advanced.

¶ 5 I do not think an appellate court can properly decline to decide a legal question of this kind merely because it had not been raised or adequately presented in the court of first instance. It is not surprising that an unrepresented defendant in the Provincial Offences Court would not have argued what to a lawyer would appear to be the obvious and crucial point. While it clearly would be preferable to have both a trial record that addressed the issue and the benefit of the justice's reasons considering the matter, it is significant, I think, that the constitutional issue now argued involves "legislative facts" concerning the purpose and effect of the statutory provision, rather than "adjudicative facts" relating to the conduct of the people involved in this particular case: see R. v. Danson, [1990] 2 S.C.R. 1086, 73 D.L.R. (4th) 686 at p.695. Such "legislative facts", it seems to me, can be as easily established here as they could have been in the trial court. Indeed, there are well-known instances where the Court of Appeal has adjourned appeals it had started to hear to allow the parties to file additional evidence or to make further submissions concerning Charter arguments developed at the appellate stage: see R. v. Ladouceur (1987), 35 C.C.C. (3d) 240, 57 C.R. (3d) 45 (Ont.C.A.), aff'd (1990), 56 C.C.C. (3d) 22, 77 C.R. (3d) 137 (S.C.C.); R. v. Morin (1990), 55 C.C.C. (3d) 209, 76 C.R. (3d) 37 (Ont.C.A.), aff'd (1992) 76 C.C.C. (3d) 193, 12 C.R. (4th) 1 (S.C.C.). Since the same procedure has been followed in this case, I do not think that either side can complain that it was not given the opportunity to present fully its case on the constitutional issue.

The Evidence

¶ 6 The evidence at trial was not complicated. The case for the Crown consisted of the unchallenged testimony of a police officer, Cst. Zayachkowski, that he stopped the defendant when he drove a motor vehicle at Clinton and Harbord Streets in Toronto on January 8, 1994. After he was stopped, Mr. Bellomo produced his driver's licence, which indicated his date of birth and address. The Crown then filed a certificate of suspension linked to the defendant by the same name, address and birth date, certifying that Mr. Bellomo's driver's licence was under suspension on the date of the alleged offence because of an unpaid fine. Although the certificate was filed as an exhibit at trial, it was not forwarded with the original papers to the appeal court and, inexplicably, it appears not to have been retained by the Provincial Offences Court. In his submissions, however, the appellant did not attach any significance, so far at this appeal was concerned, to the absence of the document.

¶ 7 There appeared to be no issue that the certificate of suspension, under the signature and seal of the Registrar of Motor Vehicles, certified as well that a notice of the suspension had been sent by registered mail to the defendant's address on December 15, 1993, stating that the suspension was effective as of that date.

¶ 8 Mr. Bellomo gave evidence in his own defence. He testified that he had no knowledge, before being stopped by the officer, that his licence had been suspended. The Crown did not challenge the defendant's assertion that he had "proof" that he been in Florida from at least December 13th to 24th. He also testified that when he returned to Toronto, no one brought to his attention that any mail from the Ministry of Transportation had been received in his absence. The accused gave further evidence that immediately after being notified by Cst. Zayachkowski of the suspension, he went to pay the outstanding fine.

¶ 9 In cross-examination, Mr. Bellomo testified that he lived in a house with his 90-year old mother who is unable to read or write. His 64-year old sister lived in a separate apartment on the second floor. During his cross-examination of the defendant, the prosecutor produced what was described as a photocopy of the receipt for an item sent by registered mail. The defendant testified that he did not recognize the signature on it, and the document was not tendered as an exhibit. Mr. Bellomo was not asked who else might have been at the address, nor who cared for his mother while he was in Florida, nor any further questions directed to ascertaining who it was who had allegedly received the Notice. In answer to a question from the justice of the peace, however, Mr. Bellomo testified that after he had been stopped by the officer and charged with this offence, he asked his mother and sister if there had been any registered mail for him and, despite the hearsay character of the evidence by the justice, he stated that they had had no knowledge of it.

¶ 10 With respect to the unpaid fine that had led to the suspension, the defendant testified that he recalled having been stopped by an officer on an unspecified earlier occasion when he had been returning from London, but that he had misplaced the ticket he received and had done nothing about it. Mr. Bellomo testified that he had expected to get a summons in the mail relating to the matter. He stated as well that he did not remember receiving what the prosecutor called "a notice of fine and a due date," although he said he could not categorically deny that he had received such a document.

The Reasons for Convicting the Appellant

¶ 11 The justice of the peace explained that the onus was on the prosecutor to prove that the defendant had been driving a motor vehicle as alleged, and this his licence was under suspension at the time. He was clearly satisfied that both facts, which were not in dispute in any event, had been proved.

¶ 12 The justice then referred to the notion on the Certificate that a copy of the notice of suspension had been sent to the defendant's address, and His Worship stated, "it would appear, sir, that is was received at the particular address." Later in his reasons, in an apparent reference to the postal receipt which was not tendered in evidence, the justice stated, "I assume the prosecutor suggested they have information that is was received."

¶ 13 The justice of the peace referred to the defendant's position that he did not know of the suspension, and proceeded to give the reasons why he did not accept the defendant's evidence. He stated that when Mr. Bellomo failed to do anything with the initial traffic ticket issued near London, it would have been dealt with as a "fail to respond", such that a justice would have reviewed the certificate of offence and, if it were proper on its face, a conviction would have followed. "We must assume from the presumption of regularity that happened," the justice stated, "because you have been since suspended as a result of that particular ticket." The justice of the peace then went on to explain that a notice would have been sent that a fine was due and payable, which he said the defendant "conveniently" did not recall receiving, and that that would have been followed by a further notice that if the fine were not paid, his driver's licence would be suspended. Finally, he stated, the Notice of Suspension itself would have been sent.

¶ 14 The learned justice then made the following statements in his reasons for judgment:

> You take a look at the balance of probability here. What is the possibility that you didn't get notice one, two or three?
>
> I can't think of many times when I've had a bill from Eaton's, Simpson's or any other place that it doesn't get to my address, and that I take the cheque and I send it to the company. I can't remember ever the mail not getting there. I would imagine not too many other people would find that either; because generally speaking, we may criticize, we may joke about the mails, but the mail gets there. We have to take a look at what is the balance of probability that you didn't get any of these notices. "I didn't get them, no one seems to know anything about it". Yet it seems to me that when you take a look at the Act, it says that five days after it's sent, it is deemed to be served.
>
> It is served on the premises, and I assume the prosecutor suggested they have information that it was received.
>
> Your defence to this matter is, of course, through no fault of your own, either through absence, or illness, or something beyond your control, you didn't get the notice.

¶ 15 The justice of the peace then expressed scepticism concerning the defendant's evidence that his mother and sister knew nothing about the notice, and went on to make a finding of guilt:

> If you had come back and said, "I spoke to my mother, a little old, she forgot about; she left it somewhere and forgot to give it to me:, then maybe that's a defence, maybe there is a defence, but that isn't offered ... You know what's offered, "I didn't get it, I didn't get, I didn't get it, I didn't get it, I didn't get." I don't buy it, okay.
> That's what this all about, sir; because the onus shifts on to you - through no fault of your own - you have to offer the court some explanation, a reasonable explanation, as to why this occurred ....
> It doesn't add up. Under all the circumstances, sir, I'm not accepting your explanation in this particular matter. I'm satisfied that under all the circumstances that you were driving while you were under suspension, and there will be a conviction for the offence.

¶ 16 With his references to "balance of probability" and not "accepting" or "buying" Mr. Bellomo's explanation, the justice of the peace made it clear that he considered that the appellant had the burden of establishing his defence on a balance of probabilities, and that he had failed to discharge that onus.

Relevant Statutory and Constitutional Provisions

¶ 17 The sections of the Highway Traffic Act creating the offence of "driving while suspended" reads as follows:

> 53.-(1) Every person who drives a motor vehicle or street car on a highway while his or her driver's licence is suspended under an Act of the Legislature or a regulation made thereunder is guilty of an offence and on conviction is liable.
>
> (a) for a first offence, a fine of not less that $500 and not more that $5,000; and
> (b) for each subsequent offence, to a fine of not less that $1,000 and not more that $5,000, or to imprisonment for a term of not more than six months, or to both.

¶ 18 The relevant portions of what was then s.46 of the Highway Traffic Act, which provided authority for the suspension of a driver's licence because of an unpaid fine, were the following:

> 46. -(1) Where a person is in default of payment of a fine imposed upon conviction for an offence against this Act, ..., an order may be made under subsection 69(2) of the Provincial Offences Act directing that,
>
> (a) the person's driver's licence be suspended, and
>
> (b) no driver's licence be issued to the person, until the fine is paid.
>
> (2) The Registrar shall,
>
> (a) on being informed of an outstanding order referred in subsection (1), suspend the person's driver's licence, if it is not already suspended under another order referred to in subsection (1); and
>
> (b) on being informed that the fine and any applicable prescribed administrative

fee for the reinstatement of the licence are paid, reinstate the licence, unless the Registrar has been informed that,

(i) there is another outstanding order referred to in subsection (1) directing that the licence be suspended,
(ii) the licence is suspended under any other order or under another statute, or
(iii) an applicable prescribed administrative fee for handling a dishonoured cheque, or interest or penalty charged to a person under subsection 5(2), is outstanding.

(3) The Lieutenant Governor in Council may make regulations prescribing forms and procedures and respecting any matter considered necessary or advisable to carry out effectively the intent and purpose of this section.

It might be noted that s. 46 was repealed by S.O. 1993, c. 31, s. 2(6), proclaimed in force August 15, 1994, and was replaced by a new section which added a number of offences under other statutes which could give rise to a licence suspension. The amended s. 46 is not, however, significant for present purposes.

¶ 19 Section 69 of the Provincial Offences Act, R.S.O. 1990, c. P.33, referred to in s. 46(1), supra, directs a justice to order a licence suspension where a fine has not been paid:

69.-(1) The payment of a fine is in default when any part of the fine is due and unpaid for fifteen days or more.

(2) Where a justice is satisfied that payment of a fine is in default, the justice,

(a) shall order that any permit, licence, registration or privilege in the respect of which a suspension is authorized by or under any Act for non-payment of the fine be suspended, not renewed or not issued until the fine is paid; and
(b) may direct the clerk of the court to proceed with civil enforcement under s. 68.

¶ 20 Also of potential significance to prosecutions for "driving while suspended" is s. 52(1) of the Highway Traffic Act, concerning service of a notice of suspension:

52.-(1) Notice to a person of the suspension of his or her driver's licence is sufficiently given if delivered personally or sent by registered mail addressed to the person to whom the licence was issued at the latest current address of the person appearing on the records of the Ministry and where notice is given by registered mail it shall be deemed to have been given on the fifth day after the mailing unless the person to whom notice is given establishes that he or she did not, acting in good faith, through absence, accident, illness or other cause beyond his or her control, receive the notice.

¶ 21 In addition to the provisions of those provincial statutes, it would also be convenient to set out the sections of the Canadian Charter of Rights and Freedoms which, the appellant submits, are of relevance to this appeal:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set

out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Analysis

¶ 22 There was not dispute that the offence of "driving while suspended" created by s. 53(1) is a strict liability offence. In R. v. MacDougall [1982] 2 S.C.R. 605, 18 M.V.R. 180, 142 D.L.R. (3d) 216, the Supreme Court of Canada considered the equivalent, similarly worded provision of the Nova Scotia Motor Vehicle Act, R.S.N.S. 1967, c. 191, and held, per Ritchie J. at p. 184 M.V.R., that the "driving while suspended" offence involves strict liability:

> I am in agreement with all of the judges in the courts below, including the dissenting judge in the Court of Appeal, in finding that as the offence here charged is one concerning the public welfare it was properly characterized as "an offence of strict liability" within the meaning of the classification stipulated by Mr. Justice Dickson and that a defence is accordingly available to the accused if he "reasonably believed in a mistaken set of facts which, if true, would render" his act in continuing to drive his motor vehicle without a licence, an innocent one.

¶ 23 The reference by Ritchie J. to Dickson J.'s classification of offences is, of course, a reference to R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30,40 C.C.C. (2d) 353, where, at p. 374 C.C.C., Dickson J. summarized his conclusion concerning the "strict liability" category of offence in the following terms:

> 2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability ...

Dickson J. went on to explain that prima facie strict liability, public welfare offences would not be subject to "the presumption of full mens rea unless the statutory provision creating the offence used such words as 'wilfully', 'with intent', 'knowingly' or 'intentionally'", none of which appears in s. 53(1). His Lordship also stated, still at p. 374 C.C.C., "On the other hand, the principle that punishment should in general not be inflicted on those without fault applies."

¶ 24 In his analysis of the literature and authorities which led him to his conclusion concerning strict liability in Sault Ste. Marie, Dickson J., at pp. 365-6 C.C.C., made the following observations:

> The case which gave the lead in this branch of the law is the Australian case of Proudman v. Dayman (1941) 67 C.L.R. 536, where Dixon, J., said, at p. 540:
>
> > It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.
>
> This case, and several others like it, speak of the defence as being that of reasonable mistake of fact. The reason is that the offences in question have generally turned on the possession by a person or place of an unlawful status, and the accused's defence was that he reasonably did not know of this status: e.g., permitting an unlicensed person to drive, or lacking a valid licence oneself, or being the owner of property in a dangerous condition. In such cases, negligence consists of an unreasonable failure to know the facts which constitute the offence. It is clear, however, that in principle the defence is that all reasonable care was taken.

In Dickson J.'s judgment, which pre-dated the Charter by four years, he also made it clear that the burden was on the defendant to prove the defence on a balance of probabilities. Referring to Woolmington v. D.P.P., [1935] A.C. 462, Dickson J. stated, at p. 367 C.C.C.:

> Viscount Sankey, L.C. referred to the strength of the presumption of innocence in a criminal case and then made the statement, universally accepted in this country, that there is no burden on the prisoner to prove his innocence; it is sufficient for him to raise a doubt as to his guilt. I do not understand the case as standing for anything more than that. It is to be noted that the case is concerned with criminal offences in the true sense; it is not concerned with public welfare offences ... There is nothing in Woolmington's case, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on the balance of probabilities.

¶ 25 It might be observed that this aspect of Sault Ste. Marie has been the subject of considerable criticism. For example, Don Stuart's treatise, Canadian Criminal Law (Toronto: Carswell, 1987), at p. 172, suggested that Dickson J.'s reasons provided "a classic example of the follies of derivative work," asserting that he misconstrued Lord Diplock's view, expressed in Sweet v. Parsley, [1970] A.C. 132, [1969] 1 All E.R. 347 (H.L.), that Proudman placed on an accused only an evidentiary burden, i.e., the onus of raising a reasonable doubt, not of proving the defence on a balance or probabilities. At pp. 173-4, Professor Stuart stated:

> At a more general level, the decision represents a disappointing instance of the Supreme Court of Canada being anything but zealous in safeguarding the fundamental presumption of innocence. We must never lose sight of the fact that the criminal sanction is always imposed at substantial cost to an accused, whatever the gravity of the penalty. The

> distinction between truly criminal and public welfare offences has not been satisfactorily drawn. Fundamental criminal law principles cannot be lightly jettisoned. There are strong arguments for the presumption in the case of any type of offence, including those dubbed "public welfare." The main rationale for reversing the onus of proof in the public welfare offence area is the alleged difficulty or impossibility of the Crown obtaining evidence. This concern seems hugely exaggerated and shows a surprising lack of faith in triers of fact. Mens rea is a matter peculiarly within the knowledge of the accused, but the accused's testimony is only one source of evidence. In practice the Crown has little difficulty in proving mens rea by asking the trier of fact to draw reasonable inferences from the circumstances. The accused bears the evidentiary burden. It is submitted that like most other defences, the half-way defence should only place the evidential burden on the accused. He may have to adduce evidence to put the defence in issue. He should not have to prove anything.

¶ 26 Notwithstanding the academic criticism, as a consequence of classifying the s. 53(1) "driving while suspended" offence as one of strict liability according to the principles from Sault Ste. Marie, it was clear that there was not burden on the Crown to prove that a defendant who committed the proscribed act, i.e., driving while his licence was suspended, had any knowledge of the suspension, and that, to avoid conviction, the burden was on the defendant to establish on a balance of probabilities that he had an honest belief, based on reasonable grounds, that he had a valid licence: see R. v. Christman (1984), 29 M.V.R. 1 (Alta. C.A.).

¶ 27 The next important development was the recognition by the Supreme Court of Canada in Reference Re Section 94(2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289, 48 C.R. (3d) 289 (S.C.C.), per Lamer J. at p. 293 C.C.C., that "a law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates s. 7" of the Charter. In that case, the Court considered the constitutionality of the provision of the British Columbia statute which created an absolute liability offence of driving while prohibited from driving or while one's driver's licence was suspended, "whether or not the person knew of the prohibition or suspension," punishable by a mandatory term of imprisonment. Lamer J. stated at p. 313 C.C.C.:

> Indeed, as I said, in penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence; it offend s. 7 of the Charter if, as a result, anyone is deprived of his life, liberty or security of the person, irrespective of the requirement of public interest. In such cases it might only be salvaged for reasons of public interest under s. 1.
>
> In this latter regard, something might be added.
>
> Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.

Because the provision in question had a potential impact on the right to liberty of "morally innocent persons', the Court found an infringement of s. 7. It then became necessary to consider whether the violation was justified under s. 1 of the Charter. Lamer J. rejected the submission that the violation was constitutionally permissible, stating at p. 315 C.C.C.:

> I do not take issue with the fact that it is highly desirable that "bad drivers" be kept off the road. I do not take issue either with the desirability of punishing severely bad drivers who are in contempt of prohibitions against driving. The bottom line of the question to be addressed here is: whether the Government of British Columbia has demonstrated as justifiable that the risk of imprisonment of a few innocents is, given the desirability of ridding the roads of British Columbia of bad drivers, a reasonable limit in a free and democratic society. That result is to be measured against the offence being one of strict liability open to a defence of due diligence, the success of which does nothing more that let those few who did nothing wrong remain free.
> As did the Court of Appeal, I find that this demonstration has not been satisfied, indeed, not in the least.

¶ 28 Apart from the importance of the constitutional principles enunciated in the Motor Vehicle Act Reference, the judgment is also significant for purposes of this case because it accepts in very clear terms, if there was every any doubt about it, that suspended drivers who are unaware of their suspensions are "morally innocent" and "persons who really have done nothing wrong".

¶ 29 In R. v. Wholesale Travel Group Inc., (1991) 67 C.C.C. (3d) 197, 8 C.R. (4th) 145 (S.C.C.), the Court directly confronted, inter alia, the constitutionality of placing the burden on an accused to establish the due diligence defence on a balance of probabilities. At issue in that case were the provisions of the Competition Act, R.S.C. 1970, c. C-23, which, in s. 37.3(2), not only set out an express due diligence defence, but placed restrictions on that statutory defence which resulted in its being considerably narrower that the defence at common law. The Court unanimously held, albeit in five separate judgments, that the restrictions on the defence violated s. 7 of the Charter and were not justified under s. 1. Of more significance, however, were the positions taken by the members of the Supreme Court with respect to the constitutionality of what was considered the equivalent of common law reverse onus to establish due diligence. While the three principal judgments must be analyzed separately, a majority of the Court (Lamer C.J.C., La Forest, Sopinka, McLachlin, Gonthier, and Iacobucci JJ.), however, found that in the context of the misleading advertising provisions of the Competition Act, the limitation of Charter rights was justified under s. 1. The result was that, in their disposition of the appeal, they joined the three judges (L'Heureux-Dubé, Cory, and Stevenson JJ.), who had held that there was no infringement of s. 7 or s. 11(d).

¶ 30 In his opinion dissenting on the issue of whether there were Charter violations, Cory J. made certain observations, at p. 238 C.C.C., concerning the nature of strict liability public welfare offences. He held that the concept of fault in the regulatory context does not imply "more blameworthiness" in the same manner as criminal offences, since a convictions only means that a defendant "has failed to meet a prescribed standard of care." Cory J. also referred, at p. 245 C.C.C., to the "licensing justification" for the differential treatment of "regulatory" and "criminal" defendants, observing that those who choose to participate in regulated activities accept the responsibility of complying with the terms and conditions governing such activity, and assume responsibility for the harm which may result from their conduct. With respect to the question of whether placing a persuasive burden on an accused to establish due diligence on a balance of probabilities violates the presumption of innocence guaranteed by s. 11(d) of the Charter, Cory J. quoted from Sault Ste. Marie and rejected the argument, at pp. 256- 57, that a lesser burden would still allow the effective pursuit of the regulatory objectives and the appropriate "protection of our vulnerable society."

¶ 31 At p. 259 C.C.C., Cory J. stated his conclusion in terms that made it clear that he intended it to apply to regulatory offences generally, and not simply to the particular offence at issue in Wholesale Travel:

> For these reasons, I conclude that the presumption of innocence as guaranteed in s. 11(d) of the Charter is not violated by strict liability offences as defined in Sault Ste. Marie. The imposition of a reverse persuasive onus on the accused to establish due diligence on a balance of probabilities does not run counter to the presumption of innocence, notwithstanding the fact that the same reversal of onus would violate s. 11(d) in the criminal context.

¶ 32 The approach taken by Lamer C.J.C. was completely different. His point of departure, at p. 211 C.C.C., was the recognition that

> ... the combination of absolute liability and possible imprisonment violates s. 7 of the Charter and will rarely be upheld under s. 1. This is because an absolute liability offence has the potential of convicting a person who really has done nothing wrong (i.e., has acted neither intentionally nor negligently). In R. v. Vaillancourt [(1987) 39 C.C.C. (3d) 118, 60 C.R. (3d) 289 (S.C.C.)] I stated that whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state (or fault requirement) which is an essential element of the offence. Reference re: s. 94(2) of the Motor Vehicle Act inferentially decided that even for a mere provincial regulatory offence at least negligence is required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment upon conviction.

(Emphasis in original.) The Chief Justice did not consider that the category into which the false advertising offence was place was determinative. At pp. 215-16 C.C.C., Lamer C.J.C. stated:

> In my view, whether this offence (or the Act generally) is better characterized as "criminal" or "regulatory" is not the issue. The focus of the analysis in Reference re: s. 94(2) of the Motor Vehicle Act and R. v. Vaillancourt [(1987), 39 C.C.C. (3d) 118, 60 C.R. (3d) 289 (S.C.C.)] was on the use of imprisonment to enforce the prohibition of certain behaviour or activity. A person whose liberty has been restricted by way of imprisonment has lost no less liberty because he or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. Jail is jail, whatever the reason for it. In my view, it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which is determinative of the principles of fundamental justice. I cannot agree that these principles take on a different meaning simply because the offence can be labelled as "regulatory." Indeed, while I agree that this offence can be characterized as "regulatory", the label loses much of its relevance when one considers that an accused faces up to five years' imprisonment upon conviction.
> While a regulatory context may well influence the Charter analysis in particular cases (see the judgment of Justice La Forest in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), (1990), 54 C.C.C. (3d) 417, 67 D.L.R. (4th) 161, 29 C.P.R. (3d) 97, [1990] 1 S.C.R. 425, it is my view that the jurisprudence of this court indicates that negligence is the minimum level of fault which will accord with s. 7 of the Charter whenever a conviction gives rise to imprisonment.

Lamer C.J.C. also examined s. 11(d) of the Charter. At p. 221 C.C.C., he summarized the principles already accepted by the Supreme Court and agreed that imposing a persuasive burden on the accused to prove due diligence violated s. 11(d) because it permitted conviction despite a reasonable doubt as to the "culpability" of the accused. Whether it was constitutionally permissible turned on whether it could be justified under s. 1 of the Charter.

¶ 33 In applying the analysis outlined in R. v. Oakes (1986) 24 C.C.C. (3d) 321, 50 C.R. (3) 1, the Chief Justice (at p. 223 C.C.C.) was prepared to accept that there was a "pressing and substantial objective" in ensuring that those guilty of false or misleading advertising were convicted and that convictions were not lost due to evidentiary problems. It was then necessary to apply the "proportionality" part of the Oakes test to the means chosen to achieve this objective. Lamer C.J.C. characterized the means chosen, still at p. 223 C.C.C., in the following terms:

> ... to facilitate convictions by removing the burden on the Crown to prove negligence (lack of due diligence) beyond a reasonable doubt. In other words, the means chosen to achieve the objective essentially amounts to a decision by Parliament to convict all those who do not establish that they were duly diligent, including some accused who were duly diligent (and for whom a reasonable doubt exists in that regard) but who are unable to prove due diligence on a balance of probabilities.

The Chief Justice found that the chosen means provided a logical way to achieve the objective, if not necessarily the most preferred method, so that the means met the "rational connection" requirement. He held, however, that the imposition of a persuasive burden did not infringe constitutionally protected rights as little as reasonably possible. Lamer C.J.C. stated at pp. 224-5 C.C.C.:

> Parliament clearly had the option of employing a mandatory presumption of negligence (following from proof of the actus reus) which could be rebutted by something less than an accused's establishing due diligence on a balance of probabilities. This option was in fact recommended by the Ontario Law Reform Commission in its Report on the Basis of Liability for Provincial Offences (1990). ...
> The use of such a mandatory presumption in s. 37.3(2) would be less intrusive on s. 11(d) and would go a long way in achieving the objective: namely, ensuring that those who are not duly diligent are convicted (either because those accused would be unable to rebut the mandatory presumption or because the Crown would be able to prove a lack of due diligence). While the over-inclusive persuasive burden may bring about more convictions that would an evidentiary burden, the general objective of convicting the guilty would be attained by a less intrusive, evidentiary burden.

In view of his opinion that the imposition of a persuasive burden did not limit constitutionally protected rights as little as reasonably possible, Lamer C.J.C. concluded that it could not be upheld as a reasonable limit under s. 1. He went on to consider, however, the third branch of the Oakes proportionality test, finding that the effect of the chosen means on Charter rights was not proportional to the objective. At p. 227 C.C.C., the Chief Justice stated:

> Indeed, here we are postulating legislation enabling the imprisonment of those who were duly diligent but could not prove it on a balance of probabilities, even though there might well have existed a reasonable doubt thereof. Sending the innocent to jail is too high a price.
>
> I also wish to point out that Parliament had the further option of maintaining the persuasive

> burden on the accused but removing the possibility of imprisonment.
> The use of a persuasive burden in circumstances where imprisonment was not a possible punishment would be far less intrusive on constitutional rights.

¶ 34 Lamer C.J.C. did not confine his reasons simply to the particular offence of false or misleading advertising, but made it clear that he intended his analysis and conclusion to apply to strict liability offences generally. At p. 228 C.C.C., he stated:

> ... where an accused faces imprisonment upon conviction, the presence of the persuasive burden in the R. v. Sault Ste. Marie (City) category of "strict liability" is inconsistent with the principles of fundamental justice. The previous judgments of this court make clear that, to the extent that imprisonment is a possible penalty, this category of "strict liability", placing a persuasive burden on the accused, cannot withstand Charter scrutiny. It follows from this that when imprisonment is a possible punishment for the commission of a "public welfare offence," the persuasive burden contemplated by this court in R. v. Sault Ste. Marie (City) cannot be operative ...

¶ 35 In his judgment, Iacobucci J. found an infringement of s. 11(d), but held that the infringement, in the context of the misleading advertising provisions of the Competition Act, constituted a reasonable limit within the meaning of s. 1 of the Charter. At p. 266 C.C.C., Iacobucci J. indicated where his opinion differed from that of the Chief Justice:

> However, it is with respect to the third requirement of the Oakes analysis, that I respectfully disagree with the conclusions of Lamer C.J.C. This step requires a consideration of whether the means chosen impair the right or freedom in question no more than is necessary to accomplish the desired objective. Lamer C.J.C. is of the opinion that the use of a persuasive burden in s. 37.3(2) of the Competition Act cannot pass this third step of the Oakes analysis because of the presence of an alternative means open to Parliament that would be less intrusive on s. 11(d) of the Charter and would "go a long way" in achieving the objective. The alternative in question is the use of a "mandatory presumption of negligence" (following from the proof of the actus reus) which could be rebutted by something less that an accused establishing due diligence on a balance of probabilities, i.e. by raising a reasonable doubt as to due diligence. With respect, I cannot agree that such a means would achieve the stated objective as effectively nor would it go a long way in achieving it.

(Emphasis in original.) Iacobucci J. continued, at pp. 267-68 C.C.C., to disagree with the Chief Justice's conclusion as to whether the effects of the means chosen on the limitation of rights were proportional to the objective:

> As for the final requirement of the Oakes analysis, I would also respectfully disagree with the conclusions of Lamer, C.J.C. As noted by Cory J. in his reasons, regulated activity and public welfare offences are a fundamental part of Canadian society. Those who choose to participate in regulated activities must be taken to have accepted the consequential responsibilities and their penal enforcement. One of these consequences is that they should be held for the harm that may result from their lack of due diligence. Unless they can prove on a balance of probabilities that they exercised due diligence, they shall be convicted and in some cases face a possible prison term. These participants are in the best position to

> prove due diligence since they possess in most cases the required information. Viewed in this context, and taking into account the fundamental importance of the legislative objective as stated and the fact that the means chosen impair the right guaranteed by s. 11(d) as little as is reasonable possible, the effects of the reverse onus on the presumption of innocence are proportional to the objective.

¶ 36 While some of the language used by Iacobucci J. perhaps suggested a conclusion that might be applicable to strict liability offences in general, His Lordship had commenced his reasons, at pp. 265-66 C.C.C., with the statement that "proper consideration must be given to the circumstances and context of a particular case," and the "the special nature of the legislation and offence in question must be kept in mind when applying s. 1 of the Charter." It is self-evident, I think, that the Oakes test is applied to particular legislative objectives and the proportionality of the particular means chosen to achieve them; it does not lend itself to generalized conclusions concerning the whole category of strict liability offences. The combined effect of the judgments of Lamer C.J.C. and Iacobucci J., then, was that the constitutionality of the persuasive burden on a defendant in a given context would depend on an Oakes assessment of the specific legislation.

¶ 37 In R. v. Ellis-Don Ltd. (1992), 71 C.C.C. (3d) 63 (S.C.C.), a brief unanimous judgment delivered from the Bench, the Supreme Court considered the same issue in the context of a charge under the Occupational Health and Safety Act, R.S.O. 1980, c. 321, and made clear what they regarded as having been decided in Wholesale Travel. This case involved an alleged offence arising from the death of a subcontractor in an elevator shaft at a construction site. The defendant had relied at trial on the defence of due diligence, both a common law and according to s. 37(2) of the statute, which imposed a persuasive burden on the defence to establish that "every precaution reasonable in the circumstances was taken." The majority of the Ontario Court of Appeal (Houlden and Galligan JJ.A.), in reasons reported at (1990), 61 C.C.C. (3d) 423, 2 C.R. (4th) 118, had held that the reverse onus constituted an unjustified infringement of the presumption of innocence guaranteed by s. 11(d). Without repeating the diverse opinions expressed in Wholesale Travel, the judgment delivered by Lamer C.J.C., in its entirety, stated at pp. 63-64 C.C.C.:

> We are all of the view that this appeal must succeed. The existence of a restriction to s. 11(d) is governed by this court's decision in R. v. Wholesale Travel Group Inc., [supra]. The s. 1 analysis in Wholesale is applicable here, as there is no difference of substance between the nature of the legislation in that case and this one.

¶ 38 Shifting the focus from a review of the governing principles to their application to the particular offence at issue in this case, in contrast to what was stated by Lamer C.J.C. in Ellis-Don concerning the nature of the Occupational Health and Safety Act., I think it is obvious that there is a fundamental "difference of substance" between the "driving while suspended" provision of the Highway Traffic Act and the legislation scrutinized in Wholesale Travel.

¶ 39 It cannot be denied that driving while suspended differs from most other strict liability public welfare offences in that it does not necessarily involve any conduct that is dangerous or harmful. Unlike such public welfare offences as discharging pollutants, maintaining safe working conditions at construction sites, or publishing misleading advertisements, all of which implicitly impose a positive duty to avoid harm, driving while suspended is not the kind of proscribed conduct that, in an effort to avoid it, one expects inquiries to be made or care to be taken. In the normal course, people simply do not take steps to ensure that their licences which purport to be valid in fact continue to be so, nor is it reasonable to think that they should do anything in that regard. Any concept of "fault" in the context of this offence must recognize that reality.

¶ 40 That is not to say that in certain circumstances, a suspended driver might not properly be regarded as a threat to public safety. Where, for example, a licence suspension results from an accumulation of demerit points indicating a pattern of bad driving, or a suspension is imposed as part of a sentence following a conviction for a particularly egregious offence, like grossly excessive speeding under s. 128(15) or careless driving under s. 130 (which sentences are often imposed in the absence of the accused), the suspension can be directly linked to safety concerns. Section 53(1), however, creates a single offence which lumps together all suspended drivers, regardless of the reason for the suspension. It fails to draw any distinction, for example, between those people whose licences have been suspended simply by operation of statute, so that ignorance of the suspension is properly regarded as a mistake of law providing no defence (see R. v. MacDougall, supra, and R. v. Robertson (1984), 30 M.V.R. 248 (Ont.Prov.Ct.)), and those who might simply be unaware of an unpaid fine and the administrative steps taken to enforce its payment.

¶ 41 The s. 53(1) offence also differs from most other strict liability offences in that while it is clear that the Crown need not prove the defendant's knowledge of the suspension as part of its case, the statute itself expressly recognizes in s. 52(1) the relevance of notice of the suspension and, implicitly, the relevance of the defendant's ignorance of it. In R. v. Coleman (1985), 31 M.V.R. 258 at p. 260 (Man.Q.B.), Hewak J. held that the offence "implies a degree of awareness," and that failure to receive a notice would support a mistaken belief which would render continuing to drive an innocent act. Whereas with most public welfare offences, lack of awareness would support a finding of negligence and fault, with this offence of driving while suspended, generally speaking, it would support a defence to the charge.

¶ 42 Section 52(1), set out above, deems notice to have been given on the fifth day after the notice was mailed "unless the person to whom the notice is given establishes that he or she did not, acting in good faith, through absence, accident, illness or other cause beyond his or her control, receive the notice." It appears, then, that the Legislature intended, without stating it in so many words, that if an accused could not "establish" that he did not receive the notice for reasons beyond his control, then he or she could properly be convicted of the "driving while suspended" offence. It is difficult to see any other purpose for including s. 52(1) in the Act.

¶ 43 Mr. Stinson submitted, quite wrongly in my view, that the observations concerning s. 52(1) made by the Ontario Court of Appeal in R. v. Middlebrook; R. v. Miller; R. v. Laporta (1988), 5 M.V.R. (2nd) 236, provided authority for a more general proposition that placing a burden on the defendant to establish due diligence or a reasonable mistake of fact on a balance of probabilities did not infringe Charter rights. In a relatively brief endorsement delivered per curiam (Dubin A.C.J.O., Martin and Tarnopolsky JJ.A.), the Court of Appeal decided, inter alia, that the "service of notice" provision in what was then s. 34, now s. 52(1), did not violate s. 11(d) or s. 7. On this point, the endorsement, at p. 238, read as follows:

> The additional point raised in Laporta was that s. 34 contravened the presumption of innocence protected by s. 11(d), and also contravenes s. 7 of the Charter. Section 34 provides for a resumptive inference of service of notice of suspension where it is given by registered mail unless the accused establishes on a balance of probabilities that he did not, for the reasons set forth in the section, receive the notice.
>
> In our view, s. 34 does not create a reverse onus with respect to an essential element of the offence under s. 35 [driving while suspended]. Section 35 is a regulatory offence to which

> the defence of due diligence is applicable; absence of notice is relevant to such a defence. Section 34 in our view does not contravene either s. 11(d) or s. 7 of the Charter, and this appeal must also be dismissed.

The Court of Appeal, then, did not purport to deal with the Charter implications of the common law due diligence defence, nor did it explain the relationship between the statutory presumption of notice and the defence of due diligence, apart from commenting that the absence of notice was "relevant" to the defence.

¶ 44 To the extent that Laporta suggested that s. 11(d) of the Charter was relevant only to essential elements of an offence and not to defences, it should be noted that the decision was delivered four months before the judgement of the Supreme Court of Canada in R. v. Whyte (1988), 42 C.C.C. (3d) 97, 64 C.R. (3d) 123. In that case, at p. 108 C.C.C., the entire Court adopted the statement made by Dickson C.J.C. two months earlier, (though still subsequent to Laporta), in R. v. Holmes (1988), 41 C.C.C. (3d) 497 at p. 512, 64 C.R. (3d) 97 (S.C.C.):

> ... it ought to be stressed that the presumption of innocence is violated not only when an accused is required to disprove an essential element of the offence. The fact that reverse onuses which accomplish this result run counter to s. 11(d) was made clear in Oakes. To limit s. 11(d) to determinations whether an element is integral or extraneous to an offence, however, would lose sight of the fact that because of the grave social and personal consequences engendered by a finding of criminal liability, the law requires proof thereof beyond a reasonable doubt. Any burden on an accused which has the effect of dictating a conviction despite the presence of reasonable doubt, whether that burden relates to proof of an essential element of the offence or some element extraneous to the offence but none the less essential to verdict, contravenes s. 11(d) of the Charter. An accused must not be placed in the position of being required to do more than raise a reasonable doubt as to his or her guilt, regardless of whether that doubt arises from uncertainty as to the sufficiency of Crown evidences supporting the constituent elements of the offence or from uncertainty as to criminal culpability in general.

(Emphasis added.) If there is any inconsistency between what was stated in the passage quoted from Laporta and Dickson C.J.C.'s statement in Holmes, it is clear that the latter must prevail.

¶ 45 Courts have dealt with other circumstances where a failure to receive notice of the suspension was held not to preclude a conviction for the offence. In R. v. Lowe (1991), 104 N.S.R. (2d) and 283 A.P.R. 81 (N.S. S.C., App. Div.), the notice had been mailed to the accused's previous address and had been returned undelivered. At p. 84, Hallett J.A. stated:

> The licence suspension provisions of the Act could be easily frustrated if a licensed driver does not notify the Registrar of changes in his residence as required by s. 63(3) because if a driver does not so notify the Registrar, he will not likely receive a notice of suspension. In these circumstances, a driver cannot plead due diligence on the ground that he was awaiting notice of when the suspension would start and was driving until the notice was given. The point system's workability depends on the Registrar being able to communicate with drivers who accumulate various point levels. Therefore, s. 63(3) of the Act is an important section that has a very real purpose. The failure to comply with it cannot be treated lightly or form the basis of the due diligence defence. The giving of notices by registered mail is a reasonable method of providing the notice I feel is required to advise a driver his licence

> has been suspended. This cannot be done unless the Registrar is provided with up-to-date information.
> Applying the test an accused must meet to make out a due diligence defence, I am of the opinion that the respondent did not do all a reasonable person would have done under the circumstances of this case; in short, he was not without fault.

Similarly, in R. v. L'Hirondelle (1993), 45 M.V.R. (2d) 264 (Alta.Q.B.) Nash J. considered the notice provisions of s. 19 of the Motor Vehicle Administration Act, R.S.A. 1980, c. M-22, which are comparable to s. 52(1) here. Following Lowe, he found that an accused who had moved without notifying the Registrar of his new address, so that the notice of suspension sent was returned, could not complain that insufficient notice had been given. (In Ontario, the same duty to inform the Ministry of a change of address was imposed by R.R.O. 1990, Reg. 587, s. 24 and now by O. Reg. 340/94, s. 33). Assuming that those cases correctly decide that a failure to receive notice that results from a driver's failure to provide his current address precludes reliance on the defence of due diligence or reasonable mistake of fact, even if one might question whether such a breach of a driver's duty is sufficiently proximate to the "fault" requirement of driving while suspended, they are still distinguishable from the present case. Here, Mr. Bellomo's defence was that, for reasons he could not explain, he had simply not received the notice apparently sent by the Ministry to his proper address.

¶ 46 Contrary to the Crown's submission, the case law from the Supreme Court of Canada dictates the conclusion that requiring an accused to prove on a balance of probabilities that he was unaware of the suspension of his or her licence, i.e. that there was a reasonable mistaken belief that the licence was valid, violates the presumption of innocence guaranteed by s. 11(d) because it permits a conviction despite a reasonable doubt as to any negligence or fault on the part of the accused, a constitutionally required element of the offence. It also contravenes s. 7 of the Charter because it permits the imprisonment of a "morally innocent" person. The question, then, is whether the infringement of these constitutionally protected rights is a reasonable limit within the meaning of s. 1.

¶ 47 Because the prosecutor refused to concede that there was any Charter violation or to take an alternative position should I disagree, s. 1 was not as fully argued as it might have been. At the same time, given the nature of the contraventions of the Charter here, I think it unlikely that further evidence or submissions directly addressing the factors to be considered in the Oakes analysis would have materially assisted the Crown. In may be that this is one of those cases envisaged by Dickson C.J.C. in Oakes (at p. 348 C.C.C.) "where certain elements of the s. 1 analysis are obvious or self-evident."

¶ 48 The first requirement of the Oakes test is that the legislative objective relate to "pressing and substantial" concerns of sufficient importance to warrant overriding constitutionally protected rights.

¶ 49 While I do not think the matter is entirely free from doubt, I am prepared to accept that the legislative objective at issue here meets the first requirement. The obvious objective sought to be achieved by authorizing a licence suspension for the failure to pay a fine and making it an offence to drive while one's licence is suspended is to compel the payment of that fine. The suspension can be avoided by paying the fine, and once the fine is paid, the licence is reinstated. Although the immediate objective can been seen as related merely to the collection of revenue, not necessarily a trivial concern to deficit-laden governments, I do not think that that must be regarded as the only aim.

¶ 50 More indirectly, the scheme is directed to encouraging compliance with the public safety aspects of the Highway Traffic Act by ensuring that convictions for traffic offences will result in actual penal consequences and not merely symbolic, unenforceable penalties. I appreciate that unpaid fines under the Highway Traffic Act may result from very minor offences as well as very serious ones, such that making a turn when prohibited at rush hour or going a few kilometres an hour over the speed limit in circumstances endangering no one can result in a fine in the same way that careless driving causing a fatal accident might. In Boggs v. The Queen (1981), 58 C.C.C. (2d) 7 at p.14 (S.C.C.), Estey J. observed the wide range of circumstances that could lead at that time to a licence suspension under the Highway Traffic Act:

> The employment of the device of administrative and judicial disqualification of the driver's licence by the Provinces has apparently come a long way since the days of Whynacht, [(1974), 77 C.C.C. 1, [1942] 1 D.L.R. 238 (N.S.S.C. en banc], where Graham J. noted (at p. 8 C.C.C., p. 245 D.L.R.) that the purpose of the reference in s. 238(3) (then 285(8)) was (and I repeat it for emphasis):
>
>> ... to prevent an unfit driver from driving on the highway ... and the inference from revocation of his licence is that he is not a fit person to drive a motor vehicle and that it would be dangerous to allow him to drive because the revocation must be presumed to have been for just cause ...
>
> It is obvious that a suspension of an owner's licence for the non-payment of a judgment arising out of the driving of an authorized driver, or suspension or revocation of a fuel oil bill relating to domestic heating oil, have no relationship in practice or in theory to the owner's ability to drive and hence to public safety on the highways of the nation.

Licence suspensions under s. 46 of the Highway Traffic Act, as amended by S.O. 1993, c. 31, s. 2(6), are now much more restricted, arising directly from unpaid fines for offences relating to motor vehicles.

¶ 51 Fostering road safety is clearly a pressing a substantial objective, and I think that the scheme for suspending licences and penalizing driving while suspended, even when the reason for the suspension is an unpaid fine, is connected closely enough to that overall statutory objective that it can be characterized as a sufficiently important concern.

¶ 52 The second part of the Oakes test concerns the "proportionality" of the means chosen by the legislature to attain the objective. Dickson C.J.C. explained this part of the analysis at p. 348 C.C.C. of Oakes:

> Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individual and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M. Drug Mart Ltd., supra. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right to freedom, and the objective which has been identified as of "sufficient importance."

It is here, I think, where the unacceptable nature of the burden imposed by the justice of the peace becomes apparent.

¶ 53 As Lamer C.J.C. stated in Wholesale Travel at p. 223 C.C.C. convicting those unable to establish due diligence is a logical means of achieving the desired objective. At the same time, part of the means chosen by the Legislature to achieve its objective is the "deemed notice" provision in s. 52(1) of the Highway Traffic Act. Since the effect of that section is that knowledge can be imputed to persons even when the notice might not have been received, I think the provision could very well be characterized as "arbitrary" or "unfair" in the sense that Dickson C.J.C. used those words in the passage just quoted.

¶ 54 Even if one can find a rational connection between the legislative objective and the means chosen to achieve it, however, I do not think the limit to rights protected by the Charter can be viewed as impairing the rights"as little as possible." I see no reason why the obvious alternative measure, convicting only those who have not raised a reasonable doubt as to their knowledge of the suspension, would not be regarded as achieving the objectives of enforcing compliance with the rules of the road and compelling the payment of fines just as effectively. If the focus is only on the collection of fines, then one might question the current system that allows for the renewal of driver's licences every three years, rather than an annual renewal where the payment of any outstanding fines could be regarded as a pre-condition to receiving a new licence. Why that clerical process would be regarded as less effective that suspending licences, prosecuting people in the Provincial Offences Court, and in some cases imprisoning people, is not completely clear. Moreover, even if the Legislature preferred the suspension and prosecution route, it could still have chosen one of the alternative, less intrusive means referred to by Lamer C.J.C. in Wholesale Travel, i.e., either a mandatory presumption of knowledge rebutting by raising a reasonable doubt as to the driver's awareness of the suspension, or, if the persuasive burden on the accused was maintained, removing imprisonment as a potential penalty.

¶ 55 Mr. Stinson's justification was essentially one of law enforcement expediency. He submitted that it would simply be too easy for anyone charged with driving while suspended to deny having received the notice that was sent. People making that assertion, however, would be subject to cross-examination. The Crown in many cases would be in a position to contradict such evidence by producing a postal receipt, or by calling evidence of notice having been given personally by a police officer on another occasion, or by demonstrating other circumstances that could compel the rejection of the defendant's denial of knowledge. The traditional methods relied upon by courts to ascertain the truth would still be available.

¶ 56 It is to be observed that in the days prior to the judgment of the Supreme Court of Canada in Boggs, supra, prosecutions for driving while disqualified usually proceeded under what was then s. 238(3) of the Criminal Code, with the normal burden on the Crown in criminal cases to prove mens rea, i.e., actual knowledge of the licence suspension, beyond a reasonable doubt. When the court was left in a state of reasonable doubt concerning that element of the offence, the accused was acquitted. That result, I think, was regarded as the fair and proper one. I see no compelling reason why subsequent developments, which in this context include both the constitutional entrenchment of Charter rights and the shifting of prosecutions to an offence involving strict liability under a provincial statute, albeit one still punishable by imprisonment, should be considered to impose an unduly onerous burden on the Crown.

¶ 57 At bottom, the prosecutor's position is that administrative expediency justifies the Charter violations here. In my view, this is not even remotely one of those "exceptional" cases envisaged by Lamer J. in the B.C. Motor Vehicle Act Reference, supra at p. 313 C.C.C., where a s. 7 violation could be justified on that basis. It is very difficult to avoid characterizing the prosecutor's submission as a claim that innocent persons should be convicted and possibly imprisoned to prevent some who are guilty from escaping conviction. In a free and democratic society, that position is completely untenable. One is forced to conclude that the means chosen do not impair the protected rights as little as possible and that the deleterious effect of those means is entirely disproportionate to the objective sought. For these reasons, then imposing a burden on the accused to establish the defence on a balance of probabilities cannot be considered to be a reasonable limit of constitutionally protected rights within the meaning of s. 1.

Application of the Law to this Appeal

¶ 58 In view of my conclusion that the learned justice of the peace erred in law in placing the burden on the accused to establish the defence on a balance of probabilities, the appeal must succeed. The proper test, in my opinion, was whether the defence left the court in a state of reasonable doubt as to whether Mr. Bellomo was aware of the suspension.

¶ 59 Because the imposition of this letter burden still involves and issue of Mr. Bellomo's credibility, and because I think it would still be open to a trier of fact, acting reasonable, to reject his evidence and articulate proper reasons for doing so, it cannot be said that a state of reasonable doubt is inevitable. In those circumstances, the appropriate disposition is to order a new trial.

¶ 60 I might add that, in my opinion, the justice at trial also erred in making what he described as an "assumption" that the Crown had "information" that the notice of suspension had been received at the defendant's address. The postal receipt was not tendered in evidence, and the only evidence concerning it was Mr. Bellomo's statement that he did not recognize the signature shown to him. It was wrong, in my view, to regard the document in the Crown's possession as in any way diminishing the credibility of the accused's evidence, the central issue in the case.

¶ 61 Similarly, I think the justice of the peace erred when he took into account his experience with his own mail in assessing the accused's explanation that he had been in Florida and that no one had brought to his attention any mail from the Ministry received in his absence. The question was not really the reliability of the postal service, but the defendant's particular domestic circumstances, and the justice was required to decide the case on the basis of the evidence before him, without regard to such extraneous considerations as his personal experience. In that regard, I also think that in the absence of any evidence as to the procedure followed by the court of the Ministry which had led to the suspension of Mr. Bellomo's licence, the learned justice of the peace was wrong to have relied on the "presumption of regularity" to support his conjecture that particular events had occurred and that a series of documents must have been sent and received by the accused.

¶ 62 Even if the justice of the peace had not placed an erroneous burden on the defendant, I think that these other errors would themselves have required a new trial.

Conclusion

¶ 63 For the reasons I have stated, the appeal is allowed, the conviction is set aside, and a new trial is ordered.

FAIRGRIEVE PROV. J.

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